



***Legislative Update 2015 Session***

***Land Use Cases Affecting Montana  
Jan 2014-September 2015***

***Reed v. Gilbert***

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October 2015



# ***4 Bills Signed into Law***

# ***HB 183 – Annexation of Parks***

- Current annexation law requires inclusion of the “full width of any public streets or roads, including the rights-of-way, that are adjacent to the property being annexed.” (§7-2-4211, MCA)
- HB 183 now requires the annexation to also include parks created through subdivision review that are “wholly surrounded by other property being or already annexed,” except county-owned parks.
- Effective date October 1, 2015

# ***HB 193 – Appeal from Board of Adjustment***

- Existing Part 2 zoning law requires counties to appoint a five-member Board of Adjustment to hear “special exceptions” to the ordinance and appeals of administrative zoning decisions. (§76-2-221, MCA)
- Under existing law, appeals from a decision of a Board of Adjustment must be made by petition to a court of record, leaving elected officials out of the process.
- HB 193 allows counties to require appeals from a decision of a Board of Adjustment be made first to the elected County Commission, then by petition to a court of record.
- Effective date October 1, 2015.

# ***SB 237 – Impact Fees***

- Existing impact fee statute requires update of the service area report every two years, and appointment of a CPA to the local impact fee advisory committee.
- SB 237 extends the required update to every five years (to match time period covered by the report) and removes the requirement for CPA on advisory committee
- Effective date October 1, 2015

# ***HB 289 – TEDD Districts and Zoning***

- Existing law for the creation of a targeted economic development district (TEDD) requires the proposed district be zoned in accordance with the area growth policy.
- HB 289 specifies that a TEDD district must be zoned under Part 2 or municipal zoning in accordance with the adopted growth policy, but that if the district is proposed for an unincorporated area and the county has not adopted a growth policy, then zoned for the uses under Part 1 zoning.
- Effective date October 1, 2015



# ***15 Bills Died in Process***

- HB 182 – Require zoning be adopted before use of land can be regulated
  - Local governments using subdivision regulation as “zoning”?
- SB 214 – Provide process for local nuisance declaration and recommendation
  - Yellowstone County industrial zoned donut
- SB 226 – Revise subdivision review criteria laws to prohibit consideration of cumulative impacts
  - HB 542 vetoed 2011 session
  - SB 41 vetoed 2013 session
  - SB 226 TABLED House Local Government 2015 session

- SB 284 – Require approval of county commissioners for bison relocation
  - Allowed growth policy to be used as a regulatory document
  - Vetoed by Governor Bullock 5/4/15
  
- SB 286 – Limit agency rule making if it burdens property rights
  - Prohibited state agencies from adopting rules that would “burden” a person’s ability to enjoy property rights or engage in a lawful business or occupation
  
- HB 302 – Prohibit adoption of rebuttable presumptions
  - Original bill would shift burden of proof to local government and prohibit rebuttable presumptions
  - What are rebuttable presumptions anyway?

- HB 312 – Require MDT to consider growth policies and neighborhood plans
  - MDT strongly opposed
  - Experiences working with MDT on complete streets or other multi-modal projects?
  
- HB 357 – Require state agencies to coordinate with county local governments
  - HB 169 last session added elements required by federal land agency
  - This bill would have required state agencies to “establish a coordinating relationship” with each County where a federal land management plan, policy, or action would be in effect.
  - State agency would also be required to incorporate County’s input before submitting final recommendations or requests to the federal agency
  
- HB 380 – Revise laws related to subdivisions and mobile home parks
  - Removed creation of 20 RV spaces or less from definition of subdivision

- HB 385 – Revise cash donation in lieu of land for park dedication requirement
  - “Cash donation” is FMV of unsubdivided, unimproved land
  - Add value of minimum improvements required to be installed
  
- HB 358 – Revise mortgage exemption
  - Legalized the subsequent transfer of any lot created by mortgage exemption prior to 10/1/2003 without foreclosure
  
- HB 565 – Define community land trust
  - Separate from townhomes and condominiums

- HB 583 – Revise laws with respect to protecting property rights (Agenda 21)
  - State and local subdivisions prohibited from taking certain actions with respect to any Agenda 21 policy, program, or activity
- HB 615 – Revise laws related to fundamental rights under the MT Constitution (state RFRA)
  - Require compelling state interest to “burden” free exercise of religion
- HB 640 – General revise local government laws (due process for restriction of property rights)
  - Agenda 21 lives on? No delegation of constitutional authority, refute legal authority of international organizations, and provide due process for restriction of any private property right by a land use policy

# *Drafted But Not Introduced*

- **LC 167** – Would have clarified that local governments cannot set deadlines on when applications could be submitted. Aftermath of SB 40?
- **LC 168** – Would limit primary subdivision review criterion regarding agriculture to the proposed subdivision's impact on adjacent agricultural operations (same as SB 147 vetoed last session)
- **LC 170** – Would create new voluntary “conceptual plan” review and approval process

# Land Use Cases – Jan 2014 – Sept 2015

- *Hamlin v. L&C County* (1<sup>st</sup> Judicial District)
- *Clark Fork Coalition v. DNRC* (1<sup>st</sup> Judicial District)
- *Pederson v. Burnaugh* (13<sup>th</sup> Judicial District)
- *Bitterrooters for Planning v. Ravalli County* (21<sup>st</sup> Judicial District)
- *L&C County v. Hampton* (MSC)
- *City of Helena v. Svee* (MSC)
- *Phillips v. Whitefish* (MSC)
- *American Tower Corp. v. City of San Diego* (9<sup>th</sup> Circ)
- *El Dorado Estates v. Fillmore* (9<sup>th</sup> Circ)
- *Pacific Shores Properties et al v. Newport Beach* (9<sup>th</sup> Circ)
- *Santa Monica Nativity Scenes v. Santa Monica* (9<sup>th</sup> Circ)
- *T-Mobile v. City of Roswell* (USSC)
- *Reed v. Town of Gilbert* (USSC)

# *Hamlin v. L&C County*

## 1<sup>st</sup> Judicial District (January 2014)

- ❑ L&C County had lost *Christison* (July 14, 2009) for failure to follow *Nollan/Dolan* with respect to requiring road improvements as condition of subdivision approval, and responded by giving most (*but not all*) applicants two options:
  - 1) Bring affected roads up to County standards through **separate contractual agreement** not part of subdivision approval; or
  - 2) Application would be denied.
  
- ❑ Developer Hamlin proposed subdivision for 127 lots (235 units) on 166 acres at the intersection of busy Canyon Ferry Road (state) and Lake Helena Drive (county). Proposed to pay 50% of all improvements need to bring large sections of both roads up to county standards (already out of compliance).



# *Hamlin v. L&C County*

- ❑ County rejected Hamlin's offer, and gave him option to pay 100% of costs through separate contractual agreement, or application would be denied. Hamlin refused, County denied.
- ❑ District Court held decision was a taking *and arbitrary and capricious* – *Nollan/Dolan/Koontz* – exactions analysis applies to subdivision approval requiring monetary exaction, and County cannot escape requirements through “separate” agreement process not provided for in Montana law
- ❑ District court awarded Hamlin \$542,772 plus interest as damages; Hamlin appealed on damage award. County settled for \$2.5 million plus subdivision approval.

# *Hamlin, cont.*

## □ Alternative solutions?

- 1) Perform subdivision-specific analysis of development's impacts on primary criteria in -608; if conditions (meeting *Nollan/Dolan*) do not fully mitigate impacts, the “unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision.” (§76-3-608(5)(a), MCA)
- 2) Legislatively adopt mitigation formulas meeting *Nollan/Dolan* that apply to all development equally and do not involve discretion of decision-makers at quasi-judicial stage.
- 3) Impact fees
- 4) Development agreements\*\*\*

# *Clark Fork Coalition v. DNRC*

## 1<sup>st</sup> Judicial District (October 2014)

- Section 85-2-306(3)(a)(iii), MCA provides an “exempt well” water right exemption for *de minimis* uses of groundwater.
  - ▣ 35 gpm or less AND 10 AFY or less;
  - ▣ Must be put to use within 60 days prior to filing for the certificate of water right; and
  - ▣ No notice to other water right holders.
  
- “... ***except that*** a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit.”

# ***Clark Fork Coalition v. DNRC, cont.***

DNRC 1987 rule defining “combined appropriation”:

An appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, ***in the department’s judgment***, could have been accomplished by a single appropriation.

Groundwater developments ***need not be physically connected nor have a common distribution system*** to be considered a “combined appropriation.”

They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs ***need not be developed simultaneously***. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the “combined appropriation.”

# ***Clark Fork Coalition v. DNRC, cont.***

DNRC four-part analysis under 1987 rule:

- 1) Are two or more wells part of a project or development?
- 2) Do the well or wells withdraw water from the same source aquifer as another well in the project or development?
- 3) In the department's judgment, could the purpose served by the wells have been accomplished by a single appropriation?
- 4) If a combined appropriation, does it exceed 10 acre-feet per year?

# ***Clark Fork Coalition v. DNRC, cont.***

- In 1993, DNRC adopted new rule with new definition for “combined appropriation”:  
“an appropriation of water from the same source aquifer by two or more groundwater developments that are ***physically manifold*** into the same system.”
- Senior water users and environmental groups sued DNRC in 2010, claiming 1993 rule violated the spirit and intent of the Water Use Act and exempt well provision – instead allows large consumptive uses of groundwater with no permit and no notice to senior water users
- 1<sup>st</sup> District Court agreed and invalidated the 1993 rule; 1987 back in effect as of November 21, 2014

# *Clark Fork Coalition v. DNRC, cont.*

How to apply to subdivisions? Case plus HB 168:

## **Grandfathered and can use exempt well under 1993 rule:**

- 1) Projects or developments with application to DEQ submitted with fee on or before 10/17/14 ;
- 2) Subdivision application to county/city submitted with fee on or before 10/17/14
- 3) Existing tracts of record as of 10/17/14

# ***Clark Fork Coalition v. DNRC, cont.***

## **Subdivision applications after 10/17/14:**

- Same standards for review – 76-3-622(1)(e); adequate *water availability* and evidence of sufficient *water quality*; forward evidence to DEQ. If want additional information, must hold public hearing pursuant to 76-3-511, MCA
- Condition on preliminary plat approval for lots under 20 acres, condos, RVs or mobile homes, leases of state or airport lands; boundary line relocations, family transfers, and divisions for agricultural use (DEQ has jurisdiction) – require DEQ approval for water and sanitation for final plat (DEQ will require water right or certificate from DNRC for DEQ approval)
- Condition on preliminary plat approval for lots over 20 acres (no DEQ jurisdiction) - require that the subdivision covenants advise the lot owners that the wells on the property must comply with DNRC rules and guidelines? Provide handout at pre-app that developer should contact DNRC regarding water availability?

# *Pederson v. Burnaugh*

## **13<sup>th</sup> Judicial District (February 2015)**

- All parties owned lots in Indian Cliffs subdivision. After Burnaugh purchased his lot, he began constructing a 3,200 sf pole structure to “house his toys.”
- Subdivision covenants require residential dwelling and allows storage as accessory use only; zoning (Residential 15000) requires at least 50% of structure to be residential.
- Burnaugh submitted plans to County for zoning permit for the structure; revised plans to include 50% “residential use” and obtained permit
- Neighbors filed suit against landowner, claimed structure was in violation of covenants – district court agreed and ordered removal. On-site visit indicated structure was agricultural/storage/commercial in nature and did not enhance values of surrounding properties



# ***Bitterrooters for Planning v. Ravalli County***

## **21<sup>st</sup> Judicial District (July 2015)**

- February 2006 – developer submitted application for 600 residential units, accompanied by EA and TIS (using 7<sup>th</sup> edition Trip Generation Manual) (“Legacy Ranch”).
- November 2006 – voters enacted interim zoning regulations, imposing 1 residential unit/2 acre minimum. Several developers with pending subdivision applications sued to allow processing without new zoning. Developers and County settled (“Lords Settlement”), agreeing to process under subdivision regs only.
- November 2007 – Legacy Ranch developer submitted new application under Lords Settlement for 639 residential units, using original 2006 EA and TIS. Communications regarding insufficiencies continued over next several years.

## ***Bitterrooters for Planning, cont.***

- May 2012 – County adopted new (more lenient?) subdivision regulations, and developer requested review under the new regulations.
- December 2012 – application deemed sufficient.
- April 2013 – Planning Board recommended approval of Legacy Ranch
- July 2013 – County Commission conditionally approved Legacy Ranch preliminary plat as a 30-year, 15-phase project, subject to 130 conditions. Plaintiff community group filed suit. District Court held for Plaintiffs on three grounds.

## ***Bitterrooters for Planning, cont.***

- 1) County failed to meet the “hard look” standard. The decision-maker must:
  - (a) Carefully consider the relevant factors (§76-608(3)(a), MCA);
  - (b) Compile and consider the relevant information supplied by the public and other agencies; and
  - (c) Articulate a satisfactory explanation for its decision, including a rational connection between the relevant facts and the final decision.

See Clark Fork Coalition v. DEQ (2008 MT 407) and Aspen Trails v. Simmons (2010 MT 79);

## ***Bitterrooters for Planning, cont.***

- **Impacts to Public Health and Safety** – County failed to compile and consider the data necessary to accurately estimate and mitigate traffic impacts:
  - TIS from 2006 did not reflect new application buildout date of 2049 (TIS used original buildout date of 2025);
  - TIS failed to reflect additional 39 units in new application;
  - TIS failed to use new version (9<sup>th</sup>) of Trip Gen Manual;
  - TIS did not analyze key intersections, despite request from MDT.

# ***Bitterrooters for Planning, cont.***

## ➤ **Impacts to Public Health and Safety, cont.**

- County did not address any of the TIS issues raised by public during review; instead imposed condition to complete new, updated TIS for certain phases prior to final plat approval, when County had no authority to impose additional mitigation.
- Court rejects County's argument that it could impose additional conditions after preliminary plat if "necessary" to address "critical public health and safety issues" – language not supported by MSPA, and "critical" not defined.

# ***Bitterrooters for Planning, cont.***

- **Impacts to Wildlife and Wildlife Habitat** – County failed to compile and consider the data related to wildlife migration corridors:
  - In 2006, biologist from USFWS Migratory Bird Program provided comments to FWS regarding potential impacts from project on protected migratory bird species and their habitats in the area - developer's biologist responded to these comments with conclusion that “there have been no migration corridors identified within the proposed subdivision.”
  - EA indicated only that the Biological Species Report “includes an overall discussion of the site's suitability as wildlife habitat.”
  - In 2013, another biologist provided detailed report analyzing and assessing habitat corridor linkages along the Highway 93 corridor, concluding that the proposed development “would sever this important linkage area” for deer, elk, and black bear - County responded that these areas “were not on the property.”

## ***Bitterrooters for Planning, cont.***

- 2) County violated §76-3-610 by approving 30-year build-out in 15 phases
  - (a) -610 unambiguously allows 1-3 year approval of preliminary plat, with extension by mutual consent “at the end of this period.”
  - (b) County improperly approved preliminary plat with 6 years for Phase 1 final plat approval and later years for successive phases
  - (c) Only exception to imposing additional conditions after preliminary plat approval is Subdivision Improvements Agreement
  - (d) Appropriate remedy for this violation is to void the approval, not shorten the time period to the -610 limitations

## ***Bitterrooters for Planning, cont.***

- 3) County violated public's right to participate by deferring the compilation and consideration of relevant information (updated TIS and water quality data) until after preliminary plat approval, when County would be required to approve the final plat regardless of public comment or conflicting information.

\*\* Will County appeal the decision??

# ***Lewis and Clark County v. Hampton***

## **2014 MT 207 (August 2014)**

- Over 20 years ago, Hampton created and sold 21 lots from a 40-acre parcel using subdivision exemptions
- In 1991, one of the parcels was further divided into two lots using the agricultural covenant exemption, allowing revocation only by mutual consent of the owners and the County; owners sold the restricted 12.3 acre lot back to Hampton.
- In 1996 and 1997, Hampton sought to remove the covenant to build a house on the restricted lot. The County denied the request, and Hampton sued. County prevailed.

# *Lewis and Clark County v. Hampton*

- In 2004, Hampton again sought to remove the covenant and County consented with 13 conditions. Hampton built the home without meeting all of the conditions (road upgrades and access).
- In 2006, Hampton applied to further subdivide the parcel. County learned conditions had not be met, refused to process the proposed subdivision, and sued to require removal of the existing house. Jury found for County, but judge denied relief, instead requiring Hampton to place permanent restrictions on the property and complete modified conditions.
- MSC upheld DC order, with minor variations to the conditions as modified by the Court.

# *City of Helena v. Svee*

## 2014 MT 311 (November 2014)

- City adopted WUI ordinance prohibiting wooden shingles within entire city. Homeowner violated ordinance in replacing shingles.
- Homeowner sued City, argued city exceeded authority in adopting ordinance; roof materials within purview of state building code. City argued it had authority to adopt restrictions under zoning authority – public health and safety.
- 1<sup>st</sup> Judicial District Court, now MSC agreed with homeowner:
  - Municipal zoning law does not authorize cities to regulate building materials expressly governed by state building code.
  - City may only adopt building codes adopted by DLI and may not enforce a building code unless certified by DLI.





# *Phillips v. Whitefish*

## **2014 MT 186 (July 2014)**

- In 1967, Whitefish and Flathead County created a City-County Planning Board with jurisdiction over the “donut”: City had exclusive zoning authority one mile beyond the City limits.
- In 2005, City and County entered into Interlocal Agreement (IA) that increased the City’s exclusive authority to two miles beyond the City limits.
- In 2008, City adopted a Critical Areas Ordinance that imposed further zoning restrictions in the extraterritorial area. The County opposed the ordinance and withdrew from the 2005 IA.
- The City sued the County, arguing 2005 IA could not be altered or terminated without mutual consent. The County claimed the mutual consent provision was unenforceable; District Court agreed.
- In 2010, City and County adopted new 2010 IA with County oversight of City zoning in donut area.

# Whitefish Doughnut Area



Graphic Illustration by Steve Larson | Flathead Beacon

# *Phillips v. Whitefish, cont.*

- City residents unhappy with the new 2010 IA collected signatures for a petition to repeal.
- Referendum passed in November 2011 by a two-to-one margin; City declared the 2010 IA was revoked and the 2005 IA was reinstated, giving the City exclusive jurisdiction over the donut.
- Residents of both the City and County filed suit challenging the validity of the referendum; District Court held the adoption of the 2010 IA was an administrative act, not subject to referendum.
- MSC affirmed - the IA was not actual zoning (which is legislative) but the method to settle contentious issues and pursue a course of cooperation (administrative). So the 2010 IA lives!

# ***American Tower Corp. v. City of San Diego***

## **763 F.3d 1035 (August 2014)**

- Wireless tower company owned three towers sited within City of San Diego with expiring 10-year CUPs. Company applied for renewal of all three permits.
- City's Land Development Code requires towers to be "designed to be *minimally invasive* through the use of architecture, landscaping architecture, and siting solutions." ATC consistently refused to consider reducing the height or redesigning the towers.
- City denied CUPs on grounds that towers could have been less "visually intrusive" and did not comply with the code to the "maximum extent feasible."

## *American Tower Corp, cont.*

- ATC filed suit, claiming the decision violated the Federal Telecommunications Act. 9<sup>th</sup> Circuit Court holds for City.
  - 1) The Act requires a local or state cell tower permit decision to be “supported by substantial evidence contained in a written record.” *Low hurdle for local governments to overcome* - substantial evidence in the record indicated ATC had refused to consider any modifications to address visual invasiveness of the towers.
  - 2) The Act prohibits discrimination among “providers of functionally equivalent services.” City’s towers (emergency services communications) are not functionally equivalent as private for-profit services.

# *American Tower Corp, cont.*

3) The Act prohibits local agencies from regulating telecommunications facilities in a way that “prohibits or has the effect of prohibiting the provision of personal wireless service.”

Two pronged analysis:

- Does the provider have a “significant gap” in service coverage?
  - Is the manner in which the gap is proposed to be filled the “least intrusive” on the values of the local government?
- 
- Court assumed ATC had “significant gap” in service coverage - decision as to whether the gap is filled in the least intrusive manner is within discretion of the local government.
  - ATC was responsible for conducting feasibility analysis of alternative sites and designs for City to make final decision

# *El Dorado Estates v. Fillmore*

## 765 F.3d 1118 (Sept 2014)

- Plaintiff owned and operated seniors-only mobile home park. Park residents approached City about adopting a mobile home rent control ordinance. In response, Plaintiff applied to City to subdivide the park into single lots for sale.
- City twice deemed application incomplete, then imposed hundreds of conditions *for completeness*.
- Plaintiff filed suit against City under Fair Housing Act, alleging City “acted with the intent of coercing, interfering with, and preventing [plaintiff] from potentially making housing available for families.”

## *El Dorado Estates, cont.*

- District Court dismissed the suit, 9<sup>th</sup> Circuit reversed and remanded. Plaintiff adequately alleged injury under FHA – expenses directly caused by City’s unreasonable delays and extralegal conditions
- The right not to have to endure housing discrimination is a constitutionally cognizable legal interest; ***land use decisions made by local governments are subject to the FHA***
- Communications by city officials showed an effort to delay and discourage the subdivision to protect park residents from family housing in the park, including offers to remove the conditions if owners would agree to sell only to seniors.

## *El Dorado Estates, cont.*

- NOTE: Fair Housing Act contains exemption for “housing for older persons” from the prohibitions against familial discrimination
- Exemption does not apply when other types of discrimination are alleged
- Exemption apparently also does not apply when owner is trying to get OUT of the housing for older persons business!
- City settled case with park owner in 2015; family park, lots approved for sale with lease-buy back provisions required for existing residents

# ***Pacific Shores Properties, et al v. Newport Beach*** **(730 F.3d 1142 (Sept 2013); en banc hearing denied March 2014)**

- City passed moratorium on new group homes in response to complaints about proliferation of “sober homes” in the city; struck down by courts as discriminatory.
- City passed new ordinance addressing group homes and short-term lodging facilities. “Single housekeeping units” allowed only with written lease and residents decide who lives in the household; “residential care facilities” subject to new zoning requirements strictly limiting allowable locations.
- City would have preferred to “simply ban all unlicensed group homes” – under state law, cooperative living arrangements with a commitment or requirement to be free from alcohol and other drugs do not require state agency license

# ***“Sober Living by the Sea”***



## ***Pacific Shores Properties, cont.***

- Ordinance immediately reduced group home housing opportunities by 40% and closed about 1/3 of all drug and alcohol treatment facilities in the city. Zoning permit application process was “burdensome, time-consuming, and costly”; majority of applications were denied.
- Owners of group homes sued city for violation of FHA, ADA, and equal protection. District court dismissed; 9<sup>th</sup> Circuit 3-judge panel overturned; *en banc* hearing denied.
- Persons recovering from drug and/or alcohol addiction meet definition of persons with a disability under both ADA and FHA

## ***Pacific Shores Properties, cont.***

- Discrimination can be shown by disparate treatment *or* impact
- Here, City's sole objective in enacting and enforcing the ordinance was to discriminate against people deemed to be disabled under the FHA and ADA.
- City's discriminatory purpose in adopting the ordinance supported disparate treatment claim:
  - Discriminatory statements made by city staff, elected officials, public at public hearings and in surveys
  - City changing policy and practices from the norm – survey conducted of complaining residents, ad hoc committees formed, task force to enforce ordinance
  - Prior to the ordinance, group homes were generally permitted in all residential areas

# ***Santa Monica Nativity Scenes v. Santa Monica***

## **2015 U.S. App. LEXIS 7155 (April 2015)**

- Since the 1950s, City had general ban on unattended displays in all City parks, except for “Winter Displays” in Palisades Park in December. Non-profit organization was created to oversee construction and management of nativity scenes.
- City used lottery system to distribute limited spaces. By 2010, lottery process had become flooded with applications from atheist groups seeking to win majority of spots historically used for nativity scenes.
- In 2012, City repealed the exception due to excessive administrative costs and resources needed to run lottery system.





## *Santa Monica Nativity Scenes, cont.*

- Religious groups sued the City; district court and 9<sup>th</sup> Circuit panel rejected the suit.
- Repeal of the exception to the generally applicable ban is a content-neutral time, place, and manner regulation to improve aesthetics and alleviate administrative burdens.
- A reasonable person would not conclude that primary effect was to communicate a message of disfavor towards Christianity.

# ***T-Mobile South, LLC v. City of Roswell***

## **(April 2015)**

- T-Mobile submitted application to construct 108-foot tower resembling a pine tree in Roswell, Georgia on vacant lot zoned for residential use in residential neighborhood.
- City staff recommended conditional approval, including relocation of tower on the site, erecting a fence, and planting pine trees to shield from adjacent residences.
- City council denied application, sent letter to T-Mobile with notice of denial and reference to the minutes of the hearing; ***minutes to the hearing were provided 26 days later.***
- T-Mobile sued, claiming lack of evidence for denial and violation of FTA's requirement to provide reasons for denial in writing.



## *T-Mobile South, cont.*

- District Court agreed with T-Mobile, ordered City to grant the permit; 11<sup>th</sup> Circuit Court of Appeals reversed. City met “in writing” requirement with notice and “substantial evidence” requirement with minutes.
- US Supreme Court agreed City had met in writing requirement – reasons do not have to be in notice of denial, but in some “sufficiently clear written record.”
- **But...** Act requires reasons for denial to be made “essentially contemporaneously” with the notice of denial, to give time to decide whether to appeal (30 days). Providing reasons 26 days later does not meet contemporaneous requirement.

# *Reed v. Town of Gilbert*

## (June 2015)

- Sign ordinance prohibited outdoor signs without a permit, with exemptions for 23 categories of signs, including:
  - Ideological signs (“communicating message or ideas”) – up to 20 sf, no placement or time restrictions
  - Political signs (“designed to influence the outcome of an election”) – up to 32 sf, placed 60 days before and 15 days after election
  - Temporary directional signs (“directing the public to a qualifying event,” generally a meeting of a nonprofit group, including churches) – 4 signs up to 6 sf, placed 12 hours before the event and one hour after
- Early each Saturday, the Good News Community Church would post temporary directional signs throughout the town with church name and the time and location of services. Signs were removed by midday each Sunday.



## *Reed, cont.*

- The Town cited the Church for exceeding display time limits and failing to include an event date on the signs. Church filed suit against the Town for violation of free speech.
- District Court and 9<sup>th</sup> Circuit found for Town. “Cursory examination” of sign to determine which provisions of ordinance apply is not the same as “synthesizing the expressive content of the sign” in order to regulate it. “Content-neutral” means based either on the viewpoint or subject-matter of the speech. If you can justify the regulation without reference to the content, then content-neutral. ***SPLIT AMONG CIRCUITS ON THIS TEST:***
  - ▣ 1, 2, 8, 11 – if you have to read the text, its content-based
  - ▣ 4, 6, 9 – motive is test for content-based
  - ▣ 3 – context-sensitive test

## *Reed, cont.*

- US Supreme Court (Thomas) reverses 9<sup>th</sup> Circuit, applying the more rigid test – application of different requirements for the different categories of signs is necessarily content-based and therefore subject to strict scrutiny.

*“Strict scrutiny, like a Civil War stomach wound, is generally fatal.”*

- ▣ Is regulation NECESSARY to further a COMPELLING government interest? and
- ▣ Is regulation NARROWLY TAILORED to meet that interest?
- ▣ Government’s motive, lack of animus, or content-neutral justification **doesn’t matter**.

## *Reed, cont.*

- If content-neutral on its face, then can look to motive, animus, or lack of justification. **Intermediate scrutiny:**
  - ▣ Is regulation **NARROWLY TAILORED** to further a **SIGNIFICANT** government interest?
  - ▣ Does the regulation **LEAVE OPEN AMPLE ALTERNATIVE CHANNELS** for speech?

## *Reed, cont.*

- If the Church had decided to support a political candidate, it could have put up larger signs, in more locations, and kept them up longer than signs inviting people to attend its services.
- “If a sign informs its reader of the time and place a book club will discuss John Locke’s *Two Treatises of Government*, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government.”

## *Reed, cont.*

- Justice Alito concurring opinion provides lists of rules that would not be considered content-based:
  - regulating the size of signs
  - regulating the locations in which signs may be placed (may distinguish between freestanding and attached signs);
  - distinguishing between lighted and unlighted signs;
  - distinguishing between signs with fixed messages and electronic changeable copy signs;
  - distinguishing between the placement of signs on private and public property, or between commercial and residential property;

## *Reed, cont.*

- Alito concurrence, continued:
  - ▣ distinguishing between on-premises and off-premises signs;
  - ▣ restricting the total number of signs allowed per mile of road;
  - ▣ imposing time restrictions on signs advertising a one-time event;\*\*
  - ▣ Government putting up its own directional, historic, or scenic signs

## *Reed*, cont.

- Justice Kagan’s concurring opinion: Of course “imposing time restrictions on signs advertising a one-time event” is content-based –that’s exactly what the majority opinion says in *Reed*.
- NOTE: this approach to content-neutrality does not yet apply to:
  - commercial speech
  - speech in limited or non-public forums
  - obscenity,
  - defamation, libel, and slander.

# Where to go from here ...???

- Review your sign ordinance for all content-references (prohibitions, exemptions, permit requirements, and differences) in a non-commercial context. How do you treat:
  - Political signs?
  - Ideological signs?
  - Direction signs?
  - Special event signs?
  - Temporary signs?
  - Address signs?
  - Others???

# Where to go from here ...???

- Base regulations on site activity/zoning distinctions, not content of the sign. Ex: Allow for minimum amount of non-commercial signage based on zones (by size, location, lighted, electronic, total amounts, type). Then:
  - ▣ Allow an extra sign on-site when property is for sale or rent (for sale or rent)?
  - ▣ Allow for an additional sign, located within certain amount of distance from street, intersections, and driveways (directional signs)?
  - ▣ Allow one small additional sign placed on front of building, on either side of the mailbox, or on a post (address signs)?
  - ▣ Provide process for limited-time sign permit, with date sticker issued by government (special/temporary event signs, speech is government's speech)?

# Where to go from here ...???

- Commercial content? Metromedia says can be treated differently, Reed's attorney said the same at oral argument. At least for now???
- Look to ordinances in cities located in the 1st (New England), 2nd (New York), 8 (Dakotas), or 11<sup>th</sup> circuit courts (Florida, Georgia) for guidance
- Informal committee to review sample ordinances and brainstorm solutions?