



OREGON REAL ESTATE AND LAND USE DIGEST

Published by the Section on
Real Estate and Land Use,
Oregon State Bar

Vol. 27, No. 1 • February 2005

Highlights

- 1 **Articles on Measure 37**
- 3 **Lessees and Licensees Beware: Private Operators Must Make Public Facilities Accessible to the Disabled**
- 5 **Court of Appeals Clarifies Process for Satisfying *Utsey* Standing Requirements**
- 6 **Local Code Interpretation Independent of Permit is not a Justiciable Controversy**
- 9 **Alterations in Nonconforming Uses Allowed Under ORS 215.130(5) Only When Required by Law**
- 10 **Court of Appeals Clarifies Key Condemnation Appraisal Exchange Requirement**
- 13 **In Michigan Condemnation Case, Property Owners Win the "Public Purpose" Battle, But Suffer Some Collateral Damage**

Articles on Measure 37

Editor's Note: On November 2, 2004, Oregon voters passed Ballot Measure 37, which added property rights compensation provisions to ORS Chapter 197. Dorothy Cofield, writing in support of Measure 37, and Ed Sullivan, writing in opposition to the measure, share their views of this historic statutory addition in the articles below.

■ MEASURE 37: RIGHTING WRONGS

In a vote that should surprise no one, Oregon voters approved Measure 37 on November 2, 2004. The measure was approved in 35 of 36 counties, and received more "yes" votes than any initiative in Oregon history, despite a confusing ballot title that likely cost the proponents votes. Measure 37 responds to Oregon's planning system, which is widely considered to be the most restrictive in the United States.

Measure 37 gives the "owner" of property, defined as "the present owner of the property, or any interest therein" the right to seek compensation for devaluation of property resulting from a "land use regulation" or series thereof that have the effect of reducing the current fair market value of the property, and which were enacted after the property was purchased by the current owner of the property or a "family member." Compensation under the measure is equivalent to the reduction in fair market value attributable to the additional restrictions placed on the property subsequent to its purchase by the current owner or a family member.

In lieu of the payment of compensation, the measure authorizes the governing body responsible for adopting the regulation to "modify, remove, or not apply" the challenged regulation(s) in order to restore to the current property owner the right to use the property in the way that it could have been used at the time it was purchased or inherited. Note that there is a distinction under the measure between compensation, which is based on regulations in place at the time the property was originally purchased by a "family member" as defined in the act, and use of the property, which is limited to uses that could have been made as of the date the property was purchased or inherited by the current owner.

As expected, the passage of Measure 37 has led to strong (and sometimes irrational) responses from its most ardent critics. To date, however, the response has not taken the form of a facial challenge to the measure. Instead, opposition to the measure lives on in the form of local "implementing" ordinances that impose punitive requirements on property owners wishing to make claims under the measure, and discussion around the many "unknowns" resulting from the measure.

Setting aside the wisdom of these ordinances from the standpoint of public policy, it is apparent that Measure 37 does not require a property owner to comply with local ordinances designed to process claims. In fact, although few claims have been filed to date, the majority of claimants have refused to comply with the requirements of the local ordinances, including payment of filing fees, and have indicated that their claims were filed under the measure, not the local ordinance.

The "unknowns" of the measure are not nearly as significant as claimed by some. Local governments are free under the measure to waive or "remove" local regulations limiting property uses. A local government's decision to waive a restriction and allow land divisions or development does not result in the creation of a nonconforming use, either before or after a transfer of the property, absent a subsequent decision to reapply the challenged regulation, which triggers a second claim under the measure. Decisions by local governments to waive regulations or compensate are subject to the sound discretion of the governing body, in the same way that local government discretion is exercised daily.

Whether the legislature chooses to act in response to Measure 37 may depend in large part on the willingness of the opponents of the measure to cast down their swords and recognize the significance of the vote. It may be that the level of regulation seen in Oregon and complete compensation cannot coexist, such that

one or the other (or both) must give. But Measure 37 also presents an opportunity for all involved to craft a system that provides for both sensible planning and fair treatment to property owners. All participants in the debate, including Measure 37's staunchest opponents, agree that the current system has created inequities that should be changed. Are they willing to put their efforts into making those changes?

One thing is certain. The proponents of Measure 37 have shown both the willingness and the financial capability to make changes via the initiative process, if need be. A strategy of obstruction and litigation, while appealing in the short term, would likely have disastrous consequences for Measure 37 opponents. Oregon voters are smarter than that.

Dorothy S. Cofield

■ *THE WORLD TURNED UPSIDE DOWN: PAYMENT FOR REGULATION UNDER OREGON'S MEASURE 37*

On November 2, 2004, Oregon voters approved Measure 37 by a 60-40 margin, making Oregon the first state in the country in which state, regional, and general purpose local governments are obligated to pay for the lowering of property values resulting from the adoption of certain land use regulations. The measure follows on the heels of Measure 7, a proposed constitutional amendment that passed by 54% in 2000, but was overturned by the Oregon Supreme Court for violating the state's single amendment rule.

Under Measure 37, landowners may make a claim for the difference in value of land associated with certain land use regulations. The difference in value is calculated by focusing on the effect of a land use regulation imposed since the time of acquisition by the owner or a "family member" (which may include a corporation). If the fair market value of the property today without the land use regulation is higher than the value with the regulation, the owner has a claim under the measure.

Claims must be filed within two years of the date a new land use regulation is made, applied, or enforced. The applicable government has six months to determine whether to pay the claim or to waive or modify the regulation. If no action is taken or the claim is denied, the landowner may seek payment in court. If payment is granted by the court, the landowner is entitled to costs and attorneys fees. If the government prevails, however, it is not so entitled.

There are exemptions, but they are broadly stated and the measure is construed so as to maximize payment. Exceptions include "public nuisances," regulations to protect health and safety, restrictions made to comply with federal laws, restrictions on the use of property to sell pornography or perform nude dancing, and regulations in existence when the owner or family member first acquired the property.

The measure is a statute, and has no obvious constitutional or procedural flaws under which a facial challenge may be taken. It became effective on December 2, 2004, although the legislature can change its terms or stay its effective date, which it is likely to be asked to do. Because governments generally do not have funds for payment of claims, it is likely that waiver or modification will be the preferred course. The legislature may be asked to create a funding source to pay compensation. However, the state's deficit is large, the revenue outlook remains bleak, and public school financing is the state's top priority.

Among the many unknowns are whether local governments may waive or modify state statutes, goals, or rules and whether government may establish binding claim procedures or charge fees to process claims. Also unknown at this point is whether waiver or modification results in resumption of those regulations in effect when the owner acquired the property when the same is sold or otherwise transferred. Further, the criteria for the granting or denial of claims and the waiver or modification of regulations is not set forth in the legislation, although the measure says that such actions are not land use decisions and are therefore not reviewable under state planning laws.

The interplay of state versus local regulations and allocation of responsibility, or liability, to respond to a claim is also unclear. Many local codes and standards are adopted as a direct requirement of an administrative rule at the state level. Some local governments are also considering whether to provide for public notice and/or public hearing processes, as is now done for land use matters, before granting waivers or modifications or paying claims.

Payment, waiver, and modification aside, the fair market value basis for payment is likely to be the most unfamiliar terrain for government, because it rests on a comparison of the value of the property with and without the regulations. While the measure creates no claims for neighboring properties affected by a waiver or modification, the value of the property without the regulation must also take into consideration waivers or modifications that may be granted to others on the date that the claim accrues (*i.e.*, is filed). The measure does not define whether a claimant may select from among a package or an array of regulations that were in effect at the time or simply select the one regulation that allegedly lowers the value of the property.

Finally, Measure 37 may threaten the stability of the real property system itself, given the vagueness of the statute, the time and uncertainties of litigation, and the demands of the real estate and financing community for certainty. In the end, the proponents of Measure 37 may face the dilemma of answered prayers. Stay tuned.

Edward J. Sullivan

Appellate Cases—Real Estate

■ LESSEES AND LICENSEES BEWARE: PRIVATE OPERATORS MUST MAKE PUBLIC FACILITIES ACCESSIBLE TO THE DISABLED

In *Disabled Rights Action Committee v. Las Vegas Events*, 375 F.3d 861 (9th Cir. 2004), the Ninth Circuit held that (1) Title III of the Americans with Disabilities Act applies to private entities providing public accommodations at publicly owned facilities, and (2) the public owner is not an indispensable party.

Defendants Las Vegas Events, Inc. and the Professional Rodeo Cowboys Association were private licensees of the University of Nevada, Las Vegas, which owned the Thomas & Mack Center, where the National Finals Rodeo has been held each year. Plaintiff Disabled Rights Action Committee (Disabled Rights) sued the private entities for violation of Title III of the ADA for failure to make a place of public accommodation accessible. The complaint alleged that disabled members were subjected to discriminatory access, substandard seating, and higher ticket prices. Disabled Rights did not join the university as a party.

The district court required Disabled Rights to join the university as an indispensable party under FRCP 19(a). However, once Disabled Rights added the university, the district court dismissed the case against all three defendants. The case was dismissed against the private licensees because they were not “public accommodations,” and against the university because it is subject to Title II of the ADA, but not Title III, and no Title II claim had been alleged.

Disabled Rights appealed, and the Ninth Circuit reversed the dismissals of the action against the licensees, ruling that (1) public accommodations include *all* places open to the public; (2) Title III applies to private *operators* of publicly owned facilities to which Title II applies, even if an operator’s use is only for a short time; and (3) the operator’s Title III responsibilities may not be avoided directly or indirectly through contractual, licensing, or other arrangements. The private entity’s operation of the facility, regardless of ownership, is what renders the private entity responsible for making the public place accessible for disabled individuals. For a private entity to be considered the operator, it must exercise substantial or sufficient control over the use of the facility during the event, which the court found to be the case here.

The Ninth Circuit also reversed the order requiring joinder of the university. The court found that the private operator’s obligations under Title III were not identical to the public owner’s obligations under Title II. The court held that (1) complete relief could be provided to Disabled Rights against the private operators under Title III without the presence of the public owner; (2) separate and independent relief would remain available to Disabled Rights against the public owner under Title II; and (3) any judgment against the private operators would not necessarily set aside or cancel their license agreement with the public owner, nor would it

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 5200 SW Meadows Road, Lake Oswego, OR 97035-0889.

Subscription Price: free to Real Estate and Land Use Section Members, \$24.50 per year for others. To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

Editor

Kathryn S. Beaumont

Associate Editors

Alan K. Brickley
Edward J. Sullivan

Assistant Editor

Nathan Baker

Contributors

H. Andrew Clark	Gary K. Kahn
Lisa Knight Davies	Joan Kelsey
David Doughman	Isa Lester
Larry Epstein	Jeff Litwak
Mark J. Fucile	Peter Livingston
Glenn Fullilove	Steve Morasch
Christopher A. Gilmore	Tod Northman
Susan C. Glen	David J. Petersen
Rene Gonzalez	John Pinkstaff
Raymond W. Greycloud	Carrie Richter
Peggy Hennessy	Susan N. Safford
Keith Hirokawa	Steven R. Schell
Jack D. Hoffman	Christopher Schwindt
Emily N. Jerome	Ruth Spetter
Mary W. Johnson	Andrew Svitek
Michael E. Judd	Ty K. Wyman
William Kabeiseman	A. Richard Vial

The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

restrain the public owner or compel it to act. Nevertheless, the court opined emphatically that ADA plaintiffs should sue *both* the landlord under Title II *and* the operator under Title III to afford the court the greatest flexibility in fashioning appropriate relief.

Under this case, whenever a private client of yours leases or uses a facility owned by a public entity, your client assumes Title III responsibilities by operation of law to make the facility accessible to the disabled during the period of use, even if it is used only for a short period. This means that your client must be advised about Title III obligations, and must budget and arrange for necessary accommodations, such as dedicating floorspace for disabled seating, erecting temporary ramps or lifts, or relocating the use to an accessible venue.

Mary W. Johnson

Disabled Rights Action Comm. v. Las Vegas Events, 375 F3d 861 (9th Cir. 2004).

■ NINTH CIRCUIT HOLDS SECTION 207 OF THE 1996 TELECOMMUNICATIONS ACT DOES NOT PROVIDE PRIVATE CAUSE OF ACTION TO HOMEOWNERS ASSOCIATION

As the number of homeowners associations continues to grow nationwide, the risk of noncompliance with federal law increases. Associations must be mindful of federal laws such as the ADA, the Fair Debt Collection Act, the Fair Housing Act, and the Telecommunications Act. These laws typically impose burdens on associations. As one California homeowners association recently learned, the invocation of the Telecommunications Act proved fruitless in an attempt to enforce the association's rule prohibiting the installation of consumer satellite dishes.

In *Opera Plaza Residential Parcel Homeowners Association v. Hoang*, 375 F3d 831 (9th Cir. 2004), the Ninth Circuit Court of Appeals held that section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 114, did not give the federal courts jurisdiction to enforce a homeowners association's rules on the placement of satellite dishes against a resident. For subject matter jurisdiction to exist, Congress and not the FCC must confer such jurisdiction upon the federal courts. The District Court for the Northern District of California therefore dismissed the association's case for lack of jurisdiction.

The Hoangs were unit owners at Opera Plaza. The governing documents of the homeowners association prohibited the use of satellite dishes on common elements of the condominium. Nonetheless, the Hoangs installed a satellite dish on a common element. The association then filed a lawsuit in district court seeking validation of the satellite prohibition policy, injunctive relief to force the Hoangs to remove the dish, and damages for breach of contract.

On appeal, Opera Plaza argued that the district court had erred in dismissing the case for lack of subject matter jurisdiction. First, Opera Plaza argued that, pursuant to 28 U.S.C. § 1331, their claim "arose under" federal law because it was

predicated on the Telecommunications Act and the attendant FCC agency regulations. Next, Opera Plaza argued that the district court had subject matter jurisdiction over their claim because federal law completely preempts the field of satellite television. Finally, they argued that there was a substantial federal question sufficient to confer jurisdiction on the federal courts.

In addressing Opera Plaza's first argument, the Ninth Circuit focused on two factors of the *Cort v. Ash* test to determine when a private cause of action "arises under" a federal statute. 422 U.S. 66 (1975). First the court attempted to determine whether Opera Plaza was part of the class of beneficiaries of the Telecommunications Act. Because the Act is clearly designed to benefit viewers rather than homeowners associations, the court found that Opera Plaza was not among the class of beneficiaries who have a private right of action under the Act. Second, the court looked to the legislative intent to determine whether there was a legislative scheme to create or deny a remedy under the statute. Although the FCC's regulations state that parties may petition "a court of competent jurisdiction," the court noted that subject matter jurisdiction can only be conferred by Congress, not by an administrative agency. Thus, the Ninth Circuit rejected Opera Plaza's argument that it had jurisdiction "arising under" federal law.

Next, the court rejected Opera Plaza's contention that federal law preempts the field of satellite television, citing the well-pleaded-complaint rule. In its complaint, Opera Plaza sought a declaration that their policy was consistent with the Telecommunications Act. The Ninth Circuit rejected this approach, noting that federal law was relevant to the association's claim only as a possible defense that could be raised by the Hoangs and that federal jurisdiction cannot be invoked merely in anticipation of a defense invoking federal law; rather, federal law must be the basis of the claim.

Finally, Opera Plaza argued that federal jurisdiction was proper because there was a "substantial question of federal law." Here, Opera Plaza argued that federal enforcement methods and an interest in the uniform federal enforcement of the Telecommunications Act were sufficient to create a federal question. Again, the court cited the well-pleaded-complaint rule, noting that Opera Plaza's prayer for injunctive relief depended entirely on whether their policy is in accordance with federal law. Thus, federal law would enter this case only as a defense raised by the Hoangs. The Ninth Circuit affirmed the district court's dismissal of Opera Plaza's claim for lack of subject matter jurisdiction.

The number of homeowners associations in the United States will continue to grow, just as surely as new federal law (with its benefits and burdens) will be created. Associations must be advised, when necessary, how to ensure that their governing documents and rules do not run afoul of federal law. While many federal laws affecting homeowners associations may provide them with benefits, Opera Plaza illustrates that associations aren't necessarily the beneficiaries of section 207 of the Telecommunications Act.

A. Richard Vial & Kevin V. Harker

Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang, 375 F3d 831 (9th Cir. 2004).

Appellate Cases—Land Use

■ COURT OF APPEALS CLARIFIES PROCESS FOR SATISFYING UTSEY STANDING REQUIREMENTS

In *Friends of Eugene v. City of Eugene*, 195 Or App 20, 96 P3d 1256 (2004), the Oregon Court of Appeals clarified how and when a party seeking judicial review can meet the constitutional standing requirement articulated by the court in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *rev dismissed*, 335 Or 217 (2003).

In *Utsey*, the court of appeals held that a party challenging a LUBA decision must establish both statutory standing and constitutional standing. Statutory standing, governed by ORS 197.850, requires the petitioner to demonstrate that it participated in the LUBA proceedings. Constitutional standing requires the petitioner to demonstrate that the challenged decision would have a “practical effect” on its interests. *Utsey*, 176 Or App at 550.

In *Friends of Eugene*, the court addressed the narrow question of whether one of the petitioners could demonstrate constitutional standing for the first time while the matter was pending before the court of appeals. The court stated that it had to resolve this issue and determine whether it had jurisdiction before it could review the merits.

The parties all agreed that the petitioner (1) had statutory standing, (2) was required to demonstrate constitutional standing per *Utsey*, and (3) had not demonstrated constitutional standing before the initial decision maker or before LUBA. The parties disagreed, however, on whether the petitioner should be permitted to submit new information to the court of appeals to demonstrate its constitutional standing.

The petitioners argued that, because a petitioner doesn't need constitutional standing until it invokes the court's judicial power on review, it should not be required to demonstrate constitutional standing until then. The petitioners also argued that the court of appeals has statutory authority under ORS 1.160 and inherent authority to take evidence on constitutional standing.

In response, the city cited *Doty v. Coos County*, 185 Or App 233, 59 P3d 50 (2002), *adh'd to on recons*, 186 Or App 580, 64 P3d 1150 (2003), in which the court of appeals allowed supplemental evidence on constitutional standing, but also indicated that future parties should demonstrate constitutional standing before the initial decision maker. The city argued that, under *Doty* and for reasons of judicial efficiency, the court should deny the request to submit new information.

The respondent applicant went a step further, arguing that, because ORS 197.850(8) states that the court's review of LUBA decisions “shall be confined to the record,” the court of appeals had no authority to accept new evidence regarding the petitioner's standing.

The court sided with the petitioners and rejected all of the respondents' arguments. First, *Doty* merely indicated the court's preference that parties demonstrate constitutional standing before the initial decision maker, rather than establishing a hard and fast requirement to do so. Second, the question of whether a petitioner has constitutional standing is a jurisdictional issue that is “separate and distinct” from the court's actual review of a LUBA order; thus, ORS 197.850(8) does not limit the constitutional standing determination to the record. 195 Or App at 28. Finally, while the court agreed with the respondents that its holding could have “serious consequences” on judicial efficiency, the court is nevertheless bound by *Utsey* to determine whether it has jurisdiction to review each challenged LUBA decision. *Id.* at 29.

In a tangential but helpful passage, the court also made it clear that parties should not, and indeed cannot, attempt to submit evidence of constitutional standing for the first time before LUBA. As the court held in *Just v. City of Lebanon*, 193 Or App 132, 888 P3d 312, *rev allowed*, 337 Or 247 (2004), LUBA is an administrative agency rather than a court, and therefore *Utsey's* constitutional standing requirements do not apply to LUBA. Further, the court agreed with two prior LUBA decisions in which LUBA held that it has no statutory or regulatory authority to take additional evidence regarding constitutional standing. See *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002); *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004), *petition and cross-petition dismissed*, 194 Or App 212, 94 P3d 160 (2004).

The court granted the petitioner's request to submit additional information regarding its constitutional standing, and gave it 14 days to do so. The court also neatly summarized its holding as follows:

[A] petitioner on judicial review may demonstrate his or her constitutional standing [before the court of appeals] in two ways. First, when the petitioner was before the local decision-maker, he or she may have put into the record evidence of constitutional standing. In that case, and at this point, the petitioner can demonstrate his or her constitutional standing to the court by simply citing to the pertinent portions of the record in the statement of the case in the opening brief. Second, if the petitioner did not establish his or her constitutional standing before the initial decision-maker, the petitioner may submit such evidence for the first time on judicial review.

195 Or App at 29–30.

In a footnote, the court also noted that a proposed amendment to the Oregon Rules of Appellate Procedure would specify new procedures for demonstrating constitutional standing at the time a petition for judicial review is filed. The new procedures would specify how to submit new evidence and how to identify evidence already in the record. The court noted that if the new rule is adopted, it will be effective in January 2005.

On December 29, 2004, the court of appeals addressed the merits of the *Friends of Eugene* case in a follow-up opinion. In a footnote in this second opinion, the court stated that the petitioner had responded to the first opinion by submitting affidavits of two members of its steering committee. Without discussing the content of the affidavits, the court concluded that they sufficiently demonstrated the petitioner's constitutional standing.

Friends of Eugene reaffirms *Utsey's* central holding that the court of appeals cannot review a LUBA decision unless the challenging party demonstrates that the decision would have a "practical effect" on its interests. But it is now clear that a party is not forced to establish standing at the local level. To the extent that that issue had been unresolved in the wake of *Utsey*, *Friends of Eugene* reduces *Utsey's* "chilling effect" on judicial appeals of land use decisions—particularly for parties who were unrepresented at the initial level and unaware that they might have to establish standing on review.

In its review of *Just*, the Oregon Supreme Court will take up the question of whether *Utsey* was wrongly decided.

Mr. Baker is the staff attorney for Friends of the Columbia Gorge. Along with several other conservation groups, Friends filed an amicus brief with the Oregon Supreme Court in the Utsey case.

Nathan Baker

Friends of Eugene v. City of Eugene, 195 Or App 20, 96 P3d 1256 (2004).

■ LOCAL CODE INTERPRETATION INDEPENDENT OF PERMIT IS NOT A JUSTICIABLE CONTROVERSY

In *1000 Friends of Oregon v. Clackamas County*, 194 Or App 212, 94 P3d 160 (2004), the Oregon Court of Appeals reinforced the requirement that an appeal must present a justiciable controversy to be heard. Lacking such a controversy in this case, the court dismissed the petition and cross-petition on appeal from LUBA.

The facts of this case and LUBA's holding are discussed at length in the April 2004 issue of the *RELU Digest*. In summary, Molalla Christian Church filed an application for an interpretation of Clackamas County zoning regulations that prohibit the establishment of new churches on high-value farmland and/or within three miles of an urban growth boundary (UGB). The church argued that the prohibition violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5, because it would discriminate against and substantially burden the church.

The county planning director denied the interpretation advocated by the church. The county hearings officer affirmed that decision. On appeal, the board of county commissioners reversed the hearings officer's decision, holding that the prohibition discriminates against churches,

and that RLUIPA and the First Amendment required it to allow the church.

LUBA held that the prohibition does not discriminate irrationally against churches. LUBA also held that the church failed to show that the prohibition imposed a substantial burden on religious exercise, largely because financial difficulties are insufficient to establish a substantial burden on religious exercise. Therefore, LUBA held that the interpretation passed muster under RLUIPA. LUBA remanded the case to the county.

The church petitioned for review, and 1000 Friends cross-petitioned, each finding fault with different portions of LUBA's holding. After reciting the history of the case, the court moved quickly to the issue of justiciability, citing *Utsey v. Coos County*, 176 Or App 524, 548, 32 P3d 933 (2001), *rev dismissed*, 335 Or 217 (2003), for the principle that courts have no jurisdiction under the Oregon Constitution to adjudicate an interpretation of law unless a justiciable controversy exists between parties.

The court characterized the issue in the case as being whether, if the church were to apply for a building permit, the county would have to deny the application and, if so, whether that denial could survive RLUIPA. However, that issue "will arise only if the church requests a permit, and the county decides that the church neither fits within a permitted use nor qualifies for an exception. None of those events has occurred . . ." 194 Or App at 217. Although LUBA can issue an advisory opinion (*see Just v. City of Lebanon*, 193 Or App 132, 142, 88 P3d 312 (2004)), the court cannot do so.

The church offered a supplemental brief in which it argued that (1) the matter should not be based on justiciability, because 1000 Friends had not raised that issue below; (2) the county could not grant an exception to Goal 14 to allow the church (citing *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), *rev dismissed*, 336 Or 126 (2003)); and (3) requiring the church to file a permit application would be futile.

The court disagreed with all three arguments. First, justiciability is a constitutionally imposed jurisdictional requirement that a party need not preserve below. Second, the decision in *DLCD v. Yamhill County* was not precisely on point, and it would not necessarily prevent the church from seeking an exception to Goal 14 pursuant to ORS 197.732 and OAR 660-004 and 660-033-0130(2) to overcome the prohibition. Lastly, the possibility that the church could obtain an exception means that such an application is not necessarily futile. Moreover, even if it would be "sensible or convenient" to render an advisory opinion, the court could not do so under the Oregon Constitution. 194 Or App at 218.

Mr. Epstein was the Clackamas County Hearings Officer whose opinion was reversed by the board of commissioners in this case.

Larry Epstein

1000 Friends of Oregon v. Clackamas County, 194 Or App 212, 94 P3d 160 (2004).

■ **THERE NO LONGER IS, AND NEVER SHOULD HAVE BEEN, AN “UNNEEDED BUT COMMITTED LANDS” EXCEPTION TO THE GOAL 14 FINDINGS REQUIRED FOR UGB AMENDMENTS**

Milne v. City of Canby, 195 Or App 1, 96 P3d 1267 (2004), presents an in-depth review of Statewide Land Use Goal 14 and the findings necessary to support an amendment to an existing urban growth boundary (UGB). The case focuses particularly on a limited exception to the findings generally required for a UGB amendment for “unneeded but committed” (UBC) lands. Considering that exception, the Oregon Court of Appeals determined that its prior applications of the “unneeded but committed” concept were unauthorized by law.

The City of Canby amended its UGB to include 30 acres of land that lay entirely within the city limits and that was entirely encircled by the existing UGB but not included within it. This decision was appealed to LUBA, which affirmed the city’s action. LUBA’s decision was appealed to the court of appeals. The court of appeals reversed and remanded LUBA’s decision based on Goal 14.

As a general rule, before a UGB may be amended to include more property, findings must be made on the seven criteria listed in Goal 14. The first two criteria are known as the “need” factors and the remaining seven criteria are the “locational” factors.

An exception to this general rule has been the “unneeded but committed” lands doctrine (UBC doctrine). The UBC doctrine arose from a 1979 LCDC continuance order regarding the Metropolitan Service District’s acknowledgement and establishment of the Metro-area UGB. That order recognized that at the time a UGB is first acknowledged, existing land uses might cause it to be necessary to include some land not needed for, but already committed to, urban development.

Over time, however, the UBC doctrine became accepted as a basis for amending a UGB without regard to Goal 14’s “need” factors. The court discussed its prior recognition of the UBC doctrine at length and then determined that it had incorrectly extended the UBC doctrine to UGB amendments.

The court held that the LCDC order from which the UBC doctrine arose was intended to address situations existing when a UGB is first established, and that there was no support for extending it to later UGB amendments. In addition, Goal 14 expressly provides that its terms apply to later “changes” (i.e., amendments) to UGB boundaries. “Nothing in the text of Goal 14 authorizes the ‘unneeded but committed’ doctrine as a mechanism by which a local government is relieved from the requirement of considering all of the seven Goal 14 factors in a decision to amend an existing UGB. Thus, neither the [LCDC] Continuance Order nor Goal 14 supports [the court’s prior] extension of the ‘unneeded but committed’ doctrine to UGB amendments.” 195 Or App at 16.

The court rejected several attempts by the property owner to save the case on other grounds and overruled its prior deci-

sions of *Baker v. Marion County*, 120 Or App 50, 852 P2d 254, rev den, 317 Or 485 (1993), and *Halvorson v. Lincoln County*, 82 Or App 302, 728 P2d 77 (1986).

Ruth Spetter

Milne v. City of Canby, 195 Or App 1, 96 P3d 1267 (2004).

■ **NINTH CIRCUIT ADDRESSES CONSTITUTIONAL CLAIMS AGAINST EMPLOYEES OF REGULATORY BODY**

Squaw Valley Development Co. v. Goldberg, 375 F3d 936 (9th Cir. 2004), involved substantive due process and equal protection claims against two employees of the California Regional Water Quality Control Board, Lahontan Region, alleging “over-zealous” oversight.

The plaintiffs own a ski resort on 42,000 acres in Placer County, California, traversed by the South Fork of Squaw Creek, which drains into the Truckee River. The development is one of 800 dischargers overseen by the board, which itself is one of nine regional boards protecting the state’s water resources. The board administers a basin plan that sets water quality standards for the region, including turbidity standards, implemented through water discharge regulations (WDRs). While the plaintiffs had averaged one water quality violation each year between 1989 and 1999, the supervisor defendant’s emphasis on compliance resulted in 21 violations alleged in one year. There was a great deal of enforcement activity by the defendants, including interpretation of the standards and a request to the United States Attorney General for enforcement of the same. There was also evidence that other violators had not been pursued.

The plaintiffs filed this 42 U.S.C. § 1983 civil rights action against the two defendants, alleging, among other things, equal protection and due process violations. The United States Attorney General filed a civil enforcement action against the plaintiffs alleging water quality violations. The defendants filed a motion for summary judgment on the basis of qualified immunity. The trial court granted the motion, holding that the defendants were protected by qualified immunity and that there was no triable issue of fact that a constitutional violation had occurred. The plaintiffs appealed.

The Ninth Circuit said that qualified immunity is given to state or local officials when their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To weigh this defense, one must first consider whether a constitutional right is violated. If there is evidence of such a violation, the issue becomes whether the right was clearly established.

The court then turned to the plaintiffs’ two constitutional claims. Looking first at the equal protection claim, the court noted that the Constitution not only protects groups, but also

“classes of one.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Where there is no fundamental right or suspect classification involved, a plaintiff must show that it has been treated differently from other similarly situated regulated persons and that there is no rational basis for the difference in treatment. If an equal protection claim is based on selective enforcement of valid laws, a plaintiff may show that the purported rational basis for the selective enforcement is a mere pretext for an impermissible motive.

The defendants conceded that they had extended more oversight over the plaintiffs’ operations than with other operators, but stated that they had done so because they perceived the plaintiffs as recalcitrant and because of the plaintiffs’ size, activity level, and record of noncompliance. The court found no evidence of any other discharger that had a comparable size, level of activity, and history of noncompliance. In addition, the plaintiffs’ water quality permit was worded differently than others. The plaintiffs also had a history of failing to improve through less formal proceedings. As such, the defendants were found to have articulated a rational basis for their action.

As to whether these reasons were a mere pretext, the plaintiffs must show that the reason asserted by the defendants was either objectively false or based on an improper motive. The plaintiffs put on evidence of a personal dislike by one of the supervisory defendant employees for the president of one of the plaintiffs. This defendant could not recite a single violation by the plaintiff during the period before the second, subordinate staff defendant was assigned to the case. The court said this created a viable issue of fact for trial. As for the subordinate employee, while the plaintiffs had had disagreements with that employee, no one could trace that disagreement to animus against the plaintiffs. The court reversed the trial court’s grant of summary judgment in favor of the supervisory employee and sent that case back to the trial court, but affirmed the grant of summary judgment against the subordinate employee.

On the substantive due process claims, the court found that such a claim could only exist if the defendants’ actions shocked the conscience of the court or interfered with rights implicit in the concept of ordered liberty. The court noted that there were no allegations of deprivation of life, liberty, or property, and that the due process clause does not provide a constitutional right against arbitrary action. The court said it was not required to reach this issue, both because the application of substantive due process claims to economic and social legislation had largely been discredited, and because the takings clause has subsumed substantive due process in the Ninth Circuit ever since *Armendiares v. Penman*, 75 F3d 1311, 1327 (9th Cir. 1996). If a claim involves the deprivation of property, a plaintiff may not circumvent a Fifth Amendment claim by recharacterizing it as a substantive due process violation. The plaintiff was required to state its claim as a takings challenge (and thereby subject itself to all takings defenses) because it was essentially arguing that no legitimate

public interest supported the regulatory regime in this case. The court affirmed the grant of summary judgment for the defendants on the substantive due process claim.

Edward J. Sullivan

Squaw Valley Dev. Co. v. Goldberg, 375 F3d 936 (9th Cir. 2004).

■ NINTH CIRCUIT UPHOLDS SPOKANE ORDINANCE REGULATING ADULT BUSINESSES

In *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F3d 1186 (9th Cir. 2004), the Ninth Circuit addressed a First Amendment challenge to the City of Spokane’s ordinances regulating the location of adult-oriented retail businesses. The city became concerned with the establishment of several such stores in residential neighborhoods. To establish the negative effects of these businesses, the city compiled a legislative record of more than 1,500 pages consisting of studies done in other cities, police reports, testimony of individuals, and court cases. Based on this record and the planning commission’s recommendations, the city council approved two ordinances. Under the first ordinance, adult stores are subject to setback requirements that prevent them from opening in close proximity to certain land use categories. Under the second, affected existing adult stores were given an amortization period of one year to either relocate or change the nature of their operations.

World Wide Video of Washington, Inc. (*World Wide*) did not comply with the ordinances, and brought a 42 U.S.C. § 1983 civil rights action, alleging that the ordinances violated the First Amendment. Spokane moved for summary judgment. In support of the motion, it provided the lengthy legislative record. *World Wide* countered the motion by (1) stating that the studies in the record did not deal directly with adverse secondary effects of the adult businesses; (2) arguing that police records actually proved a lack of negative effects; (3) providing statements of residents that they had not observed any negative effects and from a broker about the lack of alternative sites available for relocation; (4) showing that it would be difficult for *World Wide* to break its leases; and (5) suggesting that citizen testimony about the presence of negative effects was actually motivated by their disapproval of this type of speech.

The district court granted the city’s motion for summary judgment, and *World Wide* appealed. The Ninth Circuit Court of Appeals reviewed the grant of summary judgment *de novo* and affirmed.

At the outset, the court decided to apply intermediate scrutiny because the ordinances, which sought to control the secondary effects of speech and not to suppress speech, were content-neutral. An ordinance limiting the secondary effects of speech is constitutional if it is narrowly tailored to serve a substantial government interest and if it leaves open alternative channels of communication. *World Wide* argued only that the ordinances were not narrowly tailored to serve a substantial government interest.

The court of appeals turned to the Supreme Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), which applies the secondary effects standards of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Supreme Court held that a municipality does not have to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." 475 U.S. at 51–52.

The *Alameda Books* decision is a fractured one, with the rule coming from a plurality that is limited by a concurring opinion from Justice Kennedy. The majority agreed that municipalities are not required to conduct their own studies to justify this type of ordinance and that experimentation amongst municipalities with superior knowledge should be encouraged as long as inferences are reasonable. *Alameda Books* adds to *Renton* a mechanism to shift the burden of proof back to the municipality once the plaintiff succeeds in casting "direct doubt" on the legislative rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings. Kennedy's concurrence stresses that the rationale for a secondary effects ordinance cannot be a significant reduction in the number of adult businesses. He further clarified that a secondary-effects ordinance is narrowly tailored if "the quantity of speech [is] substantially undiminished . . . and [the] total secondary effects [are] significantly reduced." 535 U.S. at 451.

The court also considered its only prior decision applying the *Renton/Alameda Books* standard, *Center for Fair Public Policy v. Maricopa County*, 336 F3d 1153, 1166 (9th Cir. 2003). In *Maricopa County*, the court concluded that Arizona's legislative record consisting of testimony regarding the secondary effects of pornographic litter and prostitution was a sufficient basis for the legislation, and that the evidence "was hardly overwhelming, but it does not have to be." 336 F3d at 1168. Because the state applied evidence that was "reasonably believed to be relevant," the statute was presumptively constitutional. *Id.* The court never shifted the burden back to the state, because the businesses had "failed to cast doubt on the state's theory." *Id.*

According to the court, the ordinances survived application of the *Renton/Alameda Books* standards because secondary effects will be reduced "by moving the stores from sensitive areas—without substantially reducing speech by forcing stores to close." *Id.* at 1195. The ordinances also survived the burden-shifting mechanism because World Wide had not effectively controverted much of Spokane's evidence on secondary effects, such as litter of pornographic materials. Furthermore, "the protected speech and the secondary effects described in the citizen testimony are inexorably intertwined: . . . sexual images [in adult products] may be protected, but if the stores' products are consistently discarded on public ground, municipal regulation may be—and, in this case, is—justified." *Id.* at 1196. Finally, World Wide's claim that the citizens' testimony was motivated by bias and unscientific was insufficient to cast doubt on this testimony. The second-

ary effects that Spokane wanted to combat with these ordinances included economic and aesthetic impacts on communities. These goals would be achieved less effectively absent this regulation.

The court also rejected an overbreadth argument that the ordinances encompass all stores that have a "significant or substantial" portion of its stock in adult-oriented merchandise, stating that the language is readily susceptible to a narrowing construction. Finally, the court found that the amortization provision was adequate and that World Wide had received all the due process it was entitled to. World Wide had applied for and received an eight-month extension to the amortization period, appealed the extension decision locally, and filed an action in Spokane County Superior Court before bringing this action in federal court.

Andrew Svitek

World Wide Video of Washington, Inc. v. City of Spokane, 368 F3d 1186 (9th Cir. 2004).

■ ALTERATIONS IN NONCONFORMING USES ALLOWED UNDER ORS 215.130(5) ONLY WHEN REQUIRED BY LAW

In *Cyrus v. Deschutes County*, 194 Or App 716, 96 P3d 858 (2004), Central Electric Cooperative, Inc. (CEC) petitioned the Oregon Court of Appeals for review of a LUBA decision. LUBA had remanded Deschutes County's approval of CEC's request to alter a portion of its infrastructure. 46 Or LUBA 703 (2004).

CEC is the exclusive provider of electricity for the Black Butte and Sisters area of the county. Prior to the county's adoption of a zoning code in 1972, CEC constructed various transmission lines, including the Jordan Road line at issue in this case. The Jordan Road line crosses both public and private lands throughout the county. CEC has easements to construct and maintain the line from various landowners, including Keith and Matt Cyrus, respondents at the court of appeals.

With regard to private property, the Jordan line bisects three zones: an exclusive farm use (EFU) zone, a multiple-use agricultural (MUA) zone, and a surface mining (SM) zone. A "utility facility" qualifies as a conditional use in EFU and MUA zones; however, such a facility is not allowed as a conditional use in the SM zone. Because the line was constructed prior to the adoption of the county's zoning ordinance, the court and LUBA regarded the line as a nonconforming use.

In 2003, CEC sought to make various improvements to the Jordan line. Rather than applying for a conditional use permit, it applied to the county for a nonconforming use verification and for permission to make its desired improvements. CEC asserted that under ORS 215.130(5), it was entitled as a matter of law to make the improvements. That statute allows for the alteration of a nonconforming use

“when necessary to comply with any lawful requirement for alteration in the use.”

The county administratively approved CEC’s application and the Cyruses appealed that decision to a hearing officer. In affirming the decision, the hearing officer concluded that CEC’s proposed improvements were necessary in order for CEC to comply with its legal duty under ORS Chapters 757 and 758 to, in the hearing officer’s words, “provide safe, reliable and adequate electrical service.” The Cyruses appealed that decision to LUBA.

In rejecting the county’s interpretation of ORS 215.130(5), LUBA held that the statute distinguishes between alterations that a county “may” permit and those that it “shall.” It stated,

The latter are limited to alterations “necessary to comply with any lawful requirement for alteration in the use.” Significantly, the “lawful requirement” must be “for alteration in the use.” That modifier suggests that it is not sufficient that some authority impose a general legal obligation on the nonconforming use owner; the authority must require the requested “alteration [in the] use.”

46 Or LUBA at 709. LUBA found that the statutes relied upon by the county prescribed general, open-ended obligations on CEC, and nothing in those statutes nor in the Public Utility Commission’s order delineating CEC’s service territory specifically requires the alterations in question in this case.

The court of appeals agreed with LUBA’s interpretation of ORS 215.130(5). The court construed the statute according to its plain terms, and held that the legislature used the words “lawful” and “requirement” in their ordinary sense, in the absence of a specific definition of the phrase “lawful requirement.” As such, the court stated that the phrase “is a demand that is authorized by law. So understood, for purposes of ORS 215.130(5), the term appears to focus on what a governmental authority has demanded of the holder of a nonconforming use.”

The court concluded by holding that in light of its understanding of the phrase “lawful requirement,” it is insufficient for a nonconforming user’s own proposal to alter that use to trigger the “lawful requirement” prerequisite demanded by ORS 215.130(5). The court supported its holding by examining the statute’s legislative history, which it believed compelled the same conclusion. Because no authority required CEC to make the proposed improvements to its nonconforming utility lines, those proposed improvements were not sanctioned by ORS 215.130(5). Thus, the court affirmed LUBA’s remand of the County’s decision.

David Doughman

Cyrus v. Deschutes County, 194 Or App 716, 96 P3d 858 (2004).

■ COURT OF APPEALS CLARIFIES KEY CONDEMNATION APPRAISAL EXCHANGE REQUIREMENT

When the Oregon Legislature amended the Condemnation Code in 1997 to institute a system of reciprocal appraisal exchange for eminent domain cases, it established three key points. First, under ORS 35.346(2), at the same time a condemning government agency presents the property owner with its statutory pre-filing offer, the agency must also provide the appraisal report upon which the agency based its offer. Second, under ORS 35.346(4), the property owner must give the agency the appraisal report supporting its answer at least 60 days before trial. Third, ORS 35.346(5)(b) is a “catch-all” provision requiring disclosure of all other appraisals by each side.

For the first and second points, the meaning of “appraisal report” is effectively defined because the required reports are tied directly to the parties’ competing allegations of just compensation in, respectively, the agency’s complaint and the property owner’s answer. However, for the third point, the Condemnation Code contains no definition of what constitutes an “appraisal” under the ORS 35.346(5)(b). This was an important unanswered question because parties on both sides sometimes received either draft reports or completed appraisal reports that they did not use because they varied from their trial positions as reflected in their exchanged appraisal reports. The Oregon Court of Appeals in *State ex rel. Department of Transportation v. Stallcup*, 195 Or App 239, 97 P3d 1229 (2004), recently answered that question quite pointedly: the requirement to disclose appraisals includes all written drafts and completed reports that value the subject property for purposes of the condemnation case.

In *Stallcup*, the property owner’s counsel had received four written reports from its appraiser during the course of the litigation. Two were drafts or otherwise preliminary and two were completed reports. The completed reports were consistent with the property owner’s answer and trial theory. At least one of the drafts evaluated other theories and was not consistent. The property owner’s counsel exchanged the completed reports with the state but not the others. The property owner received a favorable verdict at trial and was entitled to recover his litigation expenses. The post-trial fee petition included expenses for all four reports. The state, learning of the two undisclosed reports through the fee petition, moved to set aside the verdict because the draft reports had not been available for potential cross-examination at trial of the property owner’s appraiser. The trial court denied the motion, but the court of appeals reversed.

The court of appeals read the term “appraisal” in ORS 35.346(5)(b) broadly to include all written reports—including drafts—concerning the value of the property commissioned for the litigation:

We . . . conclude that “any appraisal” in ORS 35.346(5)(b) means any written opinion by a qualified person regarding valuation of the condemned property that a party obtains “as part of the condemnation action.” That is so regardless of whether the party actually relies on the appraisal. . . . Indeed, “every appraisal” encompasses *unfavorable* appraisals that a party has obtained. That construction of “every appraisal” comports both with the plain meaning of the term and with the legislative intent that the condemnation process be conducted without subterfuge, with full reciprocal pretrial disclosure of expert reports regarding valuation.

. . . .

. . . [N]othing in the statutory scheme refers to “final” appraisals. Rather, for example, ORS 35.346(2) requires production of “any written appraisal upon which the condemner relied in establishing the amount of compensation offered.” Nothing in that language suggests that, if the condemner relied on a “draft” or unsigned report, it could somehow evade mandatory production. The same is true of the owner’s reciprocal production obligation under subsection (4).

195 Or App at 250–51. The court of appeals reversed and remanded with instructions to grant the state’s motion for relief from judgment and to vacate the award of attorney fees.

The *Stallcup* decision is sweeping both in the scope of its definition and in the remedy it fashioned. But it clearly puts all parties on notice of their exchange obligations under ORS 35.346(5)(b). One issue that *Stallcup* did not reach is when the parties must disclose these other appraisals. For a discussion of that related topic, see Mark J. Fucile, *Timing Is (Almost) Everything: Why Appraisal Exchange in Condemnation Needs Fixing*, Oregon State Bar Litigation Journal, Oct. 2002, at 8, available at <www.osblitigation.com/lj2002-10.pdf>.

Mark J. Fucile

State ex rel. Dep’t of Transp. v. Stallcup, 195 Or App 239, 97 P3d 1229 (2004).

Appellate Cases— Landlord/Tenant

■ THE CASE OF THE ANGRY LANDLORD AND THE OVERUSED PARKING LOT

In *Phillips v. Rathbone*, 194 Or App 90, 93 P3d 835 (2004), the Oregon Court of Appeals reversed summary judgment on trespass claims because the language of the modified lease was ambiguous on whether the tenant had the right to exclusive possession or the landlord had retained a possessory interest in the property.

This case revolved around a lease for an office suite, including the use of a parking lot. The plaintiff landlord alleged that the defendant tenant chiropractor had breached the terms of the lease agreement by allowing patrons from adjacent businesses to use the parking lot. The landlord’s claims included breach of the lease against the tenant and trespass claims against the neighboring restaurant and market. The tenant claimed that he had the right to exclusive possession of the premises and that the landlord did not have any possessory interest. The trial court granted the defendants’ motion for summary judgment on all claims.

The court of appeals found that the trial court had erred when it held that the landlord had failed to present evidence of a trespass directed by anyone connected with the defendants’ restaurant and market. In opposition to the motion for summary judgment, the landlord had filed a controverting affidavit, in which the landlord recounted statements made by both defendants that they used the subject parking area. The court of appeals held that the statements were not hearsay, but were admissible as statements of party-opponents under OEC 801(4)(b)(A).

The court also disagreed with the contention of the restaurant and market that the landlord did not have a sufficient possessory interest in the parking area to maintain a trespass claim. Generally, a landlord only has the right to make repairs and to collect rent, unless the lease contains explicit reservations in the landlord’s favor. However, the terms of the subject lease were modified by a prior settlement agreement between the landlord and the tenant chiropractor regarding the use of the parking lot. The court found that the language of the settlement agreement was capable of two reasonable interpretations. One interpretation could be that the landlord reserved the right to use the parking area during times when the chiropractor and his staff and patients were not using the parking area. Under that interpretation, the landlord had retained possessory rights to the parking lot and could maintain a trespass action for interference with those rights. Although another interpretation of the language was possible, the court concluded that there was a genuine issue of material fact about what the parties had intended regarding the landlord’s use of the parking lot. This precluded summary judgment on the landlord’s claims against the restaurant and the market.

The surprising aspect of this case is that the only evidence that the landlord presented to establish the tenant's breach of the lease terms was the landlord's own controverting affidavit and the statements of the restaurant and the market. Although the statements were not hearsay as against the restaurant and the market in regards to the claims to which they were parties, those same statements were hearsay under OEC 802 in the landlord's claims against the tenant chiropractor because the speakers (the restaurant and market) were not parties to those claims. It is difficult to see how the landlord thought he would meet his burden of proof as against the tenant. Under these circumstances, the angry landlord's attempt to control the parking lot and his wayward tenant were flawed from the start.

Raymond W. Greycloud

Phillips v. Rathbone, 194 Or App 90, 93 P3d 835 (2004).

■ **SILENCE IS NOT CONSENT IN DISPUTE OVER LEASE TERMINATION NOTICE**

In *Guardian Management, LLC v. Zamiello*, 194 Or App 524, 95 P3d 1139 (2004), the Oregon Court of Appeals determined that a residential tenant's four-year silence in response to a landlord's repeated, yet defective, termination notices was not acquiescence through waiver or estoppel.

The parties entered the original rental agreement in 1996. Because the tenant received assistance from the Department of Housing and Urban Development (HUD), the original rental agreement contained a term that required the landlord to comply with all HUD, state, and local regulations and laws in order to terminate the agreement. The original agreement also stated that the landlord could not amend the agreement without (1) receiving HUD approval, (2) providing 60 days' notice, and (3) offering a new contract or amendment to the tenant for approval prior to changing the rental agreement.

In 1997, the legislature amended ORS 90.155 to require that rental agreements allow both landlords and tenants to serve termination notices by mail and by attaching the notice to the other party's door (known as "nail and mail"). The parties' 1996 agreement did not contain the nail and mail provisions. In November 1997, the landlord attempted to amend the rental agreement to allow for reciprocal service of notice through mail and attachment in compliance with ORS 90.155, but the landlord failed to receive HUD approval for the changes, provide 60 days' notice, and seek the tenant's approval for the changes.

In January 2002, the landlord attempted to terminate the rental agreement by attaching a termination notice to the tenant's door and mailing the notice to the tenant's address. The landlord served several other termination notices in a similar manner prior to the January 2002 notice. The tenant objected only to the January 2002 notice. The trial court found that the landlord had properly terminated the rental agreement and entered a judgment of eviction against the tenant.

In his appeal, the tenant argued that the landlord had failed to comply with the terms of the 1996 rental agreement, under which service of termination notices must be made either by personal delivery or via first-class mail. See ORS 90.155 (1995), amended by Or Laws 1997, ch 557, § 6; Or Laws 2001, ch 596, § 29(a). The 1996 agreement did not allow for nail and mail service, reciprocal or otherwise.

The landlord argued that, despite its failure to fully comply with the terms of the 1996 agreement, the tenant had waived his rights to challenge this noncompliance or, alternatively, should be estopped from making such a challenge. The court noted that the landlord's argument rested principally on the fact that the tenant had not objected to multiple termination notices over a period of more than four years. The court was not convinced by the landlord's argument, because the record showed that the tenant believed that the landlord's prior notices of termination were nothing more than requests to comply with the rental agreement. In addition, the landlord's failure to follow through with legal action had reinforced the tenant's belief that the notices did not require a response.

Similarly, the court was not persuaded that the tenant ought to be estopped from invoking the protections of ORS 90.155. The landlord bore the burden of proving that the tenant had knowingly been silent in order to prevent the landlord from curing the defective notice. The court noted that silence can constitute a false representation, but only if the party that is silent has an affirmative duty to speak, and a party only has a duty to speak if the party knew that failing to speak would materially mislead the other party. The court found no evidence that the tenant had intended to mislead the landlord.

Because the landlord had failed to properly serve the termination notice and the evidence did not support the landlord's waiver and estoppel arguments, the court reversed the trial court's decision.

Glenn Fullilove

Guardian Management, LLC v. Zamiello, 194 Or App 524, 95 P3d 1139 (2004).

Cases from other Jurisdictions

■ IN MICHIGAN CONDEMNATION CASE, PROPERTY OWNERS WIN THE “PUBLIC PURPOSE” BATTLE, BUT SUFFER SOME COLLATERAL DAMAGE

The Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), now has weighed in on one of the more controversial questions in condemnation law, namely, whether an intent to replace underutilized private properties with new privately owned development intended to create jobs and tax revenue can constitute a “public purpose.”

In this case, the proposed condemnation site is near Detroit Metropolitan Wayne County Airport, and the condemnations came to pass as the county attempted to assemble a site for the “Pinnacle Project,” a business and technology park to be constructed, owned, and operated with private funds. The county previously had assembled the majority of the acreage needed with federal funds designated to create noise buffer areas around airports. The Federal Aviation Administration grant required Wayne County to put any properties so acquired to “economically productive use.” The defendants were owners of 19 parcels yet to be acquired.

Those following this topic will recall that in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W. 2d 455 (1981), the same court construed the same Michigan constitutional provision at issue to allow the Detroit Economic Development Commission to raze an underdeveloped neighborhood to make way for a new General Motors assembly plant. Article 10, Section 2 of the 1963 Michigan constitution provides that “[p]rivate property shall not be taken for public use without just compensation.” By comparison, the relevant Michigan statute, enacted prior to the 1963 constitution, authorizes public agencies to condemn private property “necessary for a public improvement . . . or for public purposes . . . for the use or benefit of the public.” MCL 213.23 (emphasis added).

The court first disposed of the defendants’ statutory arguments in favor of the condemning authority, thus setting some precedents that the property owners’ bar certainly could have done without. As defense counsel Darius Dynkowski was heard to remark at a recent American Bar Association committee meeting, “A number of innocent bystanders were killed on the way to winning the case.” The court had no difficulty deciding that the Michigan statute authorized counties as well as state government to condemn property. It found that Wayne County’s home rule charter, reserving “all powers” to the county, reserved the power to condemn private property for the stated purposes of job creation, stimulating private investment, stemming disinvestment and population loss, and supporting development opportunities.

The court similarly decided that Wayne County’s declaration of “necessity” as per the statute did not constitute an abuse of discretion (that being the standard for review of such a declaration). There were plausible, near-term development plans for the property, and the processes yet to obtain prior to development—environmental approvals and construction financing, to name two—were not relevant, said the court, to the question of “necessity.” Finally, as to the defendants’ argument that the county had failed to prove that the public simply did not need this development, that argument was not briefed and thus was deemed abandoned.

The court next reached the constitutional argument that the development would not be for public use, and it proceeded to abandon the precedent it had set in *Poletown*. The court read its prior decisions as to what the people intended when they ratified that phrase “for public use” to find that “public use” allows for transfer of condemned property to private entities but does not allow a transfer to private entities for private use.

Transfer of condemned property to private entities has been allowable in Michigan in three circumstances. The first is in cases of extreme public necessity, as when government must use eminent domain to acquire the land needed to construct a necessary private railroad, highway, or gas line. The second is when the transferee private holder “remains accountable to the public in its use of that property,” as when a public regulatory agency oversees the private holder’s use. 684 N.W. 2d at 782. The third is “when the selection of land to be condemned is itself based on public concern . . . meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of the condemned land, must satisfy the Constitution’s public use requirement.” *Id.* at 782–83. For the third example, the court cited to a case of slum clearance where the condemned site was indeed later transferred to new private use.

The court found that Wayne County’s purposes here did not fit any of those sets of circumstances. The distinctions it makes with those prior decisions may strike many readers as somewhat arbitrary. The decision omits any discussion whether the federal government’s purposes in granting money to Wayne County to assemble this site in the first place—to create a noise buffer around the Detroit Airport with other productive uses less sensitive to noise—fit the third category above.

The court also noted that the majority decision in *Poletown* states that the plaintiffs in that case had conceded that the Michigan constitution allowed condemnation for either a “public use” or a “public purpose,” but *Poletown*’s recitation of the plaintiffs’ arguments showed the opposite of a concession on that point. The *Wayne County* court criticized the suggestion it had made in *Poletown* that a local agency’s determination of public purpose should be reviewed only for abuse of discretion, asserting instead its inherent power to interpret the state constitution. Finally, it cast out and disowned forever *Poletown*’s implied holding that general eco-

conomic benefit was sufficient to constitute public use: "After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer." *Id.* at 786.

Inquiring minds may want to know how the Oregon courts will construe recent amendments to ORS Chapter 280 now allowing cities of population 70,000 or greater (formerly 300,000) to acquire private property by eminent domain to assemble for private, mixed-use (commercial retail plus housing) developments. ORS 280.415 now states that amelioration of "substantial adverse economic conditions" (defined as "decreasing opportunities for gainful employment and lack of sites and facilities for orderly and necessary retail, commercial and industrial growth") is "deemed a public purpose and the acquisition of property for such purpose is deemed a public use." Article 1, section 18 of the Oregon Constitution allows government takings for "public use" so long as just compensation is paid, ORS 35.235(1) allows condemners to acquire property "for a purpose . . . authorized by law," and ORS 35.235(2) and (3) both mention the "public necessity of the proposed use" (emphasis added in all quotations).

The drafters of the amendments to the economic development statutes appear to have covered their bets as to any future constitutional challenges to those statutes, but the same amendments also forbid a city that acquires a site by condemnation (or otherwise) from "operat[ing] any eligible project as a business or in any manner whatsoever" other than arranging for sale or conveyance of the properties acquired. ORS 280.435. One wonders how these amendments would fit within any of the three categories articulated in *Wayne County*, but that is beyond the scope of this case note.

Editors' Note: On September 28, 2004, the United States Supreme Court granted certiorari in Kelo v. City of New London, Connecticut, 125 S. Ct. 27, a case that addresses similar issues. In the underlying decision, the Connecticut Supreme Court upheld as a public use the city's condemnation of private homes for offices, a hotel and conference centers, private residences, and other projects implementing an economic revitalization plan, all to be developed by a private economic development corporation. 268 Conn. 1, 843 A.2d 500 (2004). The Supreme Court is expected to address the extent to which the concept of "public use" can encompass economic development activities that are implemented by private interests.

William J. Scheiderich is an assistant city attorney for the City of Beaverton. He serves on the Committee on Condemnation Law of the ABA's Section of State and Local Government Law.

William J. Scheiderich

County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

■ METROPOLITAN PLANNING AUTHORITY RULES, SAYS MINNESOTA SUPREME COURT

City of Lake Elmo v. Metropolitan Council, 685 N.W.2d 1 (Minn. 2004), involved a city's challenge to a metropolitan council's authority to adopt a resolution directing the city to conform its comprehensive plan to the council's regional system plans. The Minnesota Court of Appeals determined that the council had authority and affirmed its exercise of that authority. The city sought review by the Minnesota Supreme Court.

In 1967, legislation established a regional council for the Twin Cities. That council was later authorized to adopt a comprehensive development guide, known as the "Regional Blueprint" for the seven-county area, including the Twin Cities. The council was also authorized to adopt comprehensive policy (system) plans for airports, transportation, wastewater treatment, and parks. The system plans must conform to the Regional Blueprint. The legislature further enacted the Metropolitan Land Planning Act (Act) to increase coordination between the council and the local governments within the seven-county region. The rationale for the Act is reminiscent of ORS 197.005 and 197.010 with regard to planning coordination. Under the Act, each local government must periodically prepare or amend its comprehensive plan and submit its product for review and comment by the council and by adjacent governmental units. If the council determines that the local plan "may have a substantial impact on or contain a substantial departure from Metropolitan's system plans," it may, by resolution, require the local government to modify its plan, as it did in this case.

The City of Lake Elmo submitted its plan to the council for review. The plan was oriented toward maintaining the city's rural character. The council required the city to make some modifications to the plan so as to accommodate its share of urban growth. The city objected and the council set a hearing before an administrative law judge, as provided by state law. The judge decided that the city's plan may have a substantial impact on or contain a substantial departure from the metropolitan council's system plans and that the council had the authority in that event to require the city to conform its plan as provided by the proposed modifications. The council adopted the administrative law judge's proposed order.

The council required the city to accommodate up to 9,350 sewerer households of three units per acre by the year 2040. The city currently has 2,350 households and 7,000 residents. The city opposed this change of density, which it believed would change its rural character, and argued that the council did not have the power to impose density levels. The Minnesota Supreme Court determined that state law did give the council that authority because it authorized the Council to guide "the orderly and economical development, public and private, of the Metropolitan area," in addition to its powers to coordinate and modify local plans to meet system plans. Together, these statutes gave the council the power to project and plan for population growth. The council deter-

mined that the city's plan would result in inefficient utilization of existing and proposed transportation and sewer systems. The resolution at issue, adopted after unsuccessful attempts by the council to persuade the city to change its plan, was found by the court to be within the council's statutory authority and supported by a preponderance of the evidence.

The city also challenged the council's conclusion that its plan had "a substantial impact on or departure from" the council's system plans. The court noted that the Regional Blueprint divided land within the seven-county metropolitan area into three classifications: urban, urban reserve, and permanent rural. Urban areas are those developed or to be developed by the year 2020. Urban reserve areas are to be developed between 2020 and 2040. Permanent rural areas are those that were not to be developed within the foreseeable future. The system plans worked off the urban blueprint.

In this case, the land within the city was to be developed either by 2020 or 2040, and the system plans required transportation and wastewater facilities to be planned within these periods to meet ultimate urban development standards. The council required a 20-acre minimum lot size in urban reserve areas. The city's plan was consistent on the population figures for the year 2020 for the city; however, it allowed urban reserve lands to be divided below the 20-acre minimum lot size, so that the ultimate density of the city as foreseen in the Metropolitan Regional Blueprint could not be realized. The court viewed this city growth scheme as a departure from that of the Regional Blueprint and system plans, particularly in the failure to (1) preserve lands for future development, (2) realize regional growth requirements, and (3) provide a basis for the installation of facilities envisioned by the system plans. The record showed that the city had a growth rate of approximately 16%, while its municipal neighbors had between 33% and 131% during the same period. The court also noted that it would cost regional taxpayers between \$10 million and \$40 million to build the interceptor wastewater system elsewhere in the region and that a similar analysis would apply to transportation facilities. If the city rejected its share of growth indicated in the Regional Blueprint, regional growth would be uncoordinated, disorderly, and uneconomical. The court thus concluded that the council's decision was supported by a preponderance of the evidence.

The court also rejected the city's position that the council lacked authority to require the city to build a sewer line. Although a statute prohibited the council from requiring a city to build a "new sewer system," the statute does not prohibit the council from ordering creation of new lines and participation in existing interceptor sewer projects, especially because the legislature also authorized the council to require local governments to provide for the discharge of its sewage into a regional system. The court concluded that the council had the requisite authority. To do otherwise, said the court, would "cripple" the cost-effective provision of such services. 685 N.W. 2d at 11. The decision of the council and the Minnesota Court of Appeals was thus affirmed.

Oregon's planning program for the Portland metro area is somewhat similar to that of the Twin Cities. To date, no one in Oregon has launched a comparable, direct legal challenge to Metro's planning authority. If and when such a challenge is brought, it is likely that the Oregon appellate courts will be asked to consider the same broad policy statements about the adverse impacts of uncoordinated growth and the need for fiscal efficiency.

Edward J. Sullivan

City of Lake Elmo v. Metro. Council, 685 N.W.2d 1 (Minn. 2004).

■ NEW MEXICO APPELLATE COURT FINDS POSSIBLE CIVIL CLAIMS FOR ABUSE OF PROCESS AND CONSPIRACY AGAINST WAL-MART IN LAND USE CASE

In *Valles v. Silverman*, 84 P.3d 1056 (N.M. Ct. App. 2003), the defendant developer sought approval of a shopping center, including a Wal-Mart. The plaintiffs, opponents of the project, lost at the city council level, but successfully appealed. The defendants then filed a "SLAPP" (strategic litigation against public participation) suit, alleging abuse of process and civil conspiracy. After succeeding in getting the case dismissed, the plaintiffs filed claims for malicious abuse of process and civil conspiracy against the developer, as well as Wal-Mart, even though Wal-Mart had not participated in the SLAPP suit. Wal-Mart moved to dismiss the claims against it because it was not a litigant in the second case and because the allegations did not state a claim. The trial court dismissed the case, and the plaintiffs successfully appealed.

The court noted it recognizes the tort of malicious abuse of process, which involves four elements: (1) the initiation of judicial proceedings by a defendant against a plaintiff, (2) improper acts in the presentation of the claim, (3) a primary motive to accomplish an illegitimate end, and (4) damages. The court ruled that even though Wal-Mart had not been a litigant in the SLAPP suit, it was not precluded from being subject to the malicious abuse of process claim (as opposed to a malicious prosecution claim, which would have required Wal-Mart to be a litigant). The fact that others may have wrongfully initiated and prosecuted claims against the plaintiffs did not mean that those who orchestrated or funded the litigation might not also be liable.

To avoid chilling access to the courts, the tort is construed narrowly. Thus, more is required for active participation than encouragement, advice, or consultation. The pleadings in this case alleged that Wal-Mart funded the litigation, which was sufficient to show that Wal-Mart was the determining factor in the litigation. The court also found other elements of the tort met in the pleadings, *i.e.*, that Wal-Mart knew or should have known that the allegations in the underlying pleadings were false and that the litigation was used for an illegitimate end (to harass and retaliate against the plaintiffs). The court held that the lawsuit could proceed on this claim.

As to the civil conspiracy allegations, the court rejected Wal-Mart's position that the plaintiffs must be able to recover against every conspirator before the court could allow a cause of action against it. The court noted that such a rule would defeat the rationale for the tort, which is to impute liability so as to make conspirators jointly and severally liable for the torts of its members. If Wal-Mart is liable for malicious abuse of process, it may then also be liable for civil conspiracy. The elements of the tort are a conspiracy between two or more conspirators, wrongful acts carried out as a result of the conspiracy, and damages therefrom. Reviewing the complaint, the court found that these elements were sufficiently pled to proceed further. The trial court decision was thus reversed.

While there is a long way between pleading and proof, the New Mexico Court of Appeals found that Wal-Mart's funding of the wrongful SLAPP suit may result in civil liability.

Edward J. Sullivan

Valles v. Silverman, 84 P.3d 1056 (N.M. Ct. App. 2003).

■ **WASHINGTON COURT SAYS SEWER DISTRICTS MAY ASSESS REGULATORY FEES AGAINST UNIMPROVED LOTS FOR MAKING SEWER SERVICE AVAILABLE**

In *Holmes Harbor Sewer District v. Holmes Harbor Home Building, LLC*, 123 Wn. App. 45, 96 P.3d 442 (2004), Division I of the Washington Court of Appeals upheld a charge on unimproved lots as a regulatory fee rather than a tax. Charges were assessed to make sewer service available by a utility local improvement district (ULID), formed to facilitate development in the area, and were calculated based on whether the lot was developed or undeveloped. The plaintiff owned several undeveloped lots that created no sewage, but were assessed utility charges. The plaintiff refused to pay the charges.

There are several points of interest in the *Holmes Harbor* decision, not the least of which is the manner in which the court distinguishes a "tax" from a "regulatory fee" and distinguishes the decision in *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 23 P.2d 477 (2001), in which the Washington Supreme Court invalidated, as a non-uniformly assessed property tax, a standby charge on vacant, undeveloped properties. The *Holmes Harbor* court found that the project of making sewer service available qualified the charge as a regulatory fee notwithstanding system-wide expenditures, allegations of improper expenditures, and of course, the fact that the undeveloped properties were not actually hooked up to the system.

Keith Hirokawa

Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg., LLC, 123 Wn. App. 45, 96 P.3d 442 (2004).

■ **WHEN IS A LAND USE DECISION NOT A LAND USE DECISION? WHEN SOMEONE WANTS TO USE A PARK**

Although Washington State's Land Use Petition Act (LUPA) is the "exclusive means of judicial review of land use decisions," RCW 36.70C.030(1), not every local decision qualifies as a "land use decision" under LUPA. The Court of Appeals affirmed the statutory exclusion of park decisions from LUPA's purview in *Wescot Corp. v. City of Des Moines*, 120 Wn. App. 764, 86 P.3d 320 (2004).

As an alternative to truck transport to deliver fill material during construction of a third runway at Sea-Tac Airport, Wescot Corporation sought to construct a conveyor system across, among other places, a small portion of park property owned by the City of Des Moines. Although Wescot had not obtained permission from the city, it submitted applications for construction of the system. The city refused to process the applications on the ground that its own consent was not evidenced in the applications, and that the city code required signatures of all owners of property subject to the application.

Wescot's LUPA petition was dismissed on the ground that LUPA did not confer jurisdiction on the court to review the decision. LUPA provides for jurisdiction over "land use decisions," which is defined to specifically exclude decisions relating to "applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property." RCW 36.70C.020(1)(a). Notably, Wescot had not applied for a permit to use the park property; Wescot had appealed the city's refusal to review Wescot's substantial development permit and unclassified use applications. Nevertheless, because the city's code in fact required consent of the property owners, the court could not have granted relief to Wescot without ordering the city to approve Wescot's use of the city property, and this would constitute a type of decision specifically excluded from LUPA review.

Keith Hirokawa

Wescot Corp. v. City of Des Moines, 120 Wn. App. 764, 86 P.3d 320 (2004).

■ **FEDERAL CIRCUIT AFFIRMS TAKINGS AWARDS IN "RAILS-TO-TRAILS" CASE**

Toews v. United States, 376 F.3d 1371 (Fed. Cir. 2004), involved California plaintiffs who owned a fee simple interest in property subject to a railroad right of way. The right of way had been abandoned by the railroad and converted into a public trail corridor under the Federal National Trails System Act Amendments of 1983 (Rails-to-Trails Act), Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (codified at 16 U.S.C. § 1247(d)). The plaintiffs filed a complaint in the United States Court of Federal Claims seeking just compensation under the Fifth Amendment for the alleged takings. On cross motions for summary judgment, the trial court granted the plaintiffs' motion and denied that of the defendant federal government, which appealed.

The facts were generally uncontested. In 1891, the plaintiffs' predecessor in interest granted a right of way to a railroad. The right of way had a right of reverter if the land were not used for the railroad. In 1992, service on the right of way terminated and in 1994, the railroad sought to abandon it. The Interstate Commerce Commission granted the request but reserved the land for a trail under the Rails-to-Trails Act. The City of Clovis, California sought to use the land for a pedestrian/bike/transit trail. In 1997, the railroad conveyed its interest to the city under the Act.

The plaintiffs claimed that they could use the right of way for their own purposes when the railroad used it, so long as they did not interfere with the railroad, but this was no longer the case with the city's use, because it was now used by the public and separated from the rest of the plaintiffs' property by a fence. The defendant claimed that the use by the public was within the scope of the easement under California law, and that California courts, rather than the Court of Federal Claims, should decide the property law issues.

The trial court found that the railroad had intended to abandon the subject site for right of way purposes and that the reverter was thus operational. The trial court also concluded that the government could not give to the city what the railroad did not have in the first place. The court specifically rejected the defendant's reading of California law by finding the city trail uses and railroad uses different in both degree and nature. The court found the city's use not to be within the scope of the interest granted the railroad, and, accordingly, found a taking. The parties agreed to the amount of the just compensation and the trial court entered a judgment in favor of the plaintiffs for that amount.

On appeal, the Federal Circuit distinguished two California cases that recognized the exchange of one kind of easement right for another, saying that it appeared that in California "anything goes" and rejected what it termed a "shifting public use doctrine" for easements in California. 376 F.3d at 1377, 1379. The court found the uses different in kind so that an exchange forced by the federal government constituted a taking.

The court rejected the notion that the California courts must decide the property law issues. In the leading case under the Rails-to-Trails Act, *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), the court had decided that this might be the preferred course. Here, however, the court decided to determine the nature of the affected property interests and found that the trial court had not erred. Moreover, the court found that California law did not allow for the easement conversion that occurred here. The present and future use of the property was for pedestrian, bike, and light-rail purposes, which were different from the railroad use originally granted. Moreover, the uses were undertaken by a different party than the railroad.

Presault says the fact that the federal government acts through a state or local agency to put into play a series of events that results in a taking of property does not absolve it of a regulatory taking claim. The trial court decision finding the federal government liable was thus affirmed.

This case involves the consequences of federal action under the Rails-to-Trails Act and follows *Presault*. The conversion of an easement from one use to another if not contemplated by the grant of that easement amounts to a taking for which compensation is required.

Edward J. Sullivan

Toews v. United States, 376 F.3d 1371 (Fed. Cir. 2004).

■ BETWEEN US AND THEM: CONSIDERING THE COMPREHENSIVE PLANS OF BORDERING JURISDICTIONS

In *Chevron U.S.A., Inc. v. Central Puget Sound Growth Management Hearings Board*, 121 Wn. App. 1064, 93 P.3d 880 (2004), Division I of the Washington Court of Appeals reversed the respondent hearings board's determination that two comprehensive plans contemplating annexation of the same area were inconsistent.

The *Chevron* decision concerns Point Wells, an unincorporated area of land between the City of Shoreline in King County and the Town of Woodway in Snohomish County. Both municipalities adopted comprehensive plan policies designating Point Wells as a "potential annexation area" (PAA). Shoreline is subject to King County county-wide planning policies, which provide that PAAs "shall not overlap" and that each PAA "shall be specific to each city."

The Growth Management Act (GMA), Chapter 36.70C RCW, specifically requires that "the comprehensive plan of each county or city . . . shall be coordinated with, and consistent with, the comprehensive plans . . . of other counties or cities with which the county or city has, in part, common borders or related regional issues." RCW § 36.70A.100. Woodway conceded that its PAA designation of Point Wells was inconsistent with that of Shoreline, but argued to the board that Shoreline had created the inconsistency because Shoreline was aware of Woodway's annexation interest in the area. The board found that Woodway's PAA designation "created the inconsistency" and ordered Woodway to repeal or revise its PAA policy regarding Point Wells.

The court did not reverse the board's findings of fact, which were supported by the record. Neither did the court reverse the board's construction of the term "consistency" to mean that "provisions are compatible with each other—that they fit together properly. In other words, one provision may not thwart another." Rather, the court applied the board's definition of "consistency" and held that the overlapping PAA designations were not inconsistent because they do not thwart one another. Noting that the King County policy against overlapping PAAs is not binding on cities and towns in Snohomish County, the court ruled that logic precluded the board's decision:

[T]here is no logical reason to conclude that two municipalities may not identify the same area of land for potential annexation simply because one or the

other has already done so. In other words, there is no reason in logic why land that could potentially be annexed by Shoreline could not also be potentially annexed by Woodway.

93 P3d at 883.

Undoubtedly, the court is correct in its own logic. However, the court leaves us guessing as to what the legislature could have intended by requiring that such comprehensive plans be “coordinated with, and consistent with” one another. King County’s comprehensive plan policy against overlapping PAAs has been undermined.

The court also ruled on Chevron’s claim that notice of Woodway’s comprehensive plan amendments was defective. Chevron is the sole owner of Point Wells, and argued that it was entitled to individualized notice of the comprehensive plan amendment, because the amendment dealt exclusively with Chevron’s property. Chevron cited *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990), in which the Ninth Circuit held that individualized notice was required for a comprehensive plan amendment that redesignated the owner’s property and significantly changed the property values.

The court held that individualized notice was not required under either the public participation goals or the requirement that notice be “reasonably calculated” to apprise affected owners of the action. More importantly, using the same logic as above, the court refused to find injury, holding that the potential nature of the PAA designation did not prejudice Chevron’s rights. As noted by the court, as the sole owner, Chevron could unilaterally prohibit Woodway’s annexation of the property.

Keith Hirokawa

Chevron U.S.A., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 121 Wn. App. 1064, 93 P3d 880 (2004).

Columbia River Gorge Commission

■ LOTS CREATED THROUGH PRIOR GOVERNMENTAL APPROVAL PRESUMED TO BE LEGALLY CREATED FOR SUBSEQUENT DEVELOPMENT APPLICATION, SAYS GORGE COMMISSION

In *Bacus v. Skamania County*, CRGC No. COA-S-04-01 (Aug. 10, 2004), the Columbia River Gorge Commission held that once a parcel of land has been created through a governmental approval process, that parcel is presumed to have been legally created, and that Skamania County was thus not required to review the substantive correctness of a prior short plat in reviewing a subsequent development application on the subject parcel. The Gorge Commission also found that

any procedural errors that may have occurred in the application process did not prejudice the rights of the appellants. However, the Commission ultimately determined that the county had erred in approving the use of highway demolition spoils as fill for the applicant’s driveway, and remanded the case to the county for reevaluation in light of its decision.

The Columbia River Gorge Commission is a bistate agency that administers the land use rules for the Columbia River Gorge National Scenic Area, a 300,000-acre region encompassing lands in Hood River, Multnomah, and Wasco counties in the state of Oregon, and Klickitat, Skamania, and Clark counties in the state of Washington. Congress created the National Scenic Area in 1986 to protect the scenic, cultural, recreational, and natural resources of the Columbia River Gorge, and to protect the economy of the area by encouraging growth to occur in urban areas and allowing economic development consistent with resource protection. See generally *Columbia River Gorge National Scenic Area Act*, 16 U.S.C. §§ 544–544p. The Gorge Commission is the appeals board for final county land use decisions in the Scenic Area. *Bacus* was the Gorge Commission’s first quasi-judicial decision in more than two years.

This case involved a development application for approval of a single-family dwelling on a parcel of land created by a prior short plat. Appellants Joseph and Sandra Bacus argued that the county had failed to consider whether the parcel was legally created, an approval criterion for allowing a single-family dwelling under Skamania County’s scenic area ordinance. Skamania County responded that the subject parcel was legally created because it was created by a short plat that was not appealed and thus became final.

The Gorge Commission agreed that the legality of a parcel must be evaluated in the approval process. Distinguishing between parcels created through a prior governmental approval and parcels created without governmental approval at a time when such approval was required, the Gorge Commission found that where, as here, a lot was created through a governmental approval, it is presumed that the lot was legally created. Thus, Skamania County was not required to explore the substantive correctness of the short plat creating the subject parcel. Although the Gorge Commission is not bound by state law, it noted that its decision is consistent with *McKay Creek Valley Association v. Washington County*, 118 Or App 543, 549, 848 P2d 624 (1993), in which the Oregon Court of Appeals upheld a LUBA decision finding that the existence of prior governmental approvals could be reexplored in connection with subsequent applications, while the substantive correctness of those decisions could not be.

The Commission further addressed several procedural arguments raised by the appellants. The Commission consolidated these issues into three broad categories: (1) whether the de novo hearing was adequate, (2) whether Skamania County had committed procedural errors, and (3) whether Skamania County should be defending its decision when the applicant had stated that he did not intend to build the approved dwelling.

The appellants argued that they had been denied an

opportunity for a de novo hearing because the Skamania County Board of Adjustment had not allowed them to present all of their legal arguments. The appellants based this assertion on two statements made by board members: first, that “it is not the Board’s job to decide the legalities,” and second, that the appellants must provide “extremely convincing evidence” to overturn the planning director’s decision. Skamania County did not dispute that the statements had been made, but argued that they did not constitute procedural error. Though finding that both statements were technically incorrect, the Commission held that the statements were not procedural error. The Commission noted that the board had in fact decided the legal issue presented (whether the subject parcel was legally created), and that the board’s final written order had not actually imposed a burden on the appellants to produce “extremely convincing evidence.”

The appellants argued that the county erred in issuing a notice of development review prior to receiving a complete application. Skamania County initially sent notice of the development application without first obtaining the required grading plan. However, after public comment revealed this error, the county required the applicant to submit a grading plan, after which the county sent a second notice of development review. Noting that the only missing information in the grading plan was the five-foot contour lines, the Gorge Commission found that the record demonstrated that Skamania County had reasonably believed that the grading plan was complete when it sent public notice of the development application the second time, and hence, no procedural error was committed.

Skamania County also sent notice of the development application without first obtaining the required exterior color sample(s). The applicant provided a color sample at the board of adjustment hearing. Though notice of the application should not have been sent until the applicant submitted a color sample, the Gorge Commission found that the appellants were not prejudiced, because the record revealed that they had not attempted to view the color sample prior to submitting comment, and no assignment of error was raised that the color chosen was inappropriate.

The appellants also challenged Skamania County’s failure to consult with the Washington Department of Fish and Wildlife (WDFW). Skamania County’s scenic area ordinance requires that proposed development within 1000 feet of a sensitive wildlife site must be reviewed by WDFW. “Sensitive wildlife site” is partially defined in the county’s scenic area ordinance as “sites that are used by species that are . . . listed as endangered or threatened pursuant to federal or endangered species acts.” The appellants argued that formal consultation with WDFW was required because the proposed development was within 1000 feet of the Columbia River, which contains sensitive wildlife resources. Skamania County responded that it was not required to consult because the resource inventory maps did not show a wildlife site within 1000 feet. The county also responded that even though it was not required to, it had discussed the application with WDFW.

The Gorge Commission agreed with the appellants that

Skamania County was required to consult with WDFW. Citing the definition of “sensitive wildlife site,” the Commission emphasized that these sites are not confined to the inventory maps, and that the definition recognizes that existing sites may expand, contract, or become totally inactive, and that new sites may become active. Because the development site was located within 1000 feet of the Columbia River, which is used by several species that are listed as threatened or endangered, the Commission found that Skamania County should have consulted with WDFW. However, the Commission held that Skamania County’s informal discussion with WDFW, combined with WDFW not expressing any concern about the application, was sufficient.

The appellants also challenged Skamania County’s standing, claiming that the county had exceeded its jurisdiction by defending its decision even after the applicant had stated that he no longer planned to construct the approved dwelling. The appellants maintained that this removed any case or controversy. The Gorge Commission found that the county had not erred in defending the appeal, because land use approvals for dwellings typically run with the land and are transferable. Thus, while the applicant may not have had any intention to construct the approved dwelling, he could market the property as approved for construction and sell it to someone who would construct a residence.

Finally, the Gorge Commission addressed the question of whether highway demolition spoils that had been placed on the property by the Washington Department of Transportation could be used to develop a driveway. The appellants argued that the spoils did not meet the definition of “fill” under the scenic area ordinance, which states that fill “means the placement, deposition, or stockpiling of sand, sediment or other earth materials to create new uplands or create an elevation above the existing surface.” Skamania County maintained that neither the applicant nor the county staff had stated that the highway demolition spoils would be used.

The Gorge Commission disagreed with the county’s contention, finding that the application did reference plans to make use of the spoils. The Commission held that because the spoils contained large pieces of asphalt, they could not be used as fill in developing the site. The Commission remanded the case to Skamania County for a reevaluation of the development application, with instructions to specifically disallow the use of the highway demolition spoils.

Lisa Knight Davies

Bacus v. Skamania County, CRGC No. COA-S-04-01 (Aug. 10, 2004).

Oregon State Bar
Section on Real Estate and Land Use
5200 SW Meadows Road
Lake Oswego, OR 97035-0889

Recycled/Recyclable

Presorted Standard
US Postage
PAID
Portland, OR
Permit #341