Legislative Update 2021 Session

Land Use Interim Working Group

Land Use Cases Affecting Montana September 2019-2021

Tillotson – Bozeman, Montana
May 5, 2022

Legislative Update – 2021 Session

HB 259

- Prohibits inclusionary housing requirements (fees, property dedication, deed restriction) in Part 1, Part 2, and municipal zoning or subdivision review. Annexation?

- Effective April 19, 2021

HB 450

- Limits court-ordered division exemption (Section 76-3-201(1)(a), MCA) to the creation of four or fewer new lots
- Does statute limit judicial authority over partition of property?
- Effective October 1, 2021

HB 496

- Section 76-2-402, MCA (“402” hearings) now silent as to power of Board of Adjustment to deny the proposed use
- Memo from Nugent gives some history
- Effective October 1, 2021

SB 174

- Governing body must review the "specific, documentable, and clearly defined impact on…" the 608(3)(a) criteria
- Each condition required must identify a "specific, documentable, and clearly defined purpose or objective related to the primary criteria that forms the basis for the condition."
- Does your jurisdiction follow *Nollan/Dolan*?

SB 174, cont.

- Governing body does not have approval authority of governing documents unless they directly or materially impact a condition of approval
- New language: “If a local government has historically interpreted and enforced or chosen not to enforce a condition of subdivision approval to the benefit of a parcel owner, the local government may not undertake a different interpretation or enforcement action against a similarly situated parcel owner in the same subdivision.“
- Effective April 30, 2021

SB 211

- Prohibits local government from considering whether proposed subdivision will result in a loss of agricultural soils
- Prohibits local government from requiring a set-aside of land or a monetary contribution for loss of agricultural soils
- Applies to subdivision applications submitted on or after July 1, 2021

SB 161

- Expedited subdivision review available at applicant's request
- Available where municipal zoning (or within county water and sewer districts with County consent)
- Proposed plat must comply with all applicable zoning and subdivision regulations and standards with no variances or other deviations
- Must provide for onsite development or extension of public infrastructure
- Exempt from environmental assessment and review/compliance with 608(3)(a) criteria

SB 161, cont.

- Hearing within 35 workings days of sufficiency determination – may delegate hearing to reviewing agent or agency
- At least 15 days notice by publication
- May condition for compliance with approved application and sanitation approval
- Must comply with other statutory subdivision requirements
- Cannot adopt regulations to restrict use of SB 161
- Effective October 1, 2021

Others

- HB 498 – prohibits Part 1 zoning from preventing the complete use, development, or recovery of minerals, oil, or gas
- HB 527 – draft regulations for Part 1 zoning must be submitted with petition; final regulations must be similar to draft
- HB 599 - county may not condition sand and gravel operation on Part 2 zoning unless zoning in effect prior to DEQ application.

Others

- SB 135 - Part 2 zoning appeals from Board of Adjustment to County Commission are *de novo*

- SB 294 - Part 2 zoning protest provisions struck (finally)
  - Referendum process created to terminate Part 2 zoning
  - Minimum lot sizes prohibited outside 3 miles of municipality unless consistent with densities and lot sizes on land use map in growth policy

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- MAP
- MLCT – Bozeman, Billings
- MACo – Gallatin, Missoula
- MARLS
- MAR
- MBIA
- Private sector consulting – WGM Group
- Legislators – Missoula, Polson, Whitefish, Billings, Montana City, Townsend

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- Began meeting summer of 2019 – MAP reached out to other stakeholders to build bridges and discuss major issues with statutes
- Existing statutes originally adopted 1940s, based on federal models from 1920s – Euclidean zoning, urban redevelopment. *Color of Law* by Richard Rothstein
- Most states have already modernized their statutes
- Montana has traditionally worked backwards – in the absence of comprehensive planning and zoning, we use subdivision process to do everything.

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HOUSING CRISIS

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- COVID hit and …. SB 161 ….
- 2021 Session
- What's happening nationally
  - California – duplexes, lot splits, CC&Rs, oh my!
  - Oregon, Minneapolis, New Hampshire – ADU preemption
  - Housing elements and housing need allocations
  - Removing standards and requirements – parking, lot size, lot area, height restrictions
  - Removing process – ministerial reviews, right-sizing lots
  - Pre-approved plans
  - Fighting NIMBYISM

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- *Vision:* Move site-specific development review through faster and more efficiently, remove duplicative review without losing ability to mitigate impacts
- Build concept of tiering into the statutory process
- Options to deep dive on:

  1) All jurisdictions required to do *some level of comprehensive planning*; or
  2) Some jurisdictions required to do *some level of comprehensive planning*.

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- If at least some jurisdictions were required to do some level of comprehensive planning, what would be required?

1. Planning Boards
2. Content
   i. natural resources and hazards
   ii. housing and affordability
   iii. economic development
   iv. local services and facilities
   vi. financial feasibility and impact of policy
   v. land use and future land use map
3. Public Participation
4. Process for Adoption and Amendment
5. Implementation

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- Drafting comprehensive planning sections now
- Next - what jurisdictions required to do this planning?
- Zoning – follow same process
  - In-depth analysis
  - Broad and intensive public review
  - Legislatively enacted conditions and mitigation
- Subdivision – narrow and specific review, limited public participation, limited opportunity for challenge.

Land Use Cases – Montana District Courts September 2019 - 2020

- *Beartooth v Stillwater Co.* (22nd Jud. Dist. 2020)
- *Galzagorry v Broadwater Co.* (1st Jud. Dist. 2020)
- *Rukstad v Yellowstone Co.* (13th Jud. Dist. 2021)

- In the fall – *Hinds v City of Bozeman* zoning amendment case

Galzagorry v Broadwater Co.
1st Jud. Dist., Sept. 23, 2020

- Plaintiff challenged approval of subdivision for first time within 30 days after approval of final plat
- Court held that 76-3-625(2), MCA did not require plaintiff to file within 30 days of preliminary plat approval to challenge conditions placed on preliminary plat
- Approval was deficient for failure to:
  - Establish consistency with growth policy
  - Provide required water and sanitation information
  - Depict or record irrigation ditches within subdivision
  - Consider impacts to agriculture or surrounding water users
  - Adequately describe easements
- SB 161 contained language clarifying that challenge to preliminary plat must occur within 30 days of preliminary plat approval

Rukstad v Yellowstone Co.
13th Jud. Dist., June 8, 2021

- Citizens petitioned for and County created new Part 1 zoning district in response to proposed sand and gravel operation
- Two landowners – including owner of proposed operation - constituting more than 50% of the titled property ownership in the district successfully protested
- Court finds Part 1 zoning protest provision unconstitutional on same grounds as Part 2 zoning protest provision
  - Unconstitutional delegation of legislative authority
    - No standards for protest
    - No bypass by elected body
  - Violation of procedural due process – no notice and hearing on protest
  - Violation of substantive due process – no rationale required

Beartooth v Stillwater Co.
22nd Jud. Dist., September 1, 2020

- Citizens petitioned for Part 1 zoning to regulate oil and gas activity with signatures of >60% of "affected property owners."
- County concluded owners of mineral estates were "affected" and must also be included in the total ownership; citizens did not meet 60% petition threshold with this denominator.
- Court holds that term "affected real property owners" for Part 1 zoning petitions are limited to surface holders:
  - Would make successful petition difficult and costly
  - Only the first step in the process
  - Not required before or in other jurisdictions

Land Use Cases – Montana Supreme Court September 2019 - 2020

- *Richards v. Gernant* (2020)
- *Hartshorne v City of Whitefish* (2021)

- In the fall – Egan Slough decision

Richards v. Gernant
2020 MT 239

- Plaintiff sought and obtained approval of boundary line relocation for five lots to be used for residential purposes
- Plaintiff then sought exemption to sanitation review under the "no facilities" exclusion, County refused to record
- Plaintiff sought writ from Court to force County Clerk and Recorder to record his COS with his "certification" that the subdivision qualified for the "no facilities" exclusion
- Court upheld County requirement that certifying authority attest that subdivision is eligible to claim exclusion prior to recordation; record established it was not eligible

Hartshorne v Whitefish
2021 MT 116

- Neighborhood plan for Riverside area allowed for neighborhood commercial use, and provided that up to 10% of the site could be developed with such uses through a "mixed PUD"
- Zoning for Riverside area designated as High-Density Multi-Family Residential with all development to be reviewed as a PUD
- City then amended PUD regulations to allow for residential only, and approved developer's proposed amendment to the Riverside zoning to allow for the development of the mixed uses with a CUP instead of a PUD
- Plaintiff challenged the amendment as illegal spot zoning

Hartshorne, cont.

- Court held City met *Little* test:
  - Is the requested use significantly different from the prevailing use in the area?
    - Yes, but that was contemplated in the growth policy
  - Is the area in which the requested use is to apply small?
    - Same area identified in the growth policy for the commercial uses
  - Is the requested change more in the nature of special legislation?
    - Zoning that complies with the growth policy is not "special legislation"
- Rezone was not violation of uniformity requirement – applies only within the specific zoning districts to which particular regulations apply.

Land Use Cases – Ninth Circuit September 2019 - 2020

- *Rosenblatt v. City of Santa Monica* (2019)
- *Calvary Chapel v. Riverside Co.* (2020)
- *Bridge Aina Le‘a, v. Hawai’i Land Use Comm. (*2020)
- *Citizens for Free Speech v. Alameda Co.* (2020)
- *Akshar Global v. City of Los Angeles (*2020)
- *Portland v United States* (2020)
- *Patel v City of South El Monte* (2020)
- *Boyer v. City of Simi Valley (*2020)

- In the fall – Post-*Knick* final decision case

Rosenblatt v. Santa Monica
940 F.3d 439 (9th Cir 2019)

- City prohibits any short-rental except "home sharing," where owner must live in dwelling during visitor's stay
- Plaintiff rented home out when on vacation and challenged ordinance as violation of dormant Commerce Clause
- Court upholds constitutionality of ordinance:
  - Does not directly regulate interstate commerce
  - Does not discriminate against out-of-state interests
  - Passes *Pike* test – when incidental effect on interstate commerce
    - Legitimate local public interest
    - Does not impose significant burden on interstate commerce

Calvary Chapel v. Riverside Co.
948 F.3d 1172 (9th Cir 2020)

- Plaintiff owns and operates church as legal non-conforming use in Citrus-Vineyard Zone under County's zoning ordinance
- Plaintiff purchased adjacent lot to expand church but church not allowed use in zone; non-winery allowed uses include golf courses, day care centers, hotels, restaurants, spas, cooking schools, wine sampling rooms, retail wine sale stores, and special occasion facilities
- Plaintiff filed application for church use, while pending challenged zoning ordinance on facial challenge under RLUIPA, claiming violation of "equal terms" clause

Calvary Chapel v. Riverside Co.

- No equal terms violation:
  - Ordinance treats secular and religious assemblies the same
  - Nothing in ordinance prevents plaintiff from providing religious services as a special occasion facility
- Court refused to consider late claim of discrimination based on ordinance requiring church to operate as special occasion facility
- Issue of whether RLUIPA violated in application of ordinance to Plaintiff specifically remains to be seen

Bridge Aina Le‘a, v. Hawai’i Land Use Comm.
950 F.3d 610 (9th Cir. 2020)

- Vacant 1,060-acre property on west coast of Big Island historically zoned for ag use
- In 1987, County approved development of area with mixed uses, conditioned on development of 60% of proposed units as affordable (1,656 units)
- In 1991, new owner reduced total development proposal, but 60% affordability requirement remained (1,000 units)
- In 2005, another new owner requested reduction to 20% to match County’s new inclusionary housing ordinance (385 units)
  - For first time, County put deadline on development approval – occupancy by 2010 or property would revert to ag classification

Bridge Aina Le‘a, v. Hawai’i Land Use Comm.

- 2008 – Commission asked developer to show cause why had not met numerous conditions needed for development. Owner in process of new buy-sell.

- Commission issued then rescinded verbal vote to revert to ag use with condition that 16 affordable units be built by March 2010. Developer built units by deadline, but with no water, sewer, electricity, or paved road access.

- Final reversion order issued April 2011.

Bridge Aina Le‘a, v. Hawai’i Land Use Comm.

- Developer challenged order as unconstitutional violation of due process, equal protection, and takings. Alleged:
  - Full 3,000 acres was denominator parcel;
  - Reversion order constituted a *per se* categorical taking of all economically viable use of property; and
  - Requested unrealized sale at $35 million as damages.
- Developer’s witness testified property worth $6 million as agricultural. *Lucas* doesn’t apply – if property retains value, *Penn Central* balancing test applies.
- Court reviews the valuation, timelines, sales agreement, affordability conditions, representations, and procedure in holding neither district court nor jury could find for plaintiff.

City of Portland, et al. v United States
969 F.3d 1020 (9th Circ. 2020)

- 9th Circuit upheld FCC 5G small cell wireless rules regarding shot clocks and fees
- Vacates language requiring aesthetic regulations be "no more burdensome" than those applied to other types of infrastructure deployments and to be objective
  - Regulations cannot unreasonably discriminate among functionally equivalent infrastructure
  - Regulations may be subjective but must provide a public benefit or address a public harm
- Upholds language requiring aesthetic regulations to be reasonable (technically feasible and reasonably directed at remedying aesthetic harms)

City of Portland, et al. v United States

5G Shot Clock and Fee Rules

- New permit review times (shot clocks):
  - 60 days for collocation of small wireless facilities
  - 90 days for construction of new small wireless facilities
- Safe harbor review fees:
  - $500 for one application with up to five SWF's, with an additional $100 for each additional SWF
  - $1,000 for a new pole intended to support SWFs
  - $270 per SWF/year for all recurring fees (ROW access or attachment to municipally-owned structures)
- Can set higher fees if reflect reasonable approximation of costs and same as competitors in similar situations.

Boyer v. City of Simi Valley
978 F.3d 618 (9th Circ. 2020)

- Bruce Boyer is not taking no for an answer!
- In 2016, 9th Circuit rejected his *Reed* challenge to Los Angeles' mobile billboard ordinance *Lone Star Sec. & Video, Inc. v. City of LA*, 827 F.3d 1192, 1197 (9th Cir. 2016)
- Simi Valley similarly prohibited parking of mobile billboards on public property, with exemption for authorized emergency or construction-related vehicles
- Court recognizes ordinances are almost identical and Boyer admits the prohibition itself is content-neutral under *Lone Star*

Boyer v. City of Simi Valley

Boyer v. City of Simi Valley

- But Simi Valley added an Authorized Vehicle Exemption for certain types of vehicles, which Boyer claimed was content-based and discriminatory
- Court agrees and strikes down Simi Valley ordinance
  - If the ban was adopted to protect public health and safety, then what is justification for allowing some vehicles to advertise?
  - Only makes sense if assumption is that those exemptions more likely to display messages that promote public health and safety
  - Content-based decision that triggers strict scrutiny
  - Doesn't meet government speech exemption to *Reed* – content not actually restricted to government speech

Land Use Cases - SCOTUS
September 2019 - 2020

- *Cedar Point Nursery v. Hassid* (2021)
- *Mast v. Fillmore Co*. (2021)

- In the fall - *Austin v Reagan Advertising* (2022)

Cedar Point Nursery v. Hassid
141 S. Ct. 2063 (2021)

- California laws require agriculture employers to allow union organizers access to their property for one hour before work, one hour at lunch, and one hour after work for up to 120 days per year.
- Agricultural employers claimed required access was physical per se taking in violation of 5th Amendment
- SCOTUS agrees – *Penn Central* does not apply when government physically takes private property for itself or someone else.
- Temporal nature of invasion affects compensation due, not type of takings.

Cedar Point Nursery v. Hassid

Mast v. Fillmore Co.
141 S. Ct. 2430 (2021)

- Per curium opinion – no analysis, vacates decision and remands to Minnesota court

- Gorsuch concurring opinion – State requiring Amish community to install modern septic system

- RLUIPA requires compliance with strict scrutiny standards:
  - *Government* must prove *with evidence* that rules are narrowly tailored to advance a compelling state interest with respect to the *specific* persons regulated
  - Must show why other exemptions provided are different; must prove that other means cannot work

Mast v. Fillmore Co.

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Tillotson – Bozeman, Montana
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