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John A. Myers

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JOHN A. MYERS*

This section of the Survey reviews the cases decided by the New Mexico appellate courts from the spring of 1982 through the summer of 1983 in the area of zoning law. The higher volume of cases decided by the New Mexico appellate courts reflects the national trend in land use litigation.[1] It can be anticipated that this trend will continue as New Mexico continues to develop and experiences increasing urban populations and increasing land values.

The New Mexico courts decided seven cases dealing with zoning issues. Three of the cases dealt with procedural issues.[2] The remainder of the cases involved disputes surrounding changes in zoning restrictions.

In *The City of Albuquerque v. Paradise Hills Special Zoning District Commission*,[3] the City of Albuquerque and Bernalillo County challenged a zoning decision of a special zoning district.[4] The zoning decision concerned property located within both the county and the area subject to the extra-territorial planning jurisdiction of the city, but outside of the city's municipal boundaries.[5] The city and the county challenged the zoning decisions as invalid because they did not conform with a master plan developed by the city and the county pursuant to their planning authorities.[6] The supreme court reaffirmed a corner stone of zoning law

*Shareholder, Johnson and Lanphere, P.C., Albuquerque, New Mexico.

1. 1 N. Williams, American Land Planning Law, 81, 82 (1975) notes that zoning cases constitute one of the largest fields of law, in terms of the number of cases, in some of the more populous states. Williams stated that the annual number of reported opinions has been increasing sharply.

2. Mitchell v. City of Santa Fe, 99 N.M. 505, 660 P.2d 595 (1983) (holding that a timely filed petition challenging the legality of a zoning decision is a sufficient challenge pursuant to N.M. Stat. Ann. § 3-21-9 (1978), notwithstanding that the petition did not seek a writ of certiorari); McCabe v. Hawk, 97 N.M. 622, 642 P.2d 608 (1982) (the right to challenge a zoning decision may be lost under the doctrine of laches even where the claim is that the zoning action is void); and State *ex rel.* Huning v. Los Chaves Zoning Comm'n., 97 N.M. 472, 641 P.2d 503 (1982) (in *quo warranto* proceedings challenging the creation of a special zoning district the burden is upon the district to justify usurpation of the right to zone).

3. 99 N.M. 630, 661 P.2d 1329 (1983).

4. *Id.* New Mexico laws establish a procedure for the creation of special zoning districts under certain conditions within areas outside the boundaries of municipalities. *See* N.M. Stat. Ann. § 3-21-15 to -26 (Repl. Pamp. 1983).

5. N.M. Stat. Ann. § 3-19-5 (1978) gives municipalities jurisdiction over planning and platting beyond their municipal boundaries.

6. A question exists whether the counties have planning jurisdiction within municipalities' extra-territorial jurisdiction area. N.M. Stat. Ann. § 4-57-3 (Repl. Pamp. 1980) provides:

> Each county shall have exclusive planning jurisdiction within its county boundary

that zoning regulations are required to be in accordance with a comprehensive plan.[7] In this case, however, the court found that the zoning decisions were not inconsistent with the city-county plan. The court relied heavily on the fact that at the time of adoption of the city-county plan, the land was zoned for uses similar to those permitted by the decisions of the special zoning district.[8]

The court also provided a definition of "spot zoning," an evil akin to a zoning decision not conforming to a comprehensive plan. The court defined "spot zoning" as:

> [A]n attempt to wrench a single lot from its environment and give it a new rating that disturbs the tenor of the neighborhood, and which affects only the use of a particular piece of property or a small group of adjoining properties and is not related to a general plan for the community as a whole, but is primarily for the private interest of the owner of the property so zoned.[9]

Although not finding "spot zoning" in this case, the court seems to have adopted a rule in New Mexico that "spot zoning" would be an illegal zoning decision.

Two decisions involved the right of a zoning authority to change the zoning restrictions on a piece of property to a more restrictive zoning category. This type of rezoning is characterized as a "down zoning." In *Davis v. City of Albuquerque,*[10] the supreme court reaffirmed its landmark decision in *Miller v. City of Albuquerque,*[11] establishing the "mistake or change" rule:

> [A]nyone seeking to rezone . . . property to a more restrictive zoning must show that either there was a mistake in the original zoning or

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except as to any area exclusively within the planning and platting jurisdiction of a municipality and except as to those areas where a county and a municipality may have concurrent jurisdiction. . . .

N.M. Stat. Ann. § 3-19-5 (1978) gives municipalities planning and platting jurisdiction within its municipal boundaries and from three to five miles beyond its boundaries, depending upon the population of the municipality. It appears that the municipality's jurisdiction is no more exclusive within the extraterritorial area than it is within its municipal boundaries.

7. 99 N.M. at 631, 661 P.2d at 1330. New Mexico law provides: "The regulations and restrictions of the . . . zoning authority are to be in accordance with a comprehensive plan. . . ." N.M. Stat. Ann. § 3-21-5 (1978). What constitutes a "comprehensive plan" has not been well defined by the courts. Generally, however, such a plan is a broad scheme or formula which relates the specifics of a zoning ordinance to the general public benefit which is sought by the zoning ordinance. *See* Rohan, Zoning and Land Use Controls, Ch. 37 (1978). The supreme court has held that the comprehensive plan may be found within the zoning ordinance itself. The court noted, however, that the failure to formally adopt a comprehensive plan weakens the presumption of regularity of any other zoning ordinance. Board of County Comm'rs v. City of Las Vegas, 95 N.M. 387, 390-91, 622 P.2d 695, 698-99 (1980).

8. 99 N.M. at 632, 661 P.2d at 1331.

9. *Id.*, quoting 101A C.J.S. *Zoning* § 44 (1979).

10. 98 N.M. 319, 648 P.2d 777 (1982).

11. 89 N.M. 503, 554 P.2d 665 (1976).

> that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made.[12]

The court clarified two issues relating to the rule. First, the rule applies whether the attempted "down zoning" is a piecemeal rezoning of a single tract or is part of a "comprehensive rezoning of an extensive geographic area."[13] Second, the court clarified that the type of mistake contemplated by the rule is not one of judgment. Instead, the mistake must be one where "the original zoning was mistakenly listed as a different zone than that intended due to clerical error, oversight, or misapprehension of the facts."[14]

Davis leaves zoning authorities with a relatively narrow test which must be met to support a "down zoning."[15] This narrow test should provide some comfort to property owners, because a "down zoning" may be initiated by a zoning authority and may result in a substantial noncompensable loss of value of the property.[16]

In *Aragon & McCoy v. Albuquerque National Bank,*[17] the property owners sought damages from the zoning authority as the result of a "down zoning" upon the grounds that the "down zoning" was an inverse condemnation, or alternatively, that the zoning authority was estopped from changing the zoning.[18] On the inverse condemnation claim, the court unequivocally held that property owners have no vested rights in a particular zoning classification.[19] This rule applies notwithstanding the issuance of a building permit by the zoning authority for the construction of a portion of the project pursuant to the previous zoning. The court reaffirmed its holding in *Miller* that for a "down zoning" to be an un-

12. *Id.* at 506, 554 P.2d at 668. The City of Albuquerque Comprehensive Zoning Ordinance provides a third permissible justification for a change in zoning where:

> [A] different use category is more advantageous to the community, as articulated in the master plan, even though [the 'change or mistake rule' does] not apply.
> City of Albuquerque Resolution 217-1975, as amended by Resolution 182-1978.

In *Davis*, the court was unwilling to accept this as a legally sufficient justification for a "down zoning" in New Mexico. 98 N.M. at 321, 648 P.2d at 779.

13. *Davis*, 98 N.M. at 320–321, 648 P.2d at 779.

14. *Id.* at 321, 648 P.2d at 779.

15. The court noted that "a more reasonable down zone or a more reasonable comprehensive plan might be sufficient to remove the case from the *Miller* requirements of mistake or change. . . ." *Id.* at 321, 648 P.2d at 779.

16. *See* Aragon & McCoy v. Albuquerque Nat'l Bank, 99 N.M. 420, 659 P.2d 306 (1983).

17. *Id.* The same property was the subject of an earlier supreme court decision in Nesbitt v. City of Albuquerque, 91 N.M. 455, 575 P.2d 1340 (1977).

18. 99 N.M. 420, 659 P.2d 306. The court noted that the zone change was based upon a concern over the dense concentration of dwelling units, a valid exercise of the municipality's police power. Interestingly, the court did not evaluate whether such a basis met the test of the "change or mistake rule."

19. *Id.* at 423, 659 P.2d at 309.

constitutional taking of property without compensation, the regulation must deprive "the owner of *all beneficial use* of his property. . . ."[20]

Although the court found that the municipality in *Aragon* was not estopped from changing the zoning on the property, the court discussed the elements necessary to establish "zoning estoppel." These elements include specific assurances, representations, or inducements by city officials on which the property owner could reasonably rely and conclude that he had permission to build pursuant to the existing zoning, together with a change of circumstance in reliance upon the assurances.[21] Presumably, the court would recognize zoning by estoppel under these circumstances.

Numerous constitutional issues were addressed in a challenge to the City of Albuquerque's sign ordinance in *Temple Baptist Church v. City of Albuquerque*.[22] These issues are discussed more fully in this year's Survey of constitutional law.[23] Of most significance from a zoning law perspective, the court laid out the following test:

> [A] regulation which imposes a reasonable restriction on the use of private property will not constitute a "taking" of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property.[24]

The court found that aesthetic considerations alone constitute a proper exercise of the police power.[25] The remaining question was whether provisions of the ordinance requiring pre-existing non-conforming signs to be removed within five years met the second portion of the test. The court held that if an "amortization period" is reasonable, it is a constitutional means for municipalities to terminate non-conforming uses, and it is a constitutional alternative to just compensation.[26]

Harris Books, Inc. v. City of Santa Fe[27] was a challenge to an "adult bookstore" zoning regulation.[28] In *Harris Books,* the supreme court held

20. *Id.* at 424, 659 P.2d at 310, citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (emphasis in original).

21. 99 N.M. at 423, 659 P.2d at 309.

22. 98 N.M. 138, 646 P.2d 565 (1982). The Albuquerque sign ordinance regulates the number, size, and height of commercial and non-commercial signs. *See* City of Albuquerque Comprehensive Zoning Ordinance.

23. Schowers, Constitutional Law, *supra* at 77.

24. 98 N.M. at 144–45, 646 P.2d at 571–72.

25. *Id.* at 144, 646 P.2d at 571. For a discussion of the exercise of zoning power for aesthetic purposes, see Rohan, Zoning and Land Use Controls, Ch. 16 (1978).

26. *See* 98 N.M. at 145, 646 P.2d at 572. Justices Federici and Riordan dissented in part, being of the opinion that the non-conforming provision constituted a "taking" requiring compensation and that the amortization period does not avoid the government's obligation to pay compensation. *Id.* at 147, 646 P.2d at 574.

27. 98 N.M. 235, 647 P.2d 868 (1982).

28. Santa Fe, N.M., Zoning Code ch. 3, art. I (1981).

that a provision of the ordinance prohibiting adult bookstores from locating within 1,000 feet of a residential area was unconstitutionally vague. Had the draftsmen of the ordinance been more artful, the court apparently would have upheld the use of the zoning power of municipalities to regulate "adult entertainment" otherwise protected by the first amendment.[29]

CONCLUSION

Several of these cases address the question of when non-compensable regulation of property through exercise of the police power becomes a "taking" entitling the property owner to compensation. The courts have attempted to establish guidelines for this determination. Reasonable expectations of property owners with respect to permissable use and value of their properties, however, continue to be upset. Ultimately, the Legislature may be called upon to provide a more definite answer to this question.

29. The United States Supreme Court upheld the regulation of "adult" entertainment through zoning ordinances in Young v. American Mini-Theaters, 427 U.S. 50 (1976).