Important Land Use Decisions 2010-2011

Kelly A. Casillas
Montana Department of Commerce

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Court Decisions 2010-2011

- *Neighborhoods by Design v. City of Missoula* (4th Judicial District)
- *MM&I, LLC v. Gallatin County* (MSC)
- *Guggenheim v. City of Goleta* (9th Circ.)
- *Big Sky Development/Morado Mountain Estates v. Ravalli County* (21st Judicial District)
- *Christison v. Lewis and Clark County (*1st Judicial District)
- *Boyer v. Lewis and Clark County* (1stJudicial District)
- *Heffernan et al. v. City of Missoula (Sonata Park)* (MSC)
- *Centro Familiar Cristiano Buenas Nuevas/Jorge Orozco v. City of Yuma* (9th Circ.)
- *GOMAG v. Gallatin County* (MSC)
- *Derick v. Lewis & Clark County* (1st Judicial District)

Neighborhoods by Design v. City of Missoula

4th Judicial District (March 15, 2010)

- Plaintiff sought annexation and approval of 33 lot subdivision adjacent to the Clark Fork River
- City approved subdivision subject to 36 conditions
- Plaintiff challenged four of the conditions as arbitrary and capricious, in violation of the Subdivision Act, and unconstitutional taking (all but #19):
  - Public access easement for trail along southern boundary of subdivision (#12)
  - Public access easement for trail along river (#15)
  - Private common area must be converted to public access easement (#17)
  - Provide specific development envelopes for each lot (#19)
- City admitted "the four conditions were not intended to address or mitigate impacts created by the subdivision."

Neighborhoods by Design (NBD), cont.

Condition #15 – Public access easement for trail along river

- Lack of regulation requiring such an easement
- Nothing in Findings about such a regulation, or a lack of public access along the river; City only indicated that an "onsite investigation revealed potential for continuous river bank trail" and FWP encouraged a trail on site.
- No calculations made to determine the appropriate amount or type of trails that might be needed by the subdivision's residents in addition to those already provided
- No findings that subdivision failed to provide trail linkages or transportation facilities, or that it prevented residents from accessing existing and future trails

NBD, cont.

Condition #12 – Public access easement for trail along southern border of subdivision

- Lack of regulation requiring an easement for non-motorized transportation facilities
- City pointed to priority of extending regional trails across neighboring property, but did not cite these plans in the Findings for the project
- City did not find that subdivision created impact to be mitigated with additional non-motorized trails; no calculations or studies to determine if the conditions offset any identified subdivision impacts

NBD, cont.

Condition #17 – Private common area must be converted to public access easement

- Based on a "City Engineering recommendation"
- No statute or regulation providing authority to impose such a condition
- City indicated that area contained significant public utilities, but did not identify any specific problems with the easements provided by NBD.

NBD, cont.

Condition #19 – Provide specific development envelopes for each lot

- NBD had showed building envelopes on some of the lots to "demonstrate it planned to control the location of the structures on those lots."
- City argued it was entitled to rely on the plat as proposed, and any changes would require further city review and approval
- Court agrees with city, but here city admitted the development envelopes were not necessary to fulfill any City requirement or to mitigate any potential impacts.

COURT – City failed to meet even nexus requirement under *Nollan/Dolan*; emphasized the importance of findings.

MM&I, LLC v. Gallatin County, 2010 MT 274

- 143-lot subdivision, one lot for condos; resubmitted for 135 SF lots and one lot for up to 16 condos. Major neighborhood opposition; consolidated city-county Board recommended approval; Commission denied for unmitigated impacts
- Applicant sued County; District Court held decision not arbitrary, capricious or unlawful; MSC upheld decision
- Review limited to the administrative record unless extraneous evidence is relevant to issues lawfully required to be included in the record (cites *Aspen Trails*).

MM&I, cont.

Unmitigated impacts:

- Public health and safety
  - Adverse impacts to traffic on already congested road; required improvements to access road or construction of new highway interchange not feasible mitigation
  - Decision makers may draw upon their own experiences when considering primary review criteria; including disregarding expert testimony and, instead, basing their conclusions on their personal observations at the site. *Christianson v. Gasvoda*, 242 Mont. 212 (1990).
  - Letter from sheriff concerning long distance from services and inability to provide adequate police protection

MM&I, cont.

- Education
  - Commission found educational impacts unmitigated.
  - Letter from district superintendent stating no impacts to schools contradicted his statements in Bozeman Chronicle that his district was running out of classroom space

- Agriculture
  - Dispersed residential development contrary to Belgrade Area Plan, which listed objectives to preserve open space, protect and preserve agriculture, and avoid "leap-frog" development
  - Adjoining farmer testified development would adversely affect his business

MM&I, cont.

- County not required to consult applicant about potential mitigation for these impacts

- Section 76-3-608(4) and (5), MCA do not require governing body to mitigate impacts to development – denial is always an option.

Guggenheim v. City of Goleta, 638 F.3d 1111

- 9th Circ. panel held that City's mobile home rent control ordinance resulted in a facial taking under a *Penn Central* analysis
  - Character –ordinance singled out relatively few mobile home park owners to bear the public burden of providing affordable housing
  - Diminution –reasonable return on original investment, but suffered a severe adverse economic impact because they were not able to reap the windfall they would enjoy if restriction were lifted
  - Expectations – neutral, even though plaintiffs 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
- En Banc opinion reversed: *"… 'Distinct investment-backed expectations' implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. …[plaintiffs] got exactly what they bargained for … a mobile-home park subject to a detailed rent-control ordinance."*

Christison v. Lewis and Clark County

1st Judicial District

Order I (July 14, 2009)

- 12 lot subdivision conditionally approved on paving 1.8 miles of adjacent Lake Helena Drive
- Existing traffic levels already @800 VTD (road standard 400 VTD); additional 104-130 anticipated as result of development
- Developer options – pave the road; rebate program for repayment from other developers impacting road; creation of RID
- County had approved two similar subdivisions without requirement for off-site road improvements
- "County is well within its rights to require a subdivider to pay a reasonable fee to address impacts created by his proposal."
- *Nollan/Dolan* applies - follows California courts that heightened scrutiny applies in application of ad hoc monetary exactions but not legislatively mandated, formulaic mitigation fees (*Ehrlich, San Remo*)
  - *Nollan* met; no individualized determination made to meet *Dolan*.

Christison, cont.

<u>Order II (January 25, 2011)</u>

- County adopted road mitigation assessment based on estimated increased traffic from proposed development
- County revised findings for *Christianson* subdivision – compared projected number of ADTs to existing number of ADTs, and imposed fee based on increase
- Fees imposed not earmarked to any particular development – to County general fund
- Section 76-3-510(2) requires "all fees … be expended on the capital facilities for which the payments were required."
- Court finds now the *Dolan* requirement was met, but no essential nexus to meet *Nollan*.
- County must establish road improvement fund for deposit of such fees

Boyer v. Lewis and Clark County

1st Judicial District, March 17, 2011

- Proposed 6-lot subdivision – 5 lots of 3-5 acres and remaining 150 acre lot
- Plaintiffs attempted to subdivide under family transfer exemption 76-3-207(1)(b), MCA
- County subdivision regulations contain various criteria establishing rebuttable presumption that division is evasion:
  1) The original or subsequent tract created by exemption
  2) Parcel not intended as home site
  3) Parcel will be one of three or more parcels created from the original tract
  4) Fits pattern of land divisions and land transfers
  5) Same applicant has previously used exemptions on the original tract
  6) Prior history of the tract

Boyer, cont.

- MSC – exemptions are to be narrowly construed
- Statute provides authority for local governments to establish evasion criteria
- AG – "The exemptions … were provided to deal with exceptional circumstances under which, in the Legislature's judgment, full plenary subdivision review is unnecessary."
  - 14 tracts created from original parcel
  - This parcel already reviewed and approved for minor subdivision identical to family transfer plan
- Reasonable for Commissioners to conclude that proposal for family transfer was attempt to evade subdivision review
- *But see Big Blue River v. Gallatin County Commission*, 18th Judicial District, August 2009 (invalidating rebuttable presumption of evasion on boundary relocation exemption when result shared little resemblance to original parcels)

Heffernan et al. v. City of Missoula (Sonata Park), 2011 MT 91

- First time MSC has taken up issue of whether "substantial compliance" is still correct standard after 2003 revisions to Growth Policy statute.
- Rattlesnake Valley Comprehensive Plan – acknowledged different existing densities in the area, from rural and undeveloped in the north, to suburban/exurban densities in the west and east hills (1 unit per 5–10 acres), and urban densities in the south near city services and transportation networks (6-8 units per acre).
- Sonata Park site (34 acres) straddled land use densities of 1:5-10 acres and 1:2 acres, for a total of 7-8 units under the Plan. Plan used "substantially comply" language for subdivision, zoning, and rezoning in the area.

Sonata Park, cont.

- In 2006, developer proposed 41 unit subdivision on the Sonata Park site and requested a zoning compliance permit. OPG found the proposal did not "substantially comply" with the Plan, and denied the permit.

- In 2007, developer proposed 38 unit subdivision on the site, citing a 1989 development agreement between developer's predecessor-in-interest and the City that allowed for higher density development of the site at 2 units per acre. OPG again found the proposal did not "substantially comply" with the Plan, but recommended approval, in part because 4 units per acre is minimum density necessary to recoup City costs of providing sewer.

Sonata Park, cont.

- Planning Board approved the 38-unit proposal. Court noted:
  - Board member comments that growth policy did not need to be followed;
  - Testimony that area needed to help provide housing for Missoula; and
  - Original intent of Plan drafters was for area to be developed more densely.
- City Council PAZ Committee approved the proposal. Court noted:
  - Committee member comments that proposal fit the density of the area; and
  - Testimony that every part of the city needed to provide housing.
- City Council approved the proposal at 37 lots. Court noted:
  - Council member comments regarding the owner's development rights;
  - Property previously zoned more densely at 2 units per acre; and
  - Testimony regarding the need for more housing in the city.

Sonata Park, cont.

- Neighbors sued the City, arguing the approval was a violation of Subdivision Act and zoning statutes, and not in substantial compliance with the Plan. District Court granted summary judgment for the plaintiffs.

- Court addressed 4 issues:
  1) Did neighbors have standing to bring suit? YES
  2) Standard of review on summary judgment? Review limited to administrative record of the proceedings
  3) Is "substantial compliance" still the standard for consideration of the growth policy in making zoning decisions? YES
  4) Was City's decision in arbitrary, capricious, or unlawful? YES

Sonata Park, cont.

- Proposed 37-lot subdivision represented "significant deviations" from the Plan:
  - Plan density for site was 1:2-10, and area is located in lower density area of the valley (approved density was 2:1)
  - Plan recommended limiting traffic congestion to preserve air quality (development would generate @300 VTD)
  - Plan calls for preservation of scenic views of Waterworks Hill (development would disturb the view of Waterworks Hill from the remainder of the valley)
  - Plan identified significant natural woody draw and wildlife corridor on the site (proposal placed road across it, and City's required public easement corridor and parkland dedication in this resource area)
  - Other goals and recommendations of the Plan contrary to the proposal; not addressed by City; or addressed in "conclusory fashion."

Sonata Park, cont.

- Wait a minute! Doesn't 76-1-605(2)(b) say you CANNOT deny or impose conditions on a land use approval based solely on compliance with growth policy?? Couple of thoughts:
  - Arbitrary and capricious standard – reversal warranted if the decision appears to be random, unreasonable, or seemingly unmotivated, based on the existing record.' Kiely Construction LLC v. City of Red Lodge, 2002 MT 241 ¶ 69. Here, Court seems frustrated that City doesn't address the conflicts with the Plan. FINDINGS and THE RECORD ARE CRITICAL!!!!! Lead the Court step by step through your decision-making process…
  - Are the courts seeing a difference in approving or denying zoning amendments as opposed to subdivisions? What is a "land use approval"?

Centro Familiar Cristiano Buenas Nuevas/Jorge Orozco v. City of Yuma 2011 U.S. App. LEXIS 14247 (9th Circ., July 12, 2011)

- Challenge to City requirement that church in Old Town District obtain CUP to operate
  - Presence of church within 300 feet precluded issuance of state liquor license
- Claims moot – church lost building to foreclosure; state law changed to allow waiver of liquor license restriction. Court assesses for damages under RLUIPA.
- "Equal terms" provision of RLUIPA - "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."
- The city violates "equal terms" when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria.

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

- 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.

PPL Montana v. State of Montana
Writ of Certiorari Granted 7/14/11

- Did the MSC err in concluding that riverbeds occupied by dams are the property of the State of Montana because they were navigable for title purposes at the time Montana became a State?

- Chief Justice Roberts and Justices Scalia, Thomas, and Alito have concluded that if a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause.

- Justices Kennedy and Sotomayor agree that if a case presented a situation where principles such as due process were inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented.

- **USDOJ just filed amicus brief in support of PPL's position**

MONTANA COMMUNITY TECHNICAL ASSISTANCE PROGRAM

Kelly Casillas, Division Administrator,
Deputy Chief Legal Counsel

Jerry Grebenc, Program Manager

Community Development Division
Montana Department of Commerce
301 S. Park Avenue
P.O. Box 200523
Helena, MT 59620-0523
Phone: 406-841-2598
Fax: 406-841-2771
E-mail:
kcasillas@mt.gov
jgrebenc@mt.gov