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## **Statutory Notice in Zoning Actions: Nesbit v. City of Albuquerque**

Norman Todd

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# STATUTORY NOTICE IN ZONING ACTIONS: NESBIT v. CITY OF ALBUQUERQUE

## A STATEMENT OF THE CASE

In *Nesbit v. City of Albuquerque*,<sup>1</sup> the New Mexico Supreme Court addressed the issue of public participation in the zoning process. The case involved clarification of statutory notice requirements when a change is attempted in an approved development plan for property use.

Nesbit, a land developer, applied in 1966 for a change of zoning designation on a piece of land in Albuquerque.<sup>2</sup> The requested change, from R-2 Residential to SU-1 Special Use, would have allowed a broader use of the land.<sup>3</sup> The City Planning Commission approved the requested change in zoning designation and an attached development plan for the construction of eighty-three condominium units on the site.<sup>4</sup>

In 1972, Nesbit requested city approval of a different development plan. The new plan would have permitted construction of 287 efficiency units and apartment units on the land. The City Planning Department held a hearing but gave no public notice of the meeting.<sup>5</sup> The requested change was denied.<sup>6</sup> Nesbit appealed the denial to the Albuquerque City Commission<sup>7</sup> and a hearing date was set for October of 1972. On September 8, 1972, twenty-four days before the hearing date, the following notice of the appeal was published:

Appeal No. 72-43

(7-1592)—Rodey, Dickason, Sloan, Akin & Robb, agent for Byron

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1. 91 N.M. 455, 575 P.2d 1340 (1977).

2. Record, at 125, *Nesbit v. City of Albuquerque*, 91 N.M. 455, 575 P.2d 1340 (1977) (district court finding of fact no. 4).

3. Albuquerque, N.M., Comprehensive City Zoning Code §12.A (1976) provides that an R-2 zone is suitable for houses, town houses and low density apartments. Section 30.A of the Albuquerque Comprehensive City Zoning Code allows uses which are special due to infrequent occurrence, effects on surrounding property, safety, hazard, or other reasons. Among the special uses listed in Section 30.A are airports, campgrounds, churches, mobile home parks, and mental and correctional institutions.

4. *Nesbit v. City of Albuquerque*, 91 N.M. 455, 457, 575 P.2d 1340, 1342 (1977).

5. *Id.* at 458, 575 P.2d at 1343.

6. *Id.*

7. The governing body of the City of Albuquerque is now the City Council; the form was changed to a mayor/council system in 1973, after this case was begun.

E. Nesbit and Alva J. Coats, appeals the City Planning Commission's denial of their request for approval of a revised development plan for land on Indian Plaza Drive N.E.<sup>8</sup>

No other notice was given, except that a City Commissioner called a neighboring landowner and informed him of the meeting the day before it was held.<sup>9</sup> The hearing was held on October 2, 1972, at which time the City Commission denied the requested zone change.<sup>10</sup> The neighboring landowners were represented at the meeting.<sup>11</sup>

Nesbit appealed the Commission's decision by writ of *certiorari* to the district court.<sup>12</sup> The City of Albuquerque was served with a petition in the appeal, but the adjacent landowners were not notified.<sup>13</sup> In 1973, the district court, on a petition apparently unopposed by the City of Albuquerque, reversed the City Commission's decision as arbitrary and capricious.<sup>14</sup> Nesbit's requested zoning change was remanded to the City Commission which subsequently approved the 287-unit development plan.<sup>15</sup>

No further action was taken on the project from 1973 to 1976, during which time financing for the project was obtained. Then, in 1976, Nesbit began construction on the 287-unit apartment complex. At that time, neighboring landowners moved to intervene and moved to set aside the 1973 district court judgment which had allowed approval of the new development plan. The district court granted both motions, holding that the city zoning decisions of 1972 were void due to ineffective notice.<sup>16</sup> Nesbit appealed that decision in 1977, at which time the New Mexico Supreme Court affirmed the 1976 district court decision and remanded the matter to the City of Albuquerque for reconsideration of the requested change in plans.<sup>17</sup>

#### ANALYSIS OF THE HOLDING IN *NESBIT v. CITY OF ALBUQUERQUE*

The supreme court was presented with three issues in Nesbit's appeal. The first question was whether, in light of the three-and-a-

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8. 91 N.M. at 458, 575 P.2d at 1343.

9. Record, at 116 (district court finding of fact no. 29).

10. 91 N.M. at 458, 575 P.2d at 1343.

11. *Id.*

12. Appellant's Brief-in-Chief at 1; 91 N.M. at 458, 575 P.2d at 1343.

13. 91 N.M. at 458, 575 P.2d at 1343.

14. 91 N.M. at 457, 575 P.2d at 1342. The supreme court stated that the 1973 district court reversed the decision as "arbitrary and capricious," but the 1976 district court stated in its finding of fact that the city attorney signed a judgment approving the reversal. Record, at 118 (district court finding of fact no. 39).

15. 91 N.M. at 458, 575 P.2d at 1343.

16. Record, at 135 (district court conclusion of law no. 7); 91 N.M. at 457, 575 P.2d at 1342.

17. 91 N.M. at 460, 575 P.2d at 1345.

half year lapse since the time of final judgment in 1973, the neighbors' motion to intervene in the case was properly granted. The supreme court held that the motion to intervene was properly granted under the requirements of Rule 24 of the New Mexico Rules of Civil Procedure.<sup>18</sup> The supreme court noted that intervention was proper since the validity of the final judgment was directly at issue. In order to present their claim and to be able to challenge the validity of the 1973 judgment, the neighbors were required to become parties to the original action.<sup>19</sup> Intervention was the method by which they could become parties to that action. The motion was deemed timely under Rule 24 of the Rules of Civil Procedure, since the neighbors had no notice of the 1973 judgment until actual construction was begun in 1976.<sup>20</sup>

The second issue concerned the validity of the district court's final judgment in 1973. Nesbit had obtained approval of a development plan and zoning change in 1966 which would have allowed construction of eighty-three condominium units on the land. The land's zoning designation was changed to an SU-1 status at that time to allow construction of those condominium units.

The Albuquerque Municipal Zoning Ordinance provides that an order changing land to an SU-1 status must designate the specific use to be permitted, and a building permit is to be issued only for that specified use.<sup>21</sup> The supreme court interpreted the ordinance to mean that approval of a development plan is a zoning restriction because, once adopted, the land usage is restricted to the specified use.<sup>22</sup> The court stated, "This clearly indicates that the approval of the development plan is a zoning restriction because once it is adopted the land can be used for no other purpose, i.e., it is restricted to that plan only."<sup>23</sup> A fundamental change in an approved development plan is thus a change in a zoning restriction for which a public hearing with statutory notice is required by §3-21-6(B) of the state zoning statute.<sup>24</sup>

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18. *Id.*; N.M.R. Civ. P. 24 (1978). The rule states: "(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in any action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties."

19. 91 N.M. at 459, 575 P.2d at 1344.

20. *Id.* at 460, 575 P.2d at 1345.

21. Albuquerque, N.M., Comprehensive City Zoning Code §30.A.2 (1976).

22. 91 N.M. at 458, 575 P.2d at 1343.

23. *Id.*

24. N.M. Stat. Ann. §3-21-6(B) (1978).

The supreme court held that Nesbit's requested change in plans from one permitting construction of 83 units to one permitting construction of 287 units was a fundamental change in the original restriction.<sup>25</sup> Thus, the proposed change required that notice be given and a public hearing be held.<sup>26</sup> Since no notice of the planning department hearings had been given, the supreme court held that the statutory notice requirements had not been met and the planning department's decision was therefore legally ineffective.<sup>27</sup> The notice published prior to the City Commission meeting was held to have been "inadequate to put a reasonable person on notice of the fundamental and substantial change in the use of the property."<sup>28</sup>

In deciding the final issue on appeal, the supreme court held that the motion to vacate the 1973 district court judgment was properly granted by the district court in 1976. Rule 60(b)(4) of the New Mexico Rules of Civil Procedure requires that a void judgment be set aside.<sup>29</sup> Once the court determined that the judgment was legally ineffective due to lack of notice, Rule 60(b)(4) mandated that the judgment be set aside.<sup>30</sup>

#### NOTICE IN ZONING REQUESTS AFTER *NESBIT*

In *Nesbit*, the supreme court clarified New Mexico zoning law requirements by stating when notice must be given, the kind of notice that is required, and who is entitled to notice in zoning actions under the state statute.<sup>31</sup> The supreme court adopted a broad view of when a public hearing with notice is required under the state statute by holding that approved development plans are a "zoning restriction."<sup>32</sup> Approved development plans such as those in *Nesbit* are therefore subject to the notice provisions of the state zoning statute, N.M. Stat. Ann. § 3-21-6(B). Any material change in a development plan (such as a substantial change in the number of units in a proposed housing project) requires published notice and a public hearing before it can become effective.<sup>33</sup> The court noted that

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25. 91 N.M. at 458, 575 P.2d at 1343.

26. *Id.*

27. *Id.* at 459, 575 P.2d at 1344.

28. *Id.*

29. 91 N.M. at 459, 575 P.2d at 1344. *See also* N.M.R. Civ. P. 60(B)(4) (1978); *Raton v. Cooke*, 74 N.M. 301, 393 P.2d 329 (1964); *State v. Romero*, 76 N.M. 449, 415 P.2d 837 (1966).

30. 91 N.M. at 459, 575 P.2d at 1344.

31. *Id.* at 458-59, 575 P.2d at 1343-44.

32. *Id.* at 458, 575 P.2d at 1343.

33. *See* text accompanying note 23 *supra*.

minor changes do not require adherence to the full statutory procedure of notice and hearing, but "when the deviation is of such importance or materiality as to amount to a change in the fundamental character of the property," then compliance with the full statutory process is required.<sup>34</sup> Notice and hearing procedures of the state zoning statute should be followed whenever an altered development plan is to be considered after an initial development plan has been approved. These procedures will satisfy the due process safeguards of the New Mexico Constitution<sup>35</sup> and will ensure that substantial changes in land use are subject to full public scrutiny.

As a result of the holding in *Nesbit*, the class of persons which is entitled to receive notice of a public hearing for zoning changes has been expanded. The New Mexico zoning statute requires that a public hearing receive comment from "parties in interest and citizens . . ."<sup>36</sup> The term "parties in interest" has not been expressly defined by New Mexico courts in a zoning action. But by allowing the neighboring landowners to intervene in this case, it is reasonable to infer that the court included within the protected class those surrounding landowners whose rights to use and enjoyment of their property might be infringed upon by the zoning request. Such a definition of "parties in interest" would be consistent with the requirement expressed in other New Mexico due process cases that violation of due process be asserted only by those parties who can show an impairment of their rights thereby.<sup>37</sup> Although a number of courts in other states, in defining the general term "parties in interest," have held that surrounding landowners are not necessarily within such a protected class,<sup>38</sup> the New Mexico Supreme Court seems to have adopted a broader construction of the term in *Nesbit*.

The supreme court also gave detailed instructions regarding the kind of notice required by the zoning statute, by holding that the "average citizen" must be informed of the nature of the relief sought and of the specific property involved in the zoning request.<sup>39</sup> One way of informing the average citizen is by publishing notice in a

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34. *Id.*

35. The Constitution of the State of New Mexico, provides that "[n]o person shall be deprived of life, liberty or property without due process of law . . ." N.M. Const. art. 2, § 18.

36. N.M. Stat. Ann. § 3-21-6(B) (1978).

37. *Straus v. Foxworth*, 231 U.S. 162 (1913), *aff'g*, 16 N.M. 442, 117 P. 831 (1911); *State v. Hines*, 78 N.M. 471, 432 P.2d 827 (1967).

38. *See, e.g.*, *Bell v. Studdard*, 220 Ga. 756, 141 S.E.2d 536 (1965); *American Oil Corp. v. City of Chicago*, 29 Ill. App. 3d 988, 331 N.E.2d 67 (1975); *Barrie v. Kitsap County*, 84 Wash. 2d 579, 527 P.2d 1377 (1974).

39. 91 N.M. at 459, 575 P.2d at 1344.

newspaper.<sup>40</sup> New Mexico's zoning statute requires that notice of the time and place of the public hearing be published within the jurisdiction at least fifteen days prior to the hearing date.<sup>41</sup> The supreme court followed the generally accepted rule that such publication requirements are mandatory and jurisdictional,<sup>42</sup> and that failure to comply with them renders void any subsequent action by the zoning authority.<sup>43</sup> The supreme court also adopted the view generally held in New Mexico that publication of notice pursuant to statutory requirements is intended to "bring the contents of the notice home to the public generally."<sup>44</sup>

After considering the kind of notice actually given in the *Nesbit* case,<sup>45</sup> the court held the published notice to be ineffective due to its vagueness in describing the property involved and the nature of the change requested.<sup>46</sup> The court held that notice of a proposed zoning change must describe the fundamental change in property use which is sought in the request. The change should be explained in terms the average citizen can understand.<sup>47</sup> The notice must describe the property included in the request by referring to actual streets or landmarks which allow easy identification of the land. Mere reference to "a line drawn on a map somewhere" is not sufficient.<sup>48</sup>

## CONCLUSION

The notice requirements described by the New Mexico Supreme

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40. Notice by publication is the method specifically mentioned in the zoning statute, although other methods such as posting or personal service may also serve to give adequate notice. A general practice is to have the city or county planning department assume responsibility for having notice published within the jurisdiction. Employees of the Albuquerque City Planning Department state that they routinely handle the publication requirements in all zoning change cases when the completed application and fee are received by the office.

41. N.M. Stat. Ann. § 3-21-6(B) (1978).

42. 91 N.M. at 459, 575 P.2d at 1342; *see also* *Gendron v. Naugatuck*, 21 Conn. Supp. 78, 144 A.2d 818 (1958); *Bal Harbor Village v. State*, 299 So. 2d 611 (Fla. Dist. Ct. App. 1974), *cert. denied*, 311 So. 2d 670 (Fla. 1975).

43. *Nesbit v. City of Albuquerque*, 91 N.M. 455, 457, 575 P.2d 1340, 1342 (1977); *Accord*, *Hart v. Bayless Investment & Trading Co.*, 86 Ariz. 379, 346 P.2d 1101 (1959); *Nelson v. Town of Belmont*, 274 Mass. 35, 174 N.E. 320 (1931); *Saggolf Corp. v. Lawrence*, 82 Misc. 2d 100, 367 N.Y.S.2d 683 (1975); *Edelbeck v. Town of Theresa*, 57 Wis. 2d 172, 203 N.W.2d 694 (1973); *see also* 1 Rathkopf, *The Law of Zoning and Planning* § 10.07 (1979).

44. *State v. Vigil*, 74 N.M. 766, 398 P.2d 987 (1965); *see also* *Washington County Taxpayers Assoc. v. Board of County Comm'rs*, 269 Md. 454, 306 A.2d 539 (1973); 1 Anderson, *American Law of Zoning* § 4 (2d ed. 1976).

45. *See* text accompanying note 8 *supra*.

46. 91 N.M. at 459, 575 P.2d at 1344.

47. "If the notice is insufficient, ambiguous, misleading or unintelligible to the average citizen, it is inadequate to fulfill the statutory purpose of informing persons of the hearing so that they may attend and state their views." *Id.*

48. *Id.*

Court in *Nesbit* are not "mere legal technicalities," but are designed as meaningful safeguards of public policy. By requiring statutory notice for major changes in an approved development plan, the New Mexico Supreme Court has ensured greater public participation in the zoning process. The holding requires that major alterations in existing restrictions be scrutinized carefully in accordance with the full statutory process. Specific parties in interest and the general public must be given the opportunity to participate in that process through adequate notice.

Public zoning hearings serve the dual interests of due process protection of property rights and citizen involvement in the process of determining community environment. As the demands of continuing growth press against established land uses in New Mexico such public participation will undoubtedly become more important. In *Nesbit v. City of Albuquerque*, the New Mexico Supreme Court clarified the manner by which the public may enunciate its concerns over the changing patterns of community land use.

NORMAN TODD