

**Important Land Use Decisions for
Montana Planners
2009-2010**

*Kelly A. Casillas, Legal Counsel
Community Technical Assistance Program
Montana Department of Commerce*

Court Decisions 2009-2010

- ❑ *Broadwater Development v. Nelson* (MSC)
- ❑ *Lake County First v. City of Polson* (MSC)
- ❑ *Guggenheim v. City of Goleta* (9th Cir.)
- ❑ *Fasbender v. Lewis & Clark County* (MSC)
- ❑ *Etzler v. Flathead County* (MSC)
- ❑ *Liberty Cove v. Missoula County* (MSC)
- ❑ *Roe v. City of Missoula* (MSC)
- ❑ *Richards v. County of Missoula* (MSC)
- ❑ *Aspen Trails v. City of Helena* (MSC)
- ❑ *Hansen v. Granite County* (MSC)
- ❑ *Plains Grains v. Cascade County* (MSC)

Broadwater Development v. Nelson, **2009 MT 317, Sept. 24, 2009**

- Defendant purchased property next to approved subdivision and recorded a “Notice of Invalid Easement” to repudiate construction of a road over a 60 –foot emergency public access and utility easement through her property (granted by the previous owner)
- Subdivider filed suit to declare easement valid and enforceable against new owner, and to invalidate notice
- District Court granted summary judgment in favor of subdivider and the County, MSC upholds decision.
- Express easement in Montana established when the instrument is:
 - in writing;
 - identifies the grantor and the grantee;
 - adequately describes what is being conveyed;
 - contains language of conveyance; and
 - is signed

Lake County First v. Polson,
2009 MT 317, Sept. 24, 2009

- Community group challenged the annexation, subdivision, and zone change of property from Low Density Residential to Highway Commercial to allow, in part, for the construction of a Wal-Mart Supercenter.
- District Court grant summary judgment for the City, and MSC affirmed.
- Without clear statement that the new growth policy was intended to apply retroactively, the new growth policy did not apply to Wal-Mart's application.

Lake County First, cont.

- Findings of Fact – the Lowe criteria be assessed by reference to documents in the record.

“Where a party challenges whether the governing body had sufficient facts to consider the *Lowe* criteria, we will review “whether the information upon which the [governing body] based its decision ‘is so lacking in fact and foundation’ that ‘it is clearly unreasonable and constitutes an abuse of discretion.’”
(citing *North 93 Neighbors* and *Town and Country Foods*)

- Prevailing commercial uses in the area preclude finding of illegal spot zoning

Guggenheim v. City of Goleta

582 F3d 996 (9th Cir., Sept. 28, 2009; waiting en banc op)

City's mobile home rent control ordinance resulted in a facial taking under a *Penn Central* analysis:

- Character – favored the claimants because the ordinance singled out relatively few mobile home park owners to bear the public burden of providing affordable housing
- Diminution – although claimants earned a reasonable return on their original investment, they suffered a severe adverse economic impact because they were not able to reap the windfall they would enjoy if restriction were lifted
- Expectations – neutral, despite the fact that the claimants purchased the mobile home park knowing of the rent regulations in place and paid a price for the mobile home park that reflected the effects of the restrictions

Fasbender v. Lewis & Clark County
2009 MT 323, Oct. 1, 2009

- Landowners challenged County's adoption of interim zoning regulations requiring ., after realizing did not follow process required to adopt Part 2 zoning regulations. The Board published two separate notices of a public hearing on the proposed regulations, held a public hearing, and adopted the interim zoning regulations at the conclusion of the hearing without a 30-day protest period and no resolution of intent.
- District Court and MSC reject the challenge -- the interim zoning statute – Section 76-2-206, MCA – does not incorporate the specific procedural requirements set forth in Section 76-2-205, MCA for permanent zoning regulations.
- Note: 2009 Legislature modified Section 76-2-206, MCA to clarify that notice must specify the affected boundaries, the emergency or exigent circumstance, the character of the regulation, the time and place of the hearing, and that the proposed regulations are on file for review.

Etzler v. Flathead County
2009 MT 367, Nov. 3, 2009

- Plaintiffs recorded declaration of condominiums without subdivision review. After learning of the omission, the C&R refused to accept deeds for the developments, and the County prohibited the construction or transfer of any units until the plaintiffs obtained subdivision approval. Plaintiffs filed suit, claiming all three proposals were exempt under Section 76-2-203, MCA.
- One project was located in the County's Scenic Corridor Zoning District, which regulated signs and cell towers. Neither of the other two projects were located in any zoning district.
- Montana Supreme Court affirmed District Court decision, following previous District Court precedent from Ravalli County on the condominium exemption. Exemption regarding "in compliance with local zoning regulations where local zoning regulations are in effect" only applies when the zoning addresses the development of condominiums.

Liberty Cove v. Missoula County
2009 MT 377, Nov. 10, 2009

- Plaintiff sought permit from DEQ and MDT to conduct gravel pit operations on the property. Residents wanted County to enact interim zoning regulations to stop the mining operations, but the County declined – “no emergency” as impacts would be analyzed by DEQ and MDT.
- In wake of cases granting permits to gravel pit operators awaiting delayed environmental review by DEQ, JLT sought similar relief. County reconsidered position on interim zoning and adopted interim residential zoning of the area after notice and public comment. JLT sued County, District Court upheld the regulations, and MSC affirmed.

Liberty Cove, cont.

- MSC adopted 2002 Montana AG opinion concluding that “both ‘emergency’ and ‘urgency’ measures exist if there is some exigent circumstance impacting the public health, safety and welfare, and zoning is required to address the exigency ...[t]he question of what constitutes ‘exigency’ is necessarily fact-bound, and under the law it is left largely to the discretion of the local governing body.” ” (49 Mont. Op. Atty. Gen. No. 23).
- Interim zoning regulations do not require compliance with permanent zoning regulation procedures.
- Spot zoning challenges are not applicable to interim zoning measures adopted pursuant to § 76-2-206, MCA.

Roe v. City of Missoula
2009 MT 417, Dec. 8, 2009

- Plaintiff sought boundary relocation exemption to modify common boundary, creating one lot for existing home and one new vacant lot. City regulations required application to go to City Attorney's office for review for City's evasion criteria, including whether relocation would create "a new parcel of land transferable to anyone other than an adjoining property owner."
- Before the City Attorney reviewed the application, the Council received complaints from neighbors about the application and instructed the City Attorney to turn the application over to the Council. The latter conducted public hearings on the application and denied the application.
- Roes filed suit, claiming the Council improperly interfered in the normal City process, which if followed would have resulted in approval of their applications. District Court disagreed, and the Montana Supreme Court affirmed.

Roe, cont.

- MSC agrees with Roes that they were entitled to City's process (Attorney reviews first, then refers to Council only if evasion issues identified), but found error harmless since the facts would have required the Attorney to refer the application to the Council anyway.
- When setting forth an equal protection claim, the plaintiff must "properly allege a discriminatory purpose... bald assertions of equal protection claims absent a discriminatory purpose are appropriately disposed of through summary judgment."
- Cannot establish a regulatory taking when property rights asserted are not part of plaintiff's title to begin with.
 - “Rights only manifest in opportunities [here, an opportunity for an exemption to subdivision review]... if ‘the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.’”

Richards v. County of Missoula
2009 MT 453, Dec. 31, 2009

- Plaintiff sought subdivision and development of property near Clearwater Junction – eventual proposal called for 59 lots. County Commission denied the proposal, based in part on FWP concerns about unmitigated wildlife impacts. Plaintiff sued County, and District Court granted summary judgment for County without a hearing, emphasizing that judicial review is limited to the existing record.
- Montana Supreme Court affirmed, noting District Court thoroughly reviewed the record in finding the decision was not arbitrary or capricious.
- Important case regarding evidence to support conditions and or denial of subdivision for unmitigated biological impacts.

Aspen Trails v. City of Helena 2009 MT 453, April 14, 2010

- Application for 325-unit subdivision, to be annexed into City and hooked into public water and sewer system. EA for the subdivision included a community impact assessment covering issues such as water supply, sewage disposal, roads, drainage, and land use.
- The Planning Board determined the development's impacts on the natural environment, wildlife, and wildlife habitat could not be mitigated and recommended denial of the application. City Commission disagreed and approved the subdivision.
- Neighbors filed suit, alleging that the EA did not adequately address impacts from the proposed subdivision on wildlife, water quality, and flooding.

Aspen Trails, cont

- Neighbors contended that the EA did not provide further information on groundwater, “nonpoint” sources of pollution, or base flood elevation in the area.
- District Court adopted the “hard look” standard as discussed in *Clark Fork Coalition v. Mont. Dept. of Env. Quality*, 2008 MT 407, and held that City failed to include all known information about groundwater in the area, and failed to adequately analyze potential pollutants on watershed from proposed development.
- Montana Supreme Court agreed with standard of review and affirmed failure to provide all groundwater information and study pollutants.
- District Court decision to void the plat appropriate relief.

Hansen v. Granite County
2010 MT 107, May 11, 2010

- Plaintiff sought subdivision and development of property along I-90 with 202 units. No traffic study was submitted with the application, even though the subdivision would be accessed by a narrow two-lane ranch access road with no shoulders.
- At the hearing on the subdivision, rancher neighbor detailed impacts to his agricultural operations and access roads that would result from the proposed development. Commission denied the proposal, based on unmitigated impacts to roads, agricultural operations, and local schools.
- District Court upheld the denial, and Montana Supreme Court agreed. “[I]t is the developer’s duty to provide all the information to the governing body for its consideration in reviewing an application for preliminary plat approval.” MSC found the applicant had failed to provide sufficient information to address any of the impacts of the development cited by the Commission.

Plains Grains v. Cascade County 2010 MT 155, July 16, 2010

- Landowners sought rezone from Agricultural (A-2) to Heavy Industrial (I-2) for 668 acres to allow for the construction and operation of a proposed coal-fired (later changed to gas-fired) power plant (Highwood).
- The staff report on the rezone acknowledged that an electric generating station would be allowed in A-2 with a special use permit, and recommended approval of the rezone. The Commission published a resolution of intent to approve the rezone, and received 1,900 comments on the proposal, after which the rezone was approved.
- District Court granted summary judgment for the County, rejecting the plaintiffs claims that they were denied public participation and that the rezone constituted illegal spot zoning. As to the latter, the District Court relied on the fact that the same use could have been permitted through a special use permit, without a rezone.

Plains Grains, cont.

- Montana Supreme Court rejected District Court's reliance on the availability of the special use permit process, and found the rezone constituted illegal spot zoning.
- Court reiterates spot zoning analysis under three-prong test set forth in *Little v. Board of County Comm'rs*, 193 Mont. 334 (1981):
 - (1) Whether the requested use would differ significantly from the prevailing land uses in the area;
 - (2) whether the area requested for the rezone would be "rather small" in terms of the number of landowners benefitted by the requested zone change; and
 - (3) whether the requested zone change would be in the nature of "special legislation" designed to benefit one or a few landowners at the expense of the surrounding landowners or the public.

Plains Grains, cont.

- As to the first prong, noting that the “court may consider the existing zoning in addition to prevailing uses,” the MSC held that the requested use of Heavy Industrial for the 668 acres would differ significantly from surrounding Agricultural uses.
- As to the second prong, MSC held that the 668 acres at issue comprise a small percentage of the land zoned for agriculture in Cascade County.
- As to the final prong, the MSC noted that “[n]o discernible benefit for the rezone would accrue to the neighboring farmers and ranchers...” and that the “benefits of the rezone inure solely to the owners of the 668 acres ...”
- Granted a special use permit???

Questions?

Discussion?