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Highlights

Appellate Cases – Takings

■ *OREGON COURT OF APPEALS HOLDS THAT COUNTY LAND USE ORDINANCES ENACTED TO IMPLEMENT COLUMBIA RIVER GORGE COMMISSION MANAGEMENT PLAN FALL WITHIN MEASURE 37'S FEDERAL LAW EXCEPTION*

In *Columbia River Gorge Commission v. Hood River County*, 210 Or App 689, 152 P3d 997 (2007), the Oregon Court of Appeals affirmed the Hood River County Circuit Court's decision that land use ordinances enacted by Wasco, Multnomah, and Hood River counties restricting development of landowners' property in the Columbia River Gorge National Scenic Area (Scenic Area) are land use regulations that must comply with federal law for purposes of Ballot Measure 37's exception to just compensation requirements.

Measure 37, now codified at ORS 197.352, requires payment of just compensation to a property owner if a land use regulation restricts the use of the property, consequently diminishes its value, and is enforced against the property 180 days after the owner makes written demand for compensation to the public entity enacting or enforcing the regulation. ORS 197.352(4). However, the statute's just compensation requirement does not apply "[t]o the extent the land use regulation is required to comply with federal law." ORS 197.352(3)(C).

In 2005, defendants Stephen Struck and Paul Mansur, who each own property in Hood River County within the Scenic Area, filed Measure 37 claims seeking compensation because county land use ordinances enacted to implement the Columbia River Gorge Commission Management Plan (Management Plan) restricted their ability to subdivide and develop their property.

The Columbia River Gorge Commission (Commission) filed a declaratory action against Hood River County, Multnomah County, and Wasco County as well as defendant landowners Struck and Mansur, seeking a declaration that Measure 37 does not apply to property affected by the counties' land use ordinances implementing the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p (Scenic Act) and adopted pursuant to the Management Plan. The Commission alleged that application of Measure 37's just compensation or waiver provisions to local land use ordinances promulgated to comport with the Management Plan would conflict with and violate provisions of the Scenic Act. The state of Oregon and Friends of the Columbia River Gorge intervened and sought summary judgment with respect to the proper construction and application of Measure 37's "federal law" exception. The trial court granted the Commission's motion for summary judgment, and the defendants appealed.

The defendants raised two arguments on appeal. First, they argued that the trial court applied the wrong standard when it granted summary judgment because it failed to draw all reasonable inferences in their favor. The defendants argued that the trial court improperly determined, as a matter of fact, that Congress did not intend the nine standards set out in 16 U.S.C. § 544(d)(1)–(9) of the Scenic Act to be the only standards required to be included in the Management Plan.

The Oregon Court of Appeals found that the defendants' position rested on an erroneous assumption that judicial determination of legislative intent implicates issues of material fact for purposes of ORCP 47C. Citing *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or 551, 558, 871 P2d 106 (1994), the court explained that there is a distinction between adjudicative or historical facts and legislative facts, and that when a court is determining the meaning of a statute, it is taking judicial notice of legislative facts. The relevant summary judgment record in this case consisted of the various state and federal laws and regulations surrounding the dispute. Thus, the issues were legal, not factual.

Second, the defendants argued that the trial court erred in concluding that the county land use ordinances at issue were "required to comply with federal

law" because the ordinances implement the rules of the Commission, which, defendants asserted, is a state rather than a federal agency. Beginning with an overview of the laws underlying the dispute, the court discussed relevant provisions of the Scenic Act and creation of the Gorge Commission and Management Plan.

Congress created the Scenic Act 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. As part of the Scenic Act, Congress authorized Oregon and Washington to "[e]stablish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission." 16 U.S.C. § 544c(a)(1)(A). The Commission is to carry out its functions in accordance with the interstate agreement and Scenic Act, but is not considered an agency of the United States for the purpose of any federal law. *Id*. The Scenic Act further instructs the Commission to conduct studies, develop land use designations, and then adopt a Management Plan. 16 U.S.C. § 544d(a)–(c).

The Scenic Act specifies that the Management Plan shall include certain provisions as set forth in 16 U.S.C. § 544d(d). The Scenic Act further provides that after the Commission has developed the Management Plan, Hood River, Multnomah, and Wasco counties in Oregon and Clark, Klickitat, and Skamania counties in Washington are to adopt land use ordinances consistent with the Management Plan. 16 U.S.C. § 544e(b)(1). After the counties adopt such ordinances, the Commission makes a determination as to whether or not they comply with the Management Plan. If so, they are transmitted to the Department of Agriculture for approval. 16 U.S.C. § 544f(i). If the counties fail to enact ordinances consistent with the Management Plan, then the Commission enacts ordinances to assure that the use of land is consistent with the Management Plan. 16 U.S.C. § 544f(l). Finally, the Scenic Act authorizes the Commission to initiate civil actions to enforce the Act and provides for state court jurisdiction over such actions. 16 U.S.C. § 544m(b)(1), (6)(B).

In 1987, Oregon and Washington entered into the interstate agreement authorized by the Scenic Act and referred to as the Columbia River Gorge Compact (Compact). The Compact established the Commission and gave it authority to perform all functions and responsibilities in accordance with the Compact and Scenic Act. The Commission completed the Management Plan in the early 1990's, and each of the Oregon counties included in the Scenic Area adopted ordinances consistent with the Management Plan. Those ordinances restricted the subdivision and development of certain properties in the Scenic Area, including properties owned by defendants Struck and Mansur.

Against that backdrop, the Oregon Court of Appeals returned to the construction of Measure 37's "federal law" exception and its proper application in this case. The defendants argued that the Commission was not a federal agency and that the county ordinances were enacted pursuant to the Management Plan, not pursuant to the Scenic Act itself. Thus, the defendants reasoned that the Commission is an agency of the state of Oregon, the Management Plan is not federal law, and the county ordinances enacted pursuant to the Management Plan are therefore not ordinances "required to comply with federal law" under Measure 37. The defendants further asserted that many of the provisions of the Management Plan and county ordinances that mirror those provisions were not specifically prescribed by the Scenic Act. Thus, the defendants concluded that only the nine standards set out in 16 U.S.C. §544d(d) can be said to be required by federal law.

The plaintiffs responded that the interstate compact that created the Commission has the status of federal law, citing *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), wherein the Supreme Court stated that where Congress has authorized the states to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the states' agreement into federal law under the Compact Clause. The plaintiffs thus reasoned that because the Compact is federal law, and the Compact created the Commission that adopted the Management Plan pursuant to which the county ordinances were adopted, the ordinances are "required to comply with federal law."

The court agreed with the plaintiffs, finding that Oregon's compact with Washington establishes a regional agency, the Gorge Commission, to carry out the provisions of the Compact and Scenic Act, and that regional agencies created by interstate compacts are generally recognized to be neither categorically state nor federal in nature, but hybrids. *Murray v. State of Oregon*, 203 Or App 377, 379, 124 P3d 1261 (2005). Further, the court agreed with the plaintiffs that the Compact has the force of federal law because it specifically authorizes the Commission to disapprove county land use ordinances that are inconsistent with the Management Plan and to enact ordinances consistent with the Management Plan should counties fail to do so.

The court also found that the Scenic Act itself clearly mandates that county land use ordinances of the sort at issue in this case must comply with federal law. The court disagreed with the defendants' view that the Scenic Act requires only the nine standards set forth in section 544d(d) in the Management Plan and county ordinances implementing the plan. Thus it disagreed with the defendants' conclusion that the specific restrictions on subdividing parcels of land for residential development in the Scenic Area were not "required to comply with federal law," as that phrase is used in Measure 37. The court stated that this view could not be reconciled with the Scenic Act's comprehensive design and operation. The Scenic Act specifies that the Management Plan must: "(a) be based on the results of a resource inventory to be carried out pursuant to the Act; (b) include land use regulations developed pursuant to the Act; (c) be consistent with the standards established in subsection (d) of this section; and (d) include guidelines for the adoption of land

use ordinances for lands with the scenic area." 16 U.S.C. § 544c(1), (2), (3), (5). In sum, the court found that the Scenic Act is comprehensive land use legislation that requires a degree of detail in the Management Plan and implementing ordinances far transcending the nine standards set out in section 544d(d).

Finally, the Oregon Court of Appeals noted that the Scenic Act provides for a degree of federal oversight that belies the defendants' assertion that the county ordinances in question were not required to comply with federal law. As noted, the Secretary of Agriculture is charged with the responsibility of determining whether the Commission's Management Plan is consistent with the standards and purposes of the Scenic Act. Moreover, the secretary must approve implementing local ordinances to ensure they are consistent with the Management Plan. Thus, the court concluded that the land use ordinances enacted by Wasco, Hood River, and Multnomah counties to implement the Management Plan were "required to comply with federal law" under Measure 37.

Lisa Knight Davies

Columbia River Gorge Commission v. Hood River County, 210 Or App 689, 152 P3d 997 (2007).

■ *MEASURE 37 CLAIMANT HAS A PROPERTY INTEREST IN A WAIVER OF LAND USE REGULATIONS, AND THE OREGON COURT OF APPEALS IS THE PROPER VENUE TO REVIEW THE CONTESTED CASE*

In *Corey v. Department of Land Conservation and Development*, 210 Or App 542, 152 P3d 933 (2007), the owners of a 23-acre parcel in Clackamas County filed a Measure 37 claim seeking nearly five million dollars in compensation for the loss in property value they claimed was caused by certain state regulations that restricted its use. The Department of Land Conservation and Development (DLCD) decided to waive some, but not all, of the land use regulations affecting the property rather than pay compensation. The owners disagreed with DLCD's determination about which land use regulations should be waived and sought judicial review in both the circuit court and the Oregon Court of Appeals, posing to each court the question of who should hear the case.

The Oregon Court of Appeals determined that it had jurisdiction because the Oregon Administrative Procedures Act gives that court jurisdiction over "contested cases," including those state agency matters in which the state constitution or laws require a hearing at which specific parties are entitled to appear and be heard.

The court then went on to say that this particular Measure 37 claim involved "property" rights that cannot be diminished without a hearing. Since no statute requires notice and a hearing and the Oregon Constitution contains no "due process" clause that might be used to require a hearing, the

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court was left to consider whether the federal constitution requires the opportunity for a hearing. Even though a claimant's interest in the waiver is not "property" in the traditional sense, that term does include benefits to which an applicant has a legitimate claim of entitlement. So deprivation of tenure at a public university or denial of welfare benefits may well require some form of hearing, which Oregon law generally requires to be done formally through the contested case process before an administrative law judge.

Because the state had already recognized that there was some property right by accepting the claim and granting a limited waiver, the extent of the right had to be resolved at a hearing at which the specific parties were entitled to appear and be heard. Thus the Oregon Court of Appeals determined that it, rather than the circuit court, has jurisdiction to decide this claim.

Carrie Richter

Corey v. Department of Land Conservation and Development, 210 Or App 542, 152 P3d 933, *recons den*, 212 Or App 536, __ P3d __ (2007

■ *JACKSON COUNTY CIRCUIT COURT REJECTS THE COUNTY'S MEASURE 37 PROVISIONS*

On January 19, 2007, the Jackson County Circuit Court, Honorable Philip Arnold, issued a decision on cross-motions for summary judgment in *Jackson County v. All Electors*, No. 05-2993-E-3(2) (Jan. 19, 2007). The case was filed by the county pursuant to ORS 33.710—a special proceeding allowing a local government to secure a court ruling as to "the regularity and legality" of any ordinance, resolution, or regulation it has adopted. The enactment in question was the county's adoption of an order implementing Ballot Measure 37. At issue were two specific provisions. The first stated that "all relief granted by the Jackson County Board of Commissioners under Measure 37 shall be transferable to subsequent owners of the property." The second directed that county employees issue permits to owners granted county waivers on Measure 37 claims "notwithstanding the failure of such owners or any previous or subsequent owners, to file a claim with the State of Oregon or to obtain relief from the State of Oregon under Measure 37." The county was represented by counsel for Oregonians in Action. Opposition was provided by the Office of the Oregon Attorney General.

The court decided it could rule on transferability without going beyond the text of the measure itself. The key factor was the definition of "owner" as "the present owner of the property." In the court's view, since waiver is granted only to "the person who was the then-present owner at the time the restrictive regulation was enacted as well as the owner on the date when he/she made written demand for compensation," the waiver itself is likewise limited to the present owner of the property. The court specifically rejected the county's assertion that the waiver would "run with the land" and be transferable to subsequent owners: "There is no support for this position of the County in the language of Measure 37." While determining it need not be considered, the court stated that the history of the measure's enactment likewise did not support the county's position on transferability. It reasoned that because there was no mention of subsequent owners in the voter's pamphlet materials or the news reports provided to the court, "it is clear the voters did not intend Measure 37 claims to be transferable."

The court also held invalid the county provision that permits could be issued for land uses pursuant to county approval of Measure 37 claims, even if the state had not waived its applicable regulations. This is an important issue because the state has taken the position that for dates of acquisition from the adoption of the Statewide Goals (January 1975) until county and city comprehensive plans were acknowledged by LCDC (commonly the early 1980's), the Goals apply directly to individual land use applications. Therefore the Goals, particularly Goal 3, may prohibit development even though the county has been required to waive all of its regulations. Citing a number of appellate decisions holding that statutes continue to apply to local land use decisions even after acknowledgement, the court held: "The county does not have the authority to sanction a wholesale disregard for compliance with state statutes that also may govern a particular claimant's application for building permits."

The court declared both sections of the county order "unenforceable and void." It is important to keep in mind, however, that this is only one of many decisions being issued by circuit courts throughout the state. We have yet to hear from the appellate courts, and transferability and other significant questions are still open.

In a recent related decision, *DLCD v. Jackson County*, ____ Or LUBA ____, (Mar. 27, 2007), LUBA reversed the county's approval of a subdivision in a forest zone based on a Measure 37 waiver it had granted, where the Goals applied and no state waiver had been granted. Although the county, after the circuit court decision, "conceded the issue," LUBA specifically held that "nothing in the challenged decision or elsewhere cited to us authorizes the county to approve development that is inconsistent with applicable state laws and regulations, unless and until those state laws and regulations are waived or otherwise rendered without effect under Ballot Measure 37."

Michael Judd

Jackson County v. All Electors, No. 05-2993-E-3(2) (Jan. 19, 2007).

Appellate Cases – Land Use

■ COURT LIMITS FARMERS' LATITUDE IN SALMONID STREAMS

Devotees of the canons of statutory construction—text, context, legislative history, grammar—will salivate over the Oregon Court of Appeals' opinion in a recent fill-removal case, *Bridgeview Vineyards v. State Land Board*, 211 Or App 251, 154 P3d 734 (2007). If the facts are not remarkable, the lengthy pursuit of legislative intent is.

Bridgeview Vineyards removed more than 50 cubic yards of material from and added rip-rap to a stream. Although Oregon Department of State Lands (DSL) denied its request for emergency approval, Bridgeview finished the work. On judicial review of DSL's order of denial, the Josephine County Circuit Court upheld Bridgeview's activities under two exemptions in the fill-removal statute: (1) ORS 196.810(1)(b) applicable to salmonid habitat and exempting activities "customarily associated with agriculture," and (2) ORS 196.905 exempting activities that involve farming and agricultural maintenance. The Oregon Court of Appeals reversed.

The circuit court observed that a plain reading of ORS 196.810(1)(b) conveyed farmers "near limitless" rights to work within state waters. Relying on context, the court of appeals disagreed. Noting the legislative policy to prohibit "unregulated" activity in salmonid habitat, the court doubted that the legislature would enact such a broad exemption.

The court bolstered its reasoning with a lengthy review of the legislative history. As to the specific amendment that spawned the exemption, the court noted an intent to increase restriction. This context further belied the circuit court's construction of a broad agricultural exemption.

Under ORS 196.905 the fill/removal law does not apply to "normal farming and ranching activities . . . on converted wetlands." Applying the "doctrine of the last antecedent," the court of appeals construed this exemption to require the "colocation of the proposed removal or filling activity with the proposed activity that the removal or filling would serve." 211 Or App at 272. In other words, farmers must obtain a permit for fill/removal unless the subject land is a "converted wetland" *and* the activity therein is "normal farming and ranching."

Given the court's reading of ORS 196.810 and 196.905, farmers need to tread more carefully near salmonid streams.

Ty Wyman

Bridgeview Vineyards v. State Land Board, 211 Or App 272, 154 P3d 734 (2007).

Appellate Cases – Real Estate

■ AGGREGATE HAULING NOT ALLOWED IN RESIDENTIAL ZONE

In *City of Mosier v. Hood River Sand, Gravel and Ready-Mix, Inc.*, 206 Or App 292, 136 P3d 1160 (2006), the Oregon Court of Appeals examined whether a city's zoning ordinance legitimately restricted a property owner's right to use an existing road to haul aggregate through a residential zone and whether a city's involvement in prior proceedings with the property owner precluded enforcement of the zoning ordinance. The court held that the zoning ordinance prohibited the road's use for hauling aggregate, the use was not a valid non-conforming use, and the city's involvement in prior proceedings did not bar it from enforcing the zoning ordinance on the grounds of claim and issue preclusion, waiver, estoppel, or laches.

In 1992, the owner of Hood River Sand, Gravel and Ready-Mix, Inc. (HRSG) purchased a parcel including a 28-acre quarry, which had been in use since the 1950s or earlier. The quarry itself was outside the city limits of Mosier, but inside its urban growth boundary. The HRSG quarry was accessed by way of an easement improved with a road on an adjoining property owned by Oregon Department of Transportation (ODOT). The road crossed an area within the Mosier city limits zoned for single family residential use. ODOT used the road for hauling sand and gravel across its property.

In the same year the owner of HRSG acquired the quarry, it applied to Wasco County for a conditional use permit. A joint management agreement between Wasco County and the city delegated responsibility for decisions involving land within the urban growth boundary to the county until the land became part of the city; however, the agreement required the county to obtain recommendations from the city prior to making a decision. The city objected to HRSG's application, but did not object based on the zoning of the haul road. The county granted the conditional use permit, but listed several conditions of approval that HRSG did not satisfy until 1998.

HRSG also sought to renew its operating permit with the Oregon Department of Geology and Mineral Industries (DOGAMI) in 1992. DOGAMI requested the city's input before issuing the permit. The city referred DOGAMI to the county, saying the county was responsible for land use decisions under the joint management agreement, but noted that the city had opposed the conditional use permit ultimately issued by the county. DOGAMI renewed HRSG's permit.

In 1996, the city challenged ODOT's use of the haul road also used by HRSG saying ODOT's use violated the city's zoning ordinance. ODOT contended that the use was a valid nonconforming use. The city, later affirmed by the Land Use Board of Appeals, determined ODOT's use was interrupted by more than a one-year period, and therefore

the exemption for valid nonconforming uses was lost.

The property acquired by the owner of HRSG included a mobile home park in addition to the quarry. In 1997, the owner applied to the city for a partition of the mobile home park and quarry parcels. The city approved the partition, but required a separate access easement burdening the mobile home park parcel for the benefit of the quarry parcel. That access easement, however, included a restriction prohibiting rock hauling or heavy industrial use.

After finally satisfying the conditions of its county conditional use permit, HRSG restarted its mining activities in 1998. Soon thereafter, the city brought an action to enjoin HRSG's use of the haul road, alleging that the use violated the zoning ordinance applicable to the road. At trial, HRSG claimed that its use of the haul road was lawful, either as a permitted use or as a valid nonconforming use, and even if it was not lawful, the city's suit was precluded.

The trial court held that HRSG's use of the haul road violated the zoning ordinance and was not a valid nonconforming use. Additionally, the trial court held the city's suit was not precluded. The trial court permanently enjoined HRSG from using the road to haul aggregate.

On appeal, HRSG argued its use of the haul road was legal. HRSG also contended that, even if the use were not legal, the city was precluded from enforcing the zoning ordinance because of its involvement in the proceedings for the county's conditional use permit, the DOGAMI mining permit, and the 1997 partition.

HRSG's primary argument that its use of the haul road was legal turned on whether the use was allowed outright. HRSG claimed ODOT's ownership of the haul road made it a public road and the city had no right to regulate public roads. The court rejected this argument, finding that the haul road was gated and locked, not open to the public and not dedicated as a public right of way, and therefore was a private road that could be regulated by the city. HRSG also argued that even if the city could regulate the road it had not exercised its right to do so. The court reviewed the applicable zoning ordinance, found that the ordinance prohibited any uses not explicitly allowed, and rejected HRSG's argument.

HRSG further maintained that even if the use were not permitted under the zoning ordinance it was legal as a valid nonconforming use. The city claimed that exemption was lost when HRSG discontinued its use of the road for more than a year. HRSG argued the applicable standard was ORS 215.130, a state statute providing the exemption was not lost unless unused for twelve years. After an extensive review of the state statute, including its legislative history, the court held that the state statute only applied to county ordinances and was inapplicable to the city. HRSG also argued that, even if the appropriate time period were one year, HRSG had not discontinued its use for longer than one year because it was actively seeking permits and engaging in other activities preparing for mining and frequently used the haul road, even if not for hauling aggregate.

Citing *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981), and *Tigard Sand and Gravel, Inc. v. Clackamas County*, 149 Or App 417, 943 P2d 1106, *adh'd to on recons*, 151 Or App 16, 949 P2d 1225 (1997), *rev den*, 327 Or 83 (1998), the court noted that sporadic and intermittent activity was consistent with use as a quarry and would not be construed as discontinuance of a use, but the absence of any rock crushing or quarrying activities coupled with no significant sales would be construed as discontinuance of use. The court held that HRSG's activities were not sufficient to continue the use because no gravel was crushed, removed, stockpiled, or sold during the time HRSG sought to satisfy the county and DOGAMI permit requirements. Additionally, the court noted there was at least a two year gap between any activity related to the permit by HRSG. The court further rejected outright HRSG's claim that ODOT's use of the haul road preserved that use for HRSG.

HRSG further asserted that the city's enforcement was precluded by the city's participation in the county and DOGAMI permit proceedings and by the city's approval of the partition of the mobile home park and quarry parcels. HRSG argued that the doctrines of issue and claim preclusion were applicable. In addition, HRSG claimed waiver, estoppel, and laches. The court rejected all four arguments.

The court dismissed the possibility that the city's enforcement action was precluded by the county or DOGAMI permit proceedings, finding neither the county nor DOGAMI could enforce the city's zoning ordinances on property within the city boundaries. Therefore, the court looked only to the partition proceeding. The court observed that a claim is precluded only when a plaintiff, having prosecuted an action against a defendant to a final judgment, attempts to raise a new claim based on the same factual situation. The court rejected HRSG's argument of claim preclusion because the partition decision did not involve a final judgment, nor was HRSG's use of the haul road an issue in the partition. Further, the court found that the city could not join a zoning enforcement action to the partition approval process.

The court also rejected HRSG's argument for issue preclusion, stating, "Issue preclusion applies only when the issue was essential to the decision in a prior proceeding." 206 Or App at 316. The court found no evidence supporting the claim that the county or DOGAMI considered whether HRSG's use of the haul road was permitted by the city. The court also found no evidence that the legality of HRSG's use of the haul road directed the city's decision in the partition action. The court questioned whether that determination could be litigated in a partition action.

The court held that waiver, estoppel, and laches were also not available as an affirmative defense benefiting HRSG. The court held that none of the city's actions in the permit proceedings or partition demonstrated a relinquishment of a known right, and further, "a local government cannot waive the requirements of the law." 206 Or App at 319. Therefore the city did not waive its right to enforce a lawful zoning

ordinance. Finally, the court held that, when a city brings suit to compel a party to comply with a local ordinance, the city is enforcing a public right protecting a public interest, and laches is not available.

This case illustrates the complexity of maintaining a use in light of a city's opposition. Here HRSG argued many ways to retain the use, and none prevailed.

Kathleen S. Sieler

City of Mosier v. Hood River Sand, Gravel and Ready-Mix, Inc., 206 Or App 292, 136 P3d 1160 (2006).

■ *ORS 105.682 DOES NOT EXTEND IMMUNITY TO LANDOWNERS WHEN PERSONS ARE INJURED CROSSING THEIR LAND TO OBTAIN ACCESS TO OTHER LAND FOR RECREATIONAL PURPOSES*

In *Liberty v. State Department of Transportation*, 342 Or 11, 148 P3d 909 (2006), the Oregon Supreme Court held that ORS 105.682 does not grant immunity to a landowner when persons cross the land to obtain access to other land where those persons will engage in recreational activities. In *Liberty*, the plaintiffs drove along a state highway to a paved turnout along the Wilson River. The plaintiffs parked their cars and proceeded to walk along a path parallel to the road's guardrail to get to a footbridge crossing the river to a riverside beach area. The path was over property owned by the Oregon Department of Transportation (ODOT). The beach area was owned by Willamette Industries and Kenneth Fan Rad, who had opened the beach for public access. After swimming, the plaintiffs began walking to their cars along the same path. While walking along the path, the asphalt crumbled, and plaintiffs slid approximately 40 feet down a steep slope and sustained injuries. *Id.* at 14–15.

> Plaintiffs filed suit to recover damages for their injuries. ODOT sought immunity under ORS 105.682, which states in pertinent part:
>
> [A]n owner of land is not liable in contract or tort for any personal injury, death, or property damage that arises out of the use of the land for recreational purposes…when the owner of land either directly or indirectly permits any person to use the land for recreational purposes . . . . The limitation on liability provided by this section applies if the principal purpose for entry upon the land is for recreational purposes…and is not affected if the injury, death or damage occurs while the person entering land is engaging in activities other than the use of the land for recreational purpose . . . .

In reversing the trial court and the Oregon Court of Appeals, the Oregon Supreme Court looked to the text of the statute. *Id.* at 19. It examined what is meant by "arises out of the use of the land for recreational purposes" by looking to the context of ORS 105.672. *Id.* ORS 105.688(1)(a) grants immunity to a landowner if the land is "adjacent or contiguous to any bodies of water, watercourses, or the ocean shore… ." The court reasoned that since the legislature expressly extended immunity to land adjacent to bodies of water where the injured person was engaged in recreational activities, it suggested that the legislature did not believe that ORS 105.682 would otherwise extend to such land. Likewise, if the legislature had intended immunity to extend to land adjacent or contiguous to land where people went to recreate, the legislature would have expressly said so. *Id.*

The court next looked to ORS 105.672(5), which defines "recreational purposes" as including:

> outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project.

The definition of "recreational purpose" in ORS 105.672 is not an exhaustive list, but rather nonspecific or general, so under the doctrine of *ejusdem generis*, the court construed the statute as referring only to items of the same kind. *Id*. at 20. The basic characteristic of all the activities is that they take place outdoors and that they are recreational in and of themselves. *Id.* at 20–21. In contrast, crossing the land to get to another parcel of land is not an end unto itself, but a means to a different end. Therefore, crossing the land does not fit under the definition of recreational purpose under ORS 105.672. *Id.* at 21.

Because crossing the land to get to another parcel is not expressly listed in the immunity statute, and because it is not a recreational purpose in and of itself, ODOT was not immune from liability under ORS 105.682.

Kimberlee Stafford

Liberty v. State Dept. of Transportation, 342 Or 11, 148 P3d 909 (2006).

Appellate Cases – Outside Jurisdiction

■ *WASHINGTON COURT OF APPEALS FINDS A MEMORANDUM OF UNDERSTANDING A DE FACTO COMPREHENSIVE PLAN AMENDMENT*

In *Alexanderson v. Clark County*, 135 Wash.App. 541, 144 P.3d 1219 (2006), the Washington Appellate Court reviewed the Growth Management Hearings Board's (GMHB) dismissal of an interesting challenge under the Growth Management Act (GMA). *Alexanderson* concerns a challenge to a Memorandum of Understanding (MOU) between

Clark County and the Cowlitz Indian Tribe. The challenge was dismissed on grounds that the GMHB lacked jurisdiction over an MOU. In this opinion, the appellate court reversed and remanded the matter for further proceedings.

The 151-acre property subject of this case was designated as agricultural and industrial urban reserve land in the county's comprehensive plan. The tribe filed an application to the Bureau of Indian Affairs (BIA) to hold the property in trust status for the tribe, which was pending at the time of the appeal. Contingent upon BIA approval, the tribe intended to use the property for commercial gaming purposes.

During the pendency of the BIA application, the tribe and the county entered into an agreement "to comprehensively mitigate impacts of this acquisition as developed," which identified applicable development regulations and included terms for environmental mitigation and development fees. Under the terms of the MOU, the county agreed to extend public water outside of the Urban Growth Boundary (UGA) to the subject land. The tribe agreed that development of the property would be consistent with county codes and certain state laws that applied at the time of development. The MOU arguably indicated some county control over the property, as a BIA approval would have otherwise provided the tribe with a claim of sovereign immunity from state regulations.

The petitioners in this case objected on the basis that the tribe's development would alter the rural nature of the affected areas. The petitioners appealed to the GMHB, alleging that the county violated the environmental review and planning requirements of the GMA and the State Environmental Policy Act (SEPA) by entering into an agreement which authorized development in violation of the county's comprehensive plan. However, the GMA limits the jurisdiction of the GMHB and authorizes GMHB review only over allegations that a comprehensive plan, development regulation, or amendment violates the planning requirements of the GMA. See RCW 36.70A.280(1) and .290. Finding that the MOU was neither a comprehensive plan nor a development regulation, the GMHB dismissed the petition for lack of jurisdiction and the trial court affirmed.

On appeal, the petitioners challenged the trial court's strict reading of GMHB jurisdiction. In this case the petitioners argued that the MOU was a *de facto* amendment to the comprehensive plan because it had the actual effect of requiring the county to act contrary to adopted planning policies. Among other things the county's comprehensive plan allows public water extension to rural areas "*only if* service is provided at a level that will accommodate *only the type of land use* and development density called for" in the comprehensive plan. 144 P.3d at 1222. The parties stipulated that the tribe's proposed uses were inconsistent with the designation as agricultural resource land and industrial urban reserve land. Hence, the MOU, in which the county agreed to supply water to the tribe land upon BIA approval, would require county action that is otherwise not allowed in the comprehensive plan.

The court was willing to look beyond the language of the MOU: the water provision language does not expressly amend the county's comprehensive plan, and so the court looked to the effect of the provision. As a practical matter, the court found that the MOU had the actual effect of a comprehensive plan amendment and that the MOU, in effect, superseded and amended the comprehensive plan: "[t]o hold that the comprehensive plan has not been amended, where what was previously forbidden is now allowed, is to exalt form over function." 144 P.3d at 1223. The board's jurisdictional determination was reversed and the case was remanded for further proceedings.

Notably, the court may have created some confusion in attempting to distinguish the MOU from the development agreement considered in *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 53 P.3d 1028 (Wash. App. 2002). In *City of Burien*, the court held that a challenge to a development agreement was outside the board's jurisdiction, but that the process by which a development agreement amends a comprehensive plan may be challenged to the GMHB. In its discussion of *City of Burien*, the court merely asserted that the MOU conflicted with the comprehensive plan and was not a development agreement—leaving the reader with the important issue of whether the MOU challenge before the GMHB will be limited to GMA process, or if the GMHB's jurisdiction will extend to the substantive *de facto* amendments to a county's comprehensive plan.

Keith Hirokawa

Alexanderson v. Clark County, 135 Wash.App. 541, 144 P.3d 1219 (2006).

■ *WHAT IS THE MEANING OF "DEVELOPED PROPERTY"?*

An *en banc* panel of the Washington Supreme Court recently resolved the question of when a property is "developed." In *Sleasman v. City of Lacey*, 159 Wash.2d 639, 151 P.3d 990 (2007), the city of Lacey attempted to enforce a city regulation requiring permit approval for tree removal on "undeveloped" or "partially developed" property, but presumably not to "developed" property. In defining the term "developed property," the supreme court reversed the appellate and superior court and held that the landowners' "developed" property was not subject to the regulations.

Under Lacey's municipal code, a permit is required for land clearing. The ordinance defines land clearing to include the "direct and indirect removal of trees and/or ground cover from any *undeveloped* or *partially developed* lot, public lands or public right-of-way." 151 P.3d at 992. In this case, the

landowners removed 18 trees from their .2 acre lot, which contains their residence. The city of Lacey initiated a code enforcement action for an alleged violation of the city's tree removal permitting requirement.

The city recognized that the landowners' house comprised "development" to some extent. However, the city argued that property was only "partially developed" when additional improvements of any kind could be allowed. In this case, the city argued that the zoning code allowed the landowners to build additional structures and/or other impervious surfaces on areas of their legal lot.

As an initial matter, the court refused to defer to the city's interpretation of its own ordinance. The court noted that deference is typically provided to an agency's administration and interpretation of its own ordinance, but that such deference is reserved for those interpretations which have become a "matter of agency policy." In this case, the city could only substantiate its interpretation on one or two instances (this being the first), and as such it "was not part of pattern of past enforcement, but a by-product of current litigation." 151 P.3d at 994.

In truth, it is not clear what difference deference would have made. The city's and the appellate court's interpretation of the ordinance was found to be so broad that nearly all property would be included. The court summarized this stating:

> Every house would be at most "partially developed" if it could be added to, altered, or if the owner is allowed to change the property's use--such as to a day care. Because some change can always be made to improvements on property or its use, all lots under this broad reading are only "partially developed."

151 P.3d at 993. The court finally rejected this argument, recognizing that "[i]f the city council intended the ordinance to reach all property, it could have simply required a permit for undeveloped or developed land." *Id.* At 993–94.

The Washington Supreme Court found that the ordinance, which contains undefined and potentially confusing terms, nonetheless clearly and unambiguously did not apply to the landowner's property. The court noted that, according to *Webster's*, "one 'develops' property by converting raw land into an area suitable for building or residential or business purposes." 151 P.3d at 992. In contrast, property qualifies as "partially" developed, where it is "either*** an area where part is raw land that is unsuitable for building or where the area as a whole is not yet finally developed so it is not yet a lawful building site." 151 P.3d at 993.

Joining the opinions of other state courts, the Washington Supreme Court sought to distinguish the term "developed" from "improved"—after land is developed it may then be improved. In this case, the landowners' property is undeniably a lawful building site ready for sale or use.

Keith Hirokawa

Sleasman v. City of Lacey, 159 Wash.2d 639, 151 P.3d 990 (2007).

■ *REGULATIONS INCREASING HOUSING COSTS DON'T NECESSARILY VIOLATE FAIR HOUSING ACT SAYS TENTH CIRCUIT*

Reinhart v. Lincoln County, 482 F.3d 1225 (10th Cir. 2007), involved the plaintiffs' efforts to subdivide land for sale of lots as affordable housing. In response, the defendant county declared a moratorium and changed the plan and zoning for the area from single family residential to either mixed use (in urban areas) and large acre (5-acre lot sizes in rural areas) classifications that the plaintiffs alleged would not allow for affordable housing.

The plaintiffs then filed suit in federal court against the county, the county planning commission and other county officials, claiming violations of the Fair Housing Act (FHA), state law, and the equal protection and takings clauses of the federal Constitution. In particular, the plaintiffs claimed the greater lot size requirements created a disparate impact on low-income families who were protected by the FHA. The defendants moved for summary judgment alleging no statistical support for the disparate impact claim, which was directed to only the county. The plaintiffs countered with affidavits showing most people could not afford a $200,000 house and that the demand for affordable housing was growing.

The trial court granted the defendants' motion for summary judgment, dismissed the federal claims, and refused to exercise jurisdiction over the state law claims. The trial court found that although the new requirements increased the cost of housing, that increase was not limited to those groups affected by the FHA. Therefore, the effect of the new requirements was not the "functional equivalent" of intentional discrimination. On appeal, the plaintiffs challenged only the dismissal of the disparate impact claim.

The Tenth Circuit noted that the FHA makes it unlawful to refuse to sell, rent, or otherwise make available, or deny a dwelling to any person because of race, color, religion, sex, family status, or national origin. A disparate impact claim requires differential treatment of similarly situated persons or groups either intentionally or effectively. The plaintiffs had the burden of proof to establish a prima facie disparate impact claim; if the plaintiffs establish their prima facie case, the burden then shifts to the defendants to show a genuine business need for the challenged practice. The court was not convinced that the plaintiffs showed disparate impacts occurred as a result of the new zoning regulations. Even if the case could be made that higher costs are equivalent to a disparate impact, the plaintiffs could not show that impact on a

group or individuals protected by the FHA. The test used was that the plaintiffs "must provide evidence indicating before-and-after costs of dwellings and the percentages of protected and non-protected persons who will be priced out of the market as a result of the increase." 482 F.3d at 1230–31.

In this case, the plaintiffs showed the percentages of the general population and of the protected groups that could afford new housing and the increased per lot costs from the change in regulations. However, the plaintiffs failed to supply the costs of housing following adoption of the challenged ordinance.

The plaintiffs may have succeeded if they could have shown a disparate impact on protected individuals or groups. For example in *Metropolitan Housing Development Corp. v. Village of Arlington Height*s, 558 F.2d 1283 (7th Cir. 1977), which involved the failure to zone sufficient property to provide federally financed low-cost housing, the case was made that a far greater number of blacks were in low income categories and could qualify for federal subsidies. Thus, the refusal to rezone lands to accommodate federally subsidized housing for lower income people would fall disproportionately on blacks. Having failed to make the necessary showing in this case, the Tenth Circuit affirmed the trial court's grant of summary judgment to defendant.

This case recalls the standard for the FHA as it relates to religion, color, race, ethnicity, and similar characteristics, rather than to low income status. In this Wyoming case, there was no demonstrable relationship between the challenged zoning regulation and a protected group.

Ed Sullivan

Reinhart v. Lincoln County, 482 F.3d 1225 (10th Cir. 2007).

■ *SECOND CIRCUIT PONDERS CIVIL RIGHTS CASE OVER OPEN SPACE RESTRICTION*

O'Mara v. Town of Wappinger, 485 F.3d 693 (2nd Cir. 2007), involved the defendant's open space restrictions imposed in a 1963 subdivision approval, particularly as they applied to a subsequent purchaser at a tax sale. The plaintiffs purchased the property and proposed to build ten houses on the property. However, a dispute arose in 2003 when the plaintiffs applied to build the first house on a parcel identified as open space on the subdivision plat and were refused. The trial court, sitting without a jury, found that the plaintiffs were entitled to damages and a declaratory judgment that they could build the houses because the open space restrictions were not "of record." The plaintiffs purchased the property for value and without actual or constructive notice of the plat restrictions. The trial court found the plaintiffs' substantive due process rights were violated; however, that court dismissed the plaintiffs' fraud and negligence claims. It awarded the plaintiffs their attorney fees because they pled a civil rights claim.

Since there was no challenge to the trial court's factual findings, the Second Circuit proceeded to review the legal conclusions. The appellate court could not determine how or why the trial court applied New York real property law to its analysis. The court found that a zoning regulation amounted to a conveyance of property, which by law would be required through a written instrument. It did not explain why New York statutes regarding the role of local planning agencies in approving subdivisions did not govern. Because there was no case law on the enforceability of open space conditions on subsequent purchasers and that question was dipositive, the court certified that question to the New York Court of Appeals. The Second Circuit noted that some statutes require that land use regulations must be recorded to be enforceable, including rezoning or other conditions of land use approval. The court bolstered its conclusion to certify the question based on an *amicus* brief filed by the Association of Towns of the State of New York, which contended that such conditions were important planning tools and certification would resolve the state law questions in these federal proceedings.

Turning to the plaintiffs' civil rights claims, the court said the plaintiffs failed to demonstrate that they had a property interest to which they were "clearly entitled." A clear entitlement requirement is defeated when the law is uncertain, as it was in this case. The court did not address the substantive due process question of whether the defendant's actions were arbitrary and irrational. The civil rights judgment was reversed and the New York state law claims were certified to the New York Court of Appeals.

This case demonstrates the difficulties of succeeding in a civil rights claim regarding land use or property rights if the underlying law is uncertain. It also illustrates the assumptions of property owners and local governments over the use of plat conditions in New York. In Oregon it is likely that open space restrictions would be shown on the face of the plat and that a lot described on that plat would not otherwise be designated for open space.

Ed Sullivan

O'Mara v. Town of Wappinger, 485 F.3d 693 (2nd Cir. 2007).

■ *SUPREME COURT TO EPA: YOU CAN REGULATE GREENHOUSE GASES IF YOU WANT TO, BUT IF NOT, JUST LET US KNOW WHY*

Massachusetts v. EPA, 127 S.Ct. 1438 (2007), is signifi-

cant because the United States Supreme Court gave attention to "the most pressing environmental problem of our time" and found that the Clean Air Act (CAA) provides at least one tool to combat global warming. At issue was the Environmental Protection Agency's (EPA) denial of a petition for rulemaking. This case clarifies the meaning of section 202 of the CAA, which provides that the EPA Administrator "shall" promulgate emissions standards for new cars for "any air pollutant[s] which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare . . . ."

In 1999 the petitioners called on the EPA to promulgate standards for four greenhouse gases (GHG) emitted by autos (including carbon dioxide) that contribute to climate change. Four years and 50,000 public comments later, the EPA gave two reasons to not regulate GHGs under the CAA: 1) the CAA does not authorize the EPA to issue mandatory regulations to address global climate change; and 2) even if it did, it would neither be "effective or appropriate" for EPA to do so at this time. Five Supreme Court justices disagreed.

The amicus brief of four former EPA Administrators (Browner, Reilly, Costle, and Train) provides the best explanation of why the EPA was wrong to not regulate GHGs under the CAA. Congress already made the policy decision to regulate dangerous pollutants, they said, and the EPA must make scientific determinations about pollutants and act preventatively to minimize the risk of harm to humans and the environment. Non-statutory policy considerations are not an excuse to not regulate, nor is scientific uncertainty. For example, had the latter stopped the EPA from phasing out lead additives in gasoline in the 1970s, ambient airborne lead concentrations in the United States would not have declined 97% between 1976 and 1995, and mean blood lead levels would not have dropped by almost 80%. Other CAA success stories set forth in the brief inspire belief that the CAA could actually help combat global warming. Justice Stevens' opinion for the Court reflects that belief.

On the merits, the Court held that carbon dioxide and other GHGs are "air pollutants" under the CAA and subject to regulation and that EPA's reasons for not regulating GHG emissions were lacking. The CAA's "sweeping definition" of air pollutant was "unambiguous" in including GHGs. 127 S.Ct. at 1460. The EPA's arguments to the contrary were based on assumptions about Congress's actions and inactions concerning GHGs and undue deference to "other administration priorities." Though the EPA had discretion in forming a judgment under section 202, that judgment had to have been supported by scientific data and factual analysis, which was lacking in the EPA's proffered reasons for not regulating. The result: the Court remanded the issue to the EPA to determine that GHGs contribute to climate change and thereby "endanger public health or welfare," or that they do not, or explain why it cannot decide that question. Only if the EPA makes an "endangerment" finding must it promulgate emissions standards, and then it will have wide latitude in setting those standards.

In order to reach the merits of what the former EPA Administrators called "the most significant public health and environmental threat facing EPA, the nation, and the world," the Court had to carve a new channel through the logjam of Article III standing jurisprudence. The Supreme Court has been telling us for decades that the "cases or controversies" clause of Article III requires that at least one litigant show 1) actual or imminent injury that is 2) fairly traceable to defendant's action and is 3) redressible by litigation. The reader can easily imagine the difficulty, if not impossibility, of showing that a particular person will be harmed by global warming and that litigation will remedy that harm. But the Court found "special solicitude" for the state of Massachusetts. 127 S.Ct. at 1455. "States," the Court found, "are not normal litigants for the purposes of invoking federal jurisdiction." Quoting from a 1907 Court opinion, the Court found that in a suit by a state for an injury to it in its capacity as a quasi-sovereign, "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." 127 S.Ct. at 1454.

Buoyed by special quasi-sovereign status, the Court escorted Massachusetts through the three Article III hoops. One, Massachusetts has been and will be injured by the loss of its coastline due to rising seas caused by global warming. Two, because the EPA did not dispute the existence of a causal connection between GHGs and global warming, the EPA's refusal to regulate GHGs contributed to Massachusetts' injury.

The EPA argued that GHG emissions from new vehicles contributed too insignificantly to make EPA responsible under the CAA, but the Court rejected that logic. Accepting the premise that an agency is not obliged to take small incremental steps, when the law clearly requires them (i.e., the Administrator "shall" promulgate regulations), there is no excuse to not take those steps.

> Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop.***They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.***That a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.

549 U.S. at 1457 (citations omitted).

Finally, the Court refused to find that significant increases in GHG emissions from other developing countries ren-

dered domestic GHG regulation moot. The Court found that Massachusetts' injury would be redressed to some degree, albeit very small, by a domestic reduction in GHG emissions "no matter what happens elsewhere." "The risk of catastrophic harm, though remote, is nevertheless real," the Court wrote, "That risk would be reduced to some extent if petitioners received the relief they seek." 127 S.Ct. at 1458.

Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, disagreed. The dissent stated that no matter how big the problem of global warming may be, "[t]his Court's standing jurisprudence simply recognizes that redress of grievances of the sort at issue here is the function of Congress and the Chief Executive, not the federal courts." 127 S.Ct. at 1464. The sanctity of the Court's standing jurisprudence could not be disturbed, even for "the most pressing environmental problem of our time." 127 S.Ct. at 1463. Further, quasi-sovereign status was not a basis to sue the federal government for a harm that was "harmful to humanity at large." In the dissent's view, "[t]he very concept of global warming seems inconsistent with" the "particularized injury" requirement of the Court's standing jurisprudence. In other words, global warming was too big a problem for the federal judiciary. 127 S.Ct. at 1467.

By contrast, the Oregon judicial system is not so constrained by federal Article III standards. When the Oregon Supreme Court recently overruled *Utsey v. Coos County*, the court held that in Oregon, "standing is not a matter of common law but is, instead, conferred by the Legislature." See Nathan Baker, RELU Digest Vol. 29, No. 1, "Oregon Supreme Court Overturns Utsey's 'Practical Effects' Requirement" (reviewing *Kellas v. Department of Corrections*, 341 Or 479 (2006)).

This case undoubtedly will have significant implications for various kinds of federal litigation on environmental topics and others. Motivated states may take advantage of their "special solicitude" to establish standing to take on the federal government to protect their quasi-sovereign interests. Thus, state attorneys general could replace citizen plaintiffs as the primary enforcer of federal laws against the federal government. Ironically, the dissent's intense focus on protecting the "tripartite allocation of power set forth in the Constitution," might have caused the majority to unearth a fourth power—the states.

In conclusion, this opinion is significant because it may embolden states to challenge the federal government more often, but it is frustrating because the four dissenting justices are convinced that Article III standing jurisprudence should have kept the Court from considering the case at all: our federal Constitution did not create a justice system capable of addressing global problems. But in the end, the opinion is rather hollow because the ultimate result was merely a remand to a federal agency to promulgate standards for GHG emissions from new cars, or to make a better excuse not to do so.

Isa Taylor

Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

NOTICES

The Oregon Real Estate and Land Use Digest would like to thank Keith Hirokawa for all of his contributions to the digest over the years. We are sad to see him go, but extend our best wishes to him in his new life as a law professor in Texas.

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