



***Important Land Use Decisions
2011-2012***

Western Planner Conference
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Court Decisions 2011-2012



- *Helena Sand and Gravel v. L&C County (1st Judicial District)*
- *GOMAG v. Gallatin County (MSC)*
- *Derick v. Lewis & Clark County (1st Judicial District)*
- *Rutherford v. Johnson (1st Judicial District)*
- *Heart K v. Park County (6th Judicial District)*
- *Allen v. Lakeside Neighborhood Planning Committee (11th Judicial District)*
- *Guatay Christian Fellowship v. San Diego County (9th Circ.)*
- *PPL v. State of Montana (USSC)*
- *Braach v. Missoula County (4th Judicial District)*
- *DeVoe v. City of Missoula (MSC)*
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- *Samson v. City of Bainbridge Island (9th Circ.)*

Helena Sand and Gravel v. L&C County

1st Judicial District (August 1, 2011)



- HSG obtained permit for 110 acre gravel pit in East Helena. Before HSG obtained the permit, the neighbors petitioned for and the county formed a Part 1 zoning district.
- The zoning regulations prevent HSG from mining its remaining 311 acres of property.
- The District Court found that L&C County has substantially complied with the provisions of its growth policy in approving the zoning district although there were several other gravel pits in the area; that while the county had not made formal findings or formally evaluated public comment (*North 93*), the record on review was sufficient to support L&C County's decision; and that there was not "reverse spot-zoning" because all of the properties in the zoning district were prohibited from mining even though no other property owner owned enough acreage to develop a gravel pit.
- District Court also found that HSG did not have a protected property interest under its takings claim

Gateway Opencut Mining Action Group (GOMAG) v. Gallatin County
2011 MT 198 (August 17, 2011)



- Gallatin County enacted interim gravel pit zoning regulations May 2008, then extended until May 2010
- During that time, County sought to create permanent zoning districts that would regulate gravel pits
 - Under 76-2-205(5), protest period required
 - County must act on proposal within 30 days of end of protest period
 - If 40% of the owners of 50% of the property within the district taxed for agriculture or forestry protest the creation of the district, County may not adopt and moratorium for 1 year

GOMAG, cont.



- After protest period expired, GOMAG filed suit, seeking TRO and injunction; challenged constitutionality of protest provisions – *unlawful delegation of legislative authority*
- District Court and MSC – case is moot
- Zoning districts did not fail because of protest provision; failed because County failed to act within statutory deadlines

Derick v. Lewis & Clark County

1st Judicial District, August 26, 2011



➤ **Facts:**

- Single-family house and separate garage apartment.
- Owners sought to rent the garage apartment.
- County concludes that subdivision review is necessary.
- Garage apartment served by single water and sewer system.
- Dispute over retraction of wastewater permit.
- Litigation ensues (parties settle portion of lawsuit).

➤ **Questions:**

- 1) Is the proposal a “subdivision?”
- 2) Is the proposal exempt from review under 76-3-204?
- 3) Does 76-3-208 apply?

Derick, cont.



1) Is the proposal a “subdivision?”

- Yes. A “division of land” occurs when one or more parcels are segregated from a larger tract.
- Tenants will receive possession of a separate dwelling unit on a tract of land.
- The interest conveyed includes **some interest** in the real estate upon which the apartment is located.
- Contrary result would create a regulatory void.

2) Is the proposal exempt from review under 76-3-204?

- No. Exemption applies to a single building.
- 76-3-208, would be rendered meaningless.

3) Does 76-3-208 apply?

- Yes.

Rutherford v. Johnson

1st Judicial District, September 9, 2011



- Lawsuit between buyers and sellers/County of Helena Valley property
- Buyers started running commercial dent repair business; County issued cease and desist for prohibited commercial use
- Original subdivider (3 lots) recorded covenants against the property restricting use to single-family dwelling on each lot
- Sellers further subdivided one of the 3 lots into 5 lots – County approval letter stated “each for one single-family dwelling.” Restrictive covenants filed but not for lot at issue; not referenced on face of plat
- Buyers sued, claiming no restriction on use of the property

Rutherford, cont.



- Court rejects:
 - County's claim that subdivision action is "lien" on property, imposing constructive notice on future buyers
 - County's claim that public records in Commissioner's office impart constructive notice on future buyers (preliminary plat approval letter not recorded)
- Montana law requires documents affecting title to real property be recorded with C&R
 - DEQ letter noting restriction to SF dwellings for each lot was recorded, therefore put buyers on constructive notice
 - Original recorded restrictive covenants noticed as exception to title insurance coverage

Heart K Ranch & Cattle v. Park County

6th Judicial District, September 19, 2011



- Lawsuit by landowners in 4.5 mile unincorporated “donut area” surrounding Livingston
- In 1980s, under authority of the City-County Planning Board, Park County had adopted and amended zoning regulations for the donut area (*Why not by City?*)
- Lawsuit in 2002 by City against the County resulted in settlement agreement, which included County’s withdrawal from City-County Planning Board
- Since that time, Park County had enforced the zoning regulations in the donut area

Heart K Ranch & Cattle, cont.



- Court finds that County's withdrawal from City-County Planning Board abolished that Board and nullified all zoning in the donut area
- County lost all jurisdiction over the donut area when it withdrew from the City-County Planning Board
- Only authority County had over donut area was to zone the area under Part 2 zoning
- Properly constituted County planning board must make recommendations concerning boundaries and regulations before adoption of Part 2 zoning regulations can occur, County must follow statutory process

Allen v. Lakeside Neighborhood Planning Committee

11th Judicial District, November 1, 2011



- Residents challenged Lakeside Neighborhood Plan adopted by Flathead County in December 2010.
- Development of plan conducted by Lakeside Neighborhood Planning Committee (LNPC), which was designated by Lakeside Community Council (LCC), which was designated by the County Commission.
- LNPC gave its recommendations to the LCC, which gave its recommendations to County Planning Board, which gave its recommendations to the County Commission.
- Plaintiffs alleged County violated the process for neighborhood planning set forth in County's growth policy, the process required by the growth policy statute, and the public's constitutional rights to know and to participate

Allen, cont.



- Court holds that County followed statutory process for development of a neighborhood plan:
 - Planning Board is advisory body only
 - Planning Board holds public hearing and makes recommendations to the governing body
 - LNPC and LCC were advisory bodies only, and County not required to follow process for appointing administrative bodies (Section 7-1-201, MCA)
- Court finds that LNPC violated constitutional and statutory open meeting requirements:
 - LNPC was a “public or governmental body” under Section 2-3-203(1)
 - Not all meetings were properly noticed – some meetings the notice indicated the public was not welcome, and other meetings did not indicate where the meeting would be held

Allen, cont.



- Court holds that public meetings do not need to be held in a public facility
- Court holds that use of Yahoo Group to distribute information and ask questions of the LNPC members did not violate open meeting law because “there is no evidence that a quorum of LNPC members could actually convene on the Yahoo Group site such that a meeting as defined by Section 2-3-202, MCA would have been possible.”
- Court holds that state statute does not provide particular process that must be followed in revising a neighborhood plan.

Guatay Christian Fellowship v. San Diego County

670 F.3d 957 (9th Circ., December 23, 2011)



- Church operating at old recreational hall at trailer park over 20 years without required use permit
- County's zoning regulations allowed religious assembly in other commercial zones and one residential zone by right; required use permit in this zone
- Church claimed that use permits issued in the 1970s "as per plot plans," where the plot plans identified "Existing Church," lawfully authorized religious assembly.
- No use of building – church or otherwise – established under 1986. Church made improvements to buildings and grounds.
- New owner shortly after church began using the building, but no use permit ever sought – church secretary asked County what was required, and County employee allegedly told her use permit required but that it would be easier to just continue without a permit.

Guatay Christian Fellowship, cont.



- Court rejects church's claims:
 - The old use permits did not authorize the current church use, since County regulations required use of building under the permit within one year and that time had long expired;
 - The County was not equitably estopped from enforcing its zoning regulations, when the church had been informed repeatedly that the church use needed an approved use permit;
 - The church's RLUIPA claims were not ripe under Williamson County ripeness requirement, where the church had never obtained a final decision from the County as to the application of the zoning requirements.
 - Futility exemption did not apply because no facts in support, and still need at least one decision on an application

Guatay Christian Fellowship, cont.



- In order to establish that a facially neutral and generally applicable zoning scheme constitutes a “substantial burden” in violation of RLUIPA, the church must demonstrate definitive, particularized obligations imposed on them as opposed to other uses subject to the regulations.
- Here, projected costs of compliance with the requirements not sufficient – church’s expert admitted same costs would apply to all.

PPL Montana v. State of Montana

132 S. Ct. 1215 (February 22, 2012)

- MSC overturned by USSC
- The MSC erred in concluding that riverbeds occupied by dams are the property of the State of Montana were navigable for title purposes at the time Montana became a State
- USSC did not reach the judicial takings issue – may be raised again at MSC on remand?

Braach v. Missoula County

4th Judicial District (February 22, 2012)



- In August 2001 Braach applied for a subdivision exemption to use a portion of their property to secure a construction mortgage, 76-3-201(1)(b) (2001).
- A survey of the mortgage tract was filed in January 2002 identifying the mortgage tract as Tract 1. The remainder was not surveyed.
- Braach originally intended to keep the property as one tract with two homes but in order to pay medical bills they sold Tract 1 in August 2006 and Missoula County recorded the deed. The two properties were then taxed separately.
- In Spring of 2011 Braach attempted to sell the remainder. The title insurance company questioned the legal description of the remainder (original description of property less “Tract 1”) and its status. The Missoula County Attorney opined that the remainder tract was not a separate tract of record because the mortgage tract had never been foreclosed upon.

Braach v. Missoula County
4th Judicial District (February 22, 2012)



- Prior to the change of the exemption law in 2003, Missoula County and other counties allowed the mortgage tract to be transferred without a survey based upon the interpretation of a 1988 AG Opinion Letter.
- After 2003 a mortgage tract is not a tract of record unless it has been foreclosed upon by a financial institution.
- District Court found that the mortgage tract was a legal tract of record when the survey was filed creating it and Braach transferred it by deed.
- District Court further found that remainder tract was legal parcel capable of being transferred as that was the policy established by the Missoula County Attorney's Office.
- Braach had filed a writ of mandamus to force the Clerk and Recorder to record the deed for the remainder tract. The Court awarded Braach their attorneys fees of over \$27,000.

DeVoe v. City of Missoula

2012 MT 72 (April 3, 2012)



- Plaintiff landowner of vacant single-family zoned property in Rattlesnake Canyon applied for building permit to build “accessory building” to store items related to his rental property business
- City denied permit, explained meaning of “accessory” building
- Plaintiff applied for building permit to build same accessory building on nearby single-family zoned rental property with existing rental residence, for same use. City approved permit, neighbors appealed
- Board of Adjustment revoked Plaintiff’s permit, Plaintiff challenged decision, suing City and neighbors

DeVoe, cont.



- District Court dismissed claims against neighbors, found in favor of City on all claims; MSC affirmed
- Evidence before BOA supported reasonable decision to revoke permit
 - Size of building not “customarily incidental” to a single-family residence
 - Plaintiff admitted he intended to store items not related to the on-site residence
- Ordinance not vague as to “accessory building,” as Plaintiff’s own actions demonstrated his understanding of the ordinance
- Neither District Court nor BOA must defer to the administrative agency on appeal

Williams v. Missoula County

4th Judicial District, April 5, 2012



- Commissioners adopted resolution to adopt Part 2 zoning for North Lolo area to prohibit sand and gravel mining operations
- Under statute, written protest period open for 30 days after adoption of resolution of intent to adopt
- Plaintiff landowner in proposed district sought and obtained TRO to stop County from any taking action based on protests received (protests received from 5 landowners already sufficient to stop adoption of zoning)
- Plaintiff sued County, challenging protest provision as:
 - Violation of equal protection
 - Violation of right to vote

Williams, cont.



Protest Provision for Part 2 Zoning

... if 40% of the real property owners within the district whose names appear on the last-completed assessment roll OR if real property owners representing 50% of the titled property ownership whose property is taxed for agricultural purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44, part 1, have protested the establishment of the district or adoption of the regulations, the board of county commissioners may not adopt the resolution and a further zoning resolution may not be proposed for the district for a period of 1 year.

Williams, cont.



- After TRO issued, County adopted Part 2 zoning for North Lolo
- District court finds protest violates state and federal constitutional rights to vote and to equal protection
 - Protest under the statute constitutes a vote, restriction must be “necessary to support a compelling governmental interest” and constitute “least restrictive means” to accomplishing that objective
 - Right to protest provides owners generally and owners of agricultural or forest land with special rights to veto the establishment of zoning, but does not provide any landowner right to offer vote in support of zoning
 - Plaintiff denied equal protection because cannot cast vote in favor of the law
 - Plaintiff denied right to vote because cannot cast vote in favor of the law

Williams, cont.



- County admitted to unconstitutionality of protest provision, and argued that provision is also unconstitutional delegation of legislative authority, because fails to provide any legislative override of protest
- District court holds protest provision constitutes unlawful delegation of legislative authority
 - No standards or guidelines for application of a valid protest. Protests must contain reason or justification related to purposes of proposed zoning regulations (public health, safety, or general welfare)
 - No legislative bypass to allow for review of protest. Governing body must retain ability to override a successful protest, to prevent a few minority landowners from having authority to make zoning decisions

Samson v. City of Bainbridge Island
683 F.3d 1051 (9th Circ., June 15, 2012)



- City passes temporary moratorium on overwater structures (docks, piers) in Blakely Harbor to preserve undeveloped character of the area
- Two weeks later city extends moratorium to all development on the island
- Six weeks later moratorium narrowed back to just overwater structures across the island, to preserve critical shoreline habitat and salmon populations
- Blakely Harbor residents challenged temporary moratorium on basis of faulty process, eventually prevailed. While that suit was pending, City passed permanent zoning banning new overwater structures.
- Plaintiffs sued City in state and federal court, claiming temporary moratorium had violated their state and federal due process (procedural and substantive) rights

Samson cont.



- State and federal substantive due process claim requires only rational relationship between regulations and public health, safety, and general welfare – “exceedingly high burden”
- City had legitimate interests in protecting wildlife, preserving undeveloped character of the island
- US Supreme Court has already acknowledged that use of temporary moratoria is reasonable
- No evidence City had other objective than to protect public health, safety, and general welfare
- Court distinguishes *Bateson v. Geisse*, 857 F.2d 1300 (1988) involving City of Billings’ discriminatory denial of building permit
- Failure to follow state required procedure does not equate to violation of procedural due process – must show “egregious official conduct,” “abuse of power.”