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61st Montana Legislature

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December 4, 2009

TO: Education and Local Government Interim Committee

FROM: Greg Petesch

RE: Due Process Considerations in Zoning

Due Process requirements apply to state and local governmental actions affecting private property through the 14th Amendment to the United States Constitution and Article II, section 17, of the Montana Constitution. Both provisions provide that a person may not be deprived of life, liberty, or property without due process of law. There are two aspects of due process -- procedural due process and substantive due process.

Procedural Due Process

Procedural due process is based on the concept of "fundamental fairness" and is designed to protect an individual so that statutes, regulations, and enforcement actions ensure that no one is deprived of life, liberty, or property without a fair opportunity to affect the judgment or result. As construed by the courts, procedural due process includes an individual's right to adequate notice of the proceedings, the opportunity to be heard at the proceedings, and an impartial decision maker. See Goldberg v. Kelly, 397 U.S. 254 (1970). The requirements for a procedural due process claim are notice and opportunity for a hearing appropriate to the nature of the case. Montanans for Justice: Vote No on CI-98 v. State, 2006 MT 277, 334 Mont. 237, 146 P.3d 759 (2006).

Substantive Due Process

Substantive due process basically requires the government to have adequate justification for its action affecting an individual's life, liberty, or property. Substantive due process requires that the goal pursued by the government constitute a valid state interest and also requires a sufficient relationship between the means being used to achieve the goal and the goal itself. Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action. See Englin v. Board of Commissioners of Yellowstone County, 2002 MT 115, 310 Mont. 1, 48 P.3d 39 (2002).

Application of Concepts to Zoning -- U.S.

In Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926), the village adopted a comprehensive zoning plan by ordinance. The ordinance was challenged as a violation of substantive due process. The Supreme Court stated that while the meaning of constitutional guaranties never varies, the scope of their application has to expand or contract to meet new and different conditions that are constantly coming within the field of the guaranties' operation. Justification for the ordinance had to be found in some aspect of the police power asserted for the public welfare. The line separating legitimate and illegitimate assumption of the power varies with circumstances and conditions. The zoning distinction between residential and commercial property bore a rational relationship to the health and safety of the community. The allocation of different uses of property was designed to prevent or reduce the congestion, disorder, and dangers inherent in unregulated municipal development and therefore the comprehensive zoning plan did not facially violate due process. The Court noted that specific provision of the zoning ordinance could be dealt with as cases arose directly involving those specific provisions.

A mere 2 years later, the application of a specific zoning regulation to a specific parcel of property was found to violate substantive due process because the health, safety, convenience, and general welfare of the inhabitants of a particular part of the city would not be promoted by the disposition made by the ordinance of the property in question. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

An illustration of how changing conditions are dealt with under substantive due process occurred in Agins v. Tiburon, 447 U.S. 255 (1980). In that case, Agins purchased 5 acres of unimproved land adjacent to the City of Tiburon for residential development. The City was required by law to prepare a general plan governing land use and the development of open space. The City adopted zoning ordinances that required the property to be devoted to one-family dwellings with density restrictions or to open space. Agins challenged the zoning ordinances without seeking approval for the development of the land. The Supreme Court found that the zoning ordinances substantially advanced legitimate government goals. California had determined that local open-space plans would discourage the premature and unnecessary conversion of open-space land to urban uses.

Application of Concepts to Zoning -- Montana

Zoning was first statutorily authorized by Chapter 136, Laws of 1929. Acting pursuant to this authority, the City of Great Falls enacted a zoning ordinance. In Freeman v. Board of Adjustment, 97 Mont. 342, 34 P.2d 534 (1934), the Montana Supreme Court adopted the rationale and holding of Village of Euclid to sustain the constitutionality of Chapter 136, Laws of 1929. That law was also the source of the police power for the City of Great Falls to enact a zoning ordinance.

Procedural Due Process

The zoning statutes contained in Title 76, chapter 2, MCA, contain specific notice and hearing requirements for the adoption of zoning districts, zoning ordinances, and zoning regulations. In Bryant Development Association v. Dagle, 166 Mont. 252, 531 P.2d 1320 (1975), temporary interim zoning regulations adopted by Lewis and Clark County were invalidated because the statutory notice and hearing requirements were not followed. The same result was reached in State ex rel. Christian, Spring, Sielbach & Associates v. Miller, 169 Mont. 242, 545 P.2d 660 (1976), involving Powell County.

In Fasbender v. Lewis and Clark County, 2009 MT 323, 352 Mont. 505, 218 P.3d 69 (2009), the Supreme Court upheld the District Court's invalidation of permanent zoning regulations for failure to comply with the notice provisions of section 76-2-205, MCA, and upheld the District Court's determination that adequate notice and hearing had been given for the adoption of interim zoning regulations by the publication of two notices and the holding of a public hearing. The interim zoning regulations were adopted at the conclusion of the hearing. In Fasbender, the Supreme Court declined to apply all of the procedural requirements contained in section 76-2-205, MCA, concerning the adoption of permanent zoning regulations to the adoption of interim zoning regulations. Section 76-3-206(3), MCA, contains the procedural requirements for the adoption of interim zoning regulations. Those provisions were added by Chapter 446, Laws of 2009 (House Bill 486). Prior to the enactment of Chapter 446, section 76-2-206, MCA, did not prescribe a particular procedure to be followed in adopting interim zoning regulations. Where a party received actual notice and commented at a public hearing, any deficiency in the notice did not affect the substantial rights of the party and the deficiency was disregarded. Liberty Cove, Inc. v. Missoula County, 2009 MT 377, ___ Mont. ___, ___ P.3d ___ (2009).

Substantive Due Process

In reviewing a discretionary exercise of a city's legislative authority concerning zoning, the Montana Supreme Court decides whether the zoning ordinance bears a reasonable and nonarbitrary relationship to a permissible state objective as provided in 76-2-301, MCA. A zoning ordinance enacted pursuant to this statute is a constitutional exercise of the police power if it has a substantial bearing upon the public health, safety, morals, or general welfare of the community. Anderson Insurance v. City of Belgrade, 246 Mont. 112, 803 P.2d 648 (1990). In Anderson, Belgrade adopted a zoning ordinance that prohibited manufactured homes in certain districts but provided for manufactured homes in other districts. The Supreme Court stated that the purpose of zoning is not to provide for the highest and best use of each particular lot or parcel of land within the zones or community. The purpose of zoning is to benefit the community generally by the sensible planning of land uses taking into consideration the peculiar suitabilities and most appropriate use of land throughout the community. The city cited a concern for long-term planning, the unique qualities of manufactured homes, and the property values of surrounding residents as a basis for the zoning and asserted that consideration of these factors was necessary in order to enforce the zoning regulations to promote the public health, safety, morals, or general welfare of the community. The Court found these factors to be a legitimate basis for zoning regulations and concluded that as long as a municipality provides an

adequate area for manufactured home development, manufactured homes could be excluded from conventional residential districts.

However, a different result was reached in Yurczyk v. Yellowstone County, 2004 MT 3, 319 Mont. 169, 83 P.3d 266 (2004). The Yellowstone Board of County Commissioners created a zoning district in which dwellings had to be single-family units with not less than 1,500 square feet of floor area, with a requirement for onsite construction with new materials and for completion within 1 year. Plaintiffs moved a new modular home onto their lot, and although the home conformed to required building standards, plaintiffs were informed that the modular home did not meet the onsite construction provision. The District Court held that plaintiffs' substantive due process rights were violated because the onsite construction provision did not have a substantial bearing on the public health, safety, morals, or general welfare and was not based on a legitimate government objective. The county appealed on grounds that the regulation did have a bearing on community welfare by preserving property values. The Supreme Court disagreed. Neither the city-county planner nor a County Commissioner was able to identify any health and only minimal safety concerns. Although a resident's ability to control the environment and the preservation of property values may implicate legitimate government concerns in some zoning situations, nothing in the record indicated that those concerns actually drove the formulation of these regulations. County officials testified that allowing modular homes within the zoning district had no impact on property values. Absent a rational relationship to a legitimate governmental interest, the onsite construction requirement violated plaintiffs' substantive due process rights.

An interesting scenario involving zoning occurred in Red Lodge. After Town Pump, Inc. had entered into an agreement to purchase real property in Red Lodge with the intent to build and operate a gas station, convenience store, and casino and to sell beer and wine in the casino, the city rezoned the property as "commercial highway". That designation required a "special exception" in order to sell beer and wine for on-premises consumption. The special exception was denied and while an appeal was pending, Red Lodge adopted a master plan and a development code as an interim ordinance and finally as a permanent ordinance. Under the development code, conditional use permits instead of special exceptions were required for on-premises consumption of alcohol. The development code was made expressly retroactive to all applications that had not been granted as of the date of adoption of the code. The District Court ruled that the adoption of the development code rendered the application for the beer and wine special exception and the denial of that application moot. Town Pump, Inc. appealed to the Montana Supreme Court contending that the retroactive application of the development code violated its substantive right to due process. The Supreme Court applied a three-part test to determine if the retroactive application of the development code violated substantive due process: (1) does the code seek to achieve a legitimate governmental purpose; (2) does the code use means that are rationally related to the legitimate government purpose; and (3) is the code arbitrary or unreasonable in its effects. The Supreme Court found that the development code had a legitimate purpose and that its means were reasonably related to that purpose. The Supreme Court also followed the general rule from other jurisdictions that applications under zoning regulations may be denied based on regulations enacted after the applications are made. Town

Pump, Inc. v. Board of Adjustment, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998).

Conclusion

Due process as applied to zoning entails two separate components. Procedural due process requires that a local government adopting a zoning ordinance comply with the statutory requirements for giving public notice and holding public hearings. In the absence of statutory requirements, notice and hearing provisions must be designed to comply with the right of participation contained in Article II, section 8, of the Montana Constitution and the right to know contained in Article II, section 9, of the Montana Constitution. Zoning is a constitutional exercise of the police power if it has a substantial bearing upon the public health, safety, morals, or general welfare of the community for substantive due process purposes. As applied to a particular property or proposed use of that property, a zoning provision must have a rational relationship to a legitimate governmental interest, must use means designed to achieve that interest, and must not be arbitrary or unreasonable. Substantive due process is an elastic concept that is adaptable to changes in society.

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