OREGON STATE BAR 1935

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 26, No. 3 • June 2004

Highlights

Appellate Cases—Land Use

THE "SUBSTANTIAL BURDEN" UNDER RLUIPA GETS HEAVIER TO BEAR

In a pair of appellate decisions issued only two weeks apart, the Ninth Circuit Court of Appeals and the Oregon Court of Appeals have both now weighed in on the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 192 Or App 567, 86 P3d 1140 (2004).

In *Morgan Hill*, the court considered whether the City of Morgan Hill violated RLUIPA by denying a rezoning application submitted by San Jose Christian College. The subject property was designated for public facility use. In addition, a PUD overlay designated the property for use as a hospital, making the property the only one in the city that was zoned for hospital use. The city's zoning code limited property within a PUD district to those uses for which the PUD district was specifically designated in the development plan.

The college filed an application seeking a zoning change to allow an educational facility. Upon review for completeness, the city informed the college that its application was incomplete and outlined additional information needed to make the application complete, including details on the number of night classes, sporting events, and the size of the gymnasium. In response to this request, the college presented a "scaled back" version of its initial proposal, explaining that it did not "have a clear enough picture of its future facility to provide the information that the City requested." Meanwhile, the city appointed a task force to determine how to facilitate a medical use on the subject property. Although the city staff argued that the underlying public facility designation would allow a private education facility, the planning commission denied the rezoning application. The college appealed the denial on both free exercise and RLUIPA grounds.

Current free exercise jurisprudence provides that laws that are "neutral" and "generally applicable" need not be justified by a compelling government interest. *Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). However, the First Amendment still bars application of a neutral, generally applicable law to religious practices if the law implicates the free exercise clause in conjunction with another constitutional protection such as freedom of speech. In this type of "hybrid" case, the law or its application must survive strict scrutiny. *Miller v. Reed,* 176 F.3d 1202, 1204 (9th Cir. 1999). The college asserted that it had suffered such a hybrid rights violation. In response, the court found that there was "not even a hint" of evidence that the college was targeted on the basis of religion for varying treatment. 360 F.3d at 1032.

Next, the court found that a successful hybrid claim requires a showing of a likelihood of success on the merits and on the claimed companion right and that the college had failed to assert a colorable claim. The city's ordinance did not disallow any particular type of speech, because all uses may be permitted in a PUD district so long as they are listed in the development plan. Further, there was no evidence that the regulation was not content-neutral or was a "pretext for suppressing expression." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

Finding no violation of the Free Exercise Clause, the court considered whether the city's denial violated RLUIPA. RLUIPA prohibits local governments from imposing a "substantial burden" on "religious exercise" unless the burden is the least restrictive means of satisfying a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1)(A)–(B). RLUIPA's definition of "religious exercise" is extremely broad and, as a result, includes converting property from hospital use to religious educational use. Once the court decided that religious exercise was implicated, it determined that the "ultimate question" was whether the city had "substantially burdened" that religious exercise. 360 F.3d at 1034.

RLUIPA does not define the term "substantial burden." Rather than look to the legislative history, the court turned first to the plain meaning of the terms. "Substantial" is defined as "considerable in quantity" or "significantly great." Thus, for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. Merging the definition of "religious exercise" with the plain meaning of "substantial burden," the court came up with the following rule: "the government is prohibited from imposing or implementing a land use regulation in a manner that imposes a 'significantly great' restriction or onus on 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief' of a person, including a religious assembly or institution unless the burden is the least restrictive means of furthering a compelling governmental interest." 360 F.3d at 1034–35 (quoting 42 U.S.C. §§ 2000cc(a)(1)(A)–(B), 2000cc-5(7)(A)). The college identified the substantial burden as its inability to further its religious mission. The court disagreed, however, finding that the ordinance did not burden the college's religious exercise; rather, it merely required the college to submit a complete application. If a complete application were filed, it was not apparent that the rezoning application would be denied.

The court found this case consistent with a recent Seventh Circuit ruling wherein the court held that "'the costs, procedural requirements, and inherent political aspects' of the permit approval process were 'incidental to any high-density urban land use' and thus '[did] not amount to a substantial burden on religious exercise.'" 360 F.3d at 1035 (alteration in original) (quoting *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 761 (7th Cir. 2003)). As in the *Civil Liberties* case, the city's regulations did not render religious exercise effectively impracticable. There was no evidence that the college was precluded from using other sites within the city. Nor was there evidence that the city would not impose the same requirements on any other entity seeking to build on the subject property. For these reasons, the court held that the college failed to establish that it suffered a substantial burden, and therefore, the city's action did not violate RLUIPA.

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 192 Or App 567, 86 P3d 1140 (2004), the Oregon Court of Appeals considered whether LUBA erred in finding a violation of RLUIPA when the City of West Linn denied a conditional use permit to a Latter-Day Saints Church wishing to build a meetinghouse in a residential neighborhood. The 5.6-acre site was zoned R-10, wherein single-family dwellings are allowed outright but church uses are subject to conditional use approval. One of the applicable conditional use criteria was that the property be sufficiently sized to allow for an aesthetic design that mitigates adverse effects to the surrounding property. The church proposed to divide the subject property to create a 3.85-acre parcel. The meetinghouse and parking lots would occupy 2.02 acres of the parcel, and the remainder would provide open space and a buffer area.

The church submitted a conditional use application. The planning commission and the city council both voted to deny the application on the grounds that no buffer could adequately screen the parking lot from the surrounding residences, a building of the proposed size was not appropriate in a residential zone, local roads were not adequate to serve the proposed meetinghouse, and the meetinghouse would not be compatible with the adjoining residences. Because the church might have obtained approval if the site were larger, the city council found under RLUIPA that the church had not suffered a substantial burden.

The church appealed to LUBA. First, LUBA found that RLUIPA applied because the conditional use criteria required the local government to make an "individualized assessment" of the application. Next, LUBA disagreed with the city council's finding that the denial of the church's application did not impose a substantial burden. According to LUBA, (1) the city's review was based on highly subjective standards, (2) there were no zones in the city that would permit the subject use outright, (3) the record did not demonstrate that larger sites were available or that a new application involving a larger site would be approved, and (4) it was immaterial under RLUIPA that the city would have denied a similar application filed by a nonreligious entity. LUBA also reasoned that less restrictive means were available because the city could have approved the application subject to conditions requiring additional buffering, relocation of parking lots, or expansion of the church property beyond 3.85 acres. Finally, LUBA rejected the city's contention that RLUIPA was unconstitutional. LUBA remanded the decision back to the city to consider whether the application could be approved with suitable conditions.

The city appealed, assigning error to LUBA's conclusions that RLUIPA applied, that the city violated RLUIPA, and that RLUIPA was constitutional. The court easily disposed of the first issue, finding that application of neutral laws of general applicability can constitute an "individualized assessment," especially when they are subjective, rather than numerical or mechanistic, in nature.

Next, the court considered and rejected the city's argument that RLUIPA improperly provides religious entities with "immunity" from land use regulations. RLUIPA provides immunity only so far as it provides partial protection from the imposition of a "substantial burden" on "religious exercise" without first showing that the regulations further a compelling government interest and are narrowly tailored by the least restrictive means. LUBA did not interpret or apply RLUIPA in a way that exempted the church from land use regulations.

Next, the court considered whether LUBA had erred in characterizing the burden imposed on the church as substantial. The city argued that the actual burden imposed on the church was not its inability to construct a church, as LUBA had found, but only the burden of submitting a new application for a project that would comply with the applicable standards. In support of this argument, the city explained that the church members currently are able to attend worship services in an adjoining town and thus, they are not prevented from engaging in religious activities. Further, the church had not demonstrated that its proposed design was the only one that met its religious requirements or that a building of this size was required to further its religious purposes.

The church responded that the denial forces it to refrain from religiously motivated conduct because the church desperately needed a new meetinghouse in the city and there was

no other land available within the city to accommodate its needs. Second, the church argued that filing a new application would be a "Herculean" task that in and of itself would amount to a substantial burden. Third, the denial of the church's application when its existing meetinghouses were overcrowded impaired its ability to divide into smaller congregations as required by church doctrine.

The court began its analysis by determining "the precise nature of the burden imposed by the city." 192 Or App at 587. LUBA had characterized this burden as the impairment of the ability to build a church. The court disagreed, finding nothing in the record to indicate that the application would not have been approved had the same building and parking lot configuration been proposed on a larger property or had the design been modified to suit the subject parcel. Thus, the burden imposed in this case was "the burden of being prevented from implementing the particular design proposal at issue plus, logically, the burden of submitting a new application." *Id.*

In order to decide whether the above-stated burdens were substantial, the court looked to the legislative findings accompanying RLUIPA, which provide that "substantial burden" is the same under RLUIPA as it is under the Religious Freedom and Reformation Act of 1993 (RFRA) and the Free Exercise Clause. To help flesh out the parameters of this term, the court summarized key U.S. Supreme Court holdings interpreting the Free Exercise Clause, RFRA cases, and state and circuit court analyses of RLUIPA.

For the following reasons, the court found that the church had failed to meet its burden of persuasion to establish that the denial had substantially burdened its religious exercise. First, even though the church would benefit from the additional meetinghouse, the record did not reflect that the church members were unable to worship at the current location. There was no evidence that members were being turned away as a result of the overcrowding. Nor was there evidence that the existing location was so distant that it was unreasonable to expect that members would travel to it. Second, the court did not believe that there was any evidence that the city would not approve an application for a smaller or differently configured building to address the buffering issues. There was no evidence that the size or design of the proposed church was dictated by religious belief. Thus, the court stated that it did not "believe that the city's rejection of that proposal was 'coercive' or put[ ] 'substantial pressure on an adherent to modify his [or her] behavior and to violate his [or her] beliefs.'" 192 Or App at 598 (alteration in original) (quoting *Thomas v. Review Bd. of Indiana,* 450 U.S. 707, 717–18 (1981). Third, although the court declined to decide whether repeated denials and reapplications could impose a substantial burden, the denial of the church's first and only application and the resulting need for it to file a new application did not constitute a substantial burden. Finally, the court was unable to discern any "animus toward religion." *Locke v. Davey*, 124 S. Ct. 1307, 1315 (2004).

In conclusion, the court found that "neither the building of a new church (and the concomitant expansion of the church community) nor, in the meantime, the ability of current members to reasonably conveniently engage in worship [had] been rendered 'effectively impracticable.'" 192 Or App

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
Sharon Smith
Edward J. Sullivan

Assistant Editor
Nathan Baker

Contributors

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

at 599. The city's decision did not violate RLUIPA. The court remanded to LUBA with instructions to affirm the city's denial of the application without prejudice to the filing of a new or amended application.

Carrie Richter

San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004).

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 192 Or App 567, 86 P3d 1140 (2004).

■ U.S. DISTRICT COURT ADDRESSES AESTHETIC CONSIDERATIONS IN SITING CELL TOWERS UNDER THE TELECOMMUNICATIONS ACT

In *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251 (D. Or. 2004), Voice Stream PCS challenged the City of Hillsboro's denial of its application for a conditional use permit to construct a cellular tower on residentially zoned land. The U.S. District Court (J. Mosman) affirmed the city's decision denying the cellular tower. The court found that the city's denial was based on substantial evidence, did not effectively prohibit wireless services, and did not discriminate among wireless service providers. This decision is the first of its kind to be issued by the District of Oregon.

In July 2002, Voice Stream applied for a conditional use permit to construct and maintain a 120-foot cell tower and equipment on property owned by the Golden Road Baptist Church. The property is zoned R-7 Single Family Residential. In Hillsboro, cell towers are allowed as conditional uses in R-7 zones.

Conditional uses can only be approved by the Hillsboro Planning and Zoning Board and only if the uses meet the requirements of sections 78 to 83 of the Hillsboro Zoning Ordinance (HZO). HZO section 83(9) imposes general standards, all of which must be met if the proposed conditional use is to be approved. Failure to meet one or more of the criteria is sufficient to support denial of the proposed use.

The planning and zoning board held public hearings on the application in September and October 2002. After taking testimony, the board voted to deny the application. Based on criteria from HZO Section 83(9), the board determined that granting the application was not in the public interest (HZO § 83(9)(b)), the property was not reasonably suited for the use requested (HZO § 83(9)(c)), the use would have a substantial adverse effect on the rights of the owners of surrounding properties through property devaluation and negative aesthetic impacts (HZO § 83(9)(d)), and the proposed use did not conform with the goals and policies of the Hillsboro Comprehensive Plan (HZO § 83(9)(e)).

Voice Stream appealed the denial to the city council, which held hearings on the appeal. Relying on the criteria provided in the Hillsboro Zoning Ordinance, the city council voted to uphold the zoning board's denial, albeit on more narrow grounds. In its decision, the city council relied on only two criteria: HZO sections 83(9)(b) and (d). The city council found that the proposed tower failed to satisfy those sections for the following reasons:

- the tower would create significant visual blight; the tower was incompatible with neighborhood character;
- other cellular facilities in the city were not located as close to established residences;
- the tower would merely improve service coverage and was not needed to fill a service gap;
- the proposed installation of future facilities on the tower would not be subject to conditional approval, and the city would not have the ability to control the design of the later facilities;
- more than 50 neighbors had expressed opposition to the tower; and
- the trees relied on for screening were outside of the city's control and could be removed.

Voice Stream appealed the city council's decision to the federal District Court of Oregon. Because this case involved the Telecommunications Act of 1996, LUBA shares concurrent jurisdiction with the District Court of Oregon. Voice Stream alleged that the city violated the Telecommunications Act because the city's decision was not based on substantial evidence; the denial was an effective prohibition on cell towers in residential areas (47 U.S.C. § 332(c)(7)(B)(i)(II)); and in denying the application, the city had unreasonably discriminated against Voice Stream (*Id.* § 332(c)(7)(B)(i)(I)). The city disputed each of these claims.

The court first addressed Voice Stream's claim that the city's denial was not supported by substantial evidence. Noting that the standard allows for the possibility that two different conclusions could have been reached, the court held that the substantial evidence test was merely a procedural safeguard to confirm that a city's decision is consistent with each of its zoning requirements.

The city argued that the city council had properly interpreted its own zoning ordinance. The court agreed that the city's interpretation of "public interest" under HZO 83(9)(b) involved the consideration of public health, safety, and welfare of the community. The court also endorsed the city's interpretation of "substantial adverse effects" under HZO 83(9)(d) as not necessarily requiring a showing of property devaluation by surrounding property owners. The court agreed with other appellate courts in concluding that aesthetic judgments were valid grounds for denying cell towers under the Telecommunications Act.

The court concluded that the city had the power to deny Voice Stream's application *solely* on the grounds of aesthetic considerations, and that the Telecommunications Act simply requires the court to safeguard against a decision that is irrational or without substance. While the court agreed with Voice Stream that "general, unsubstantiated aesthetic concerns" have very little evidentiary value, it appeared to be swayed by the city's legal argument that the record included sufficient evidence specific to this application to justify the city's decision. The court held that the city was entitled to reject the application on public interest grounds where the aesthetic impact outweighed the benefit of merely improving what Voice Stream admitted was already existing coverage.

Voice Stream also argued that the denial of its application was an effective prohibition because it was based on general

aesthetic concerns and such concerns would never allow a tower to pass the city's review. The city prevailed on this argument. After preliminarily stating that both blanket bans and singular denials could constitute effective prohibitions, the court held that in order to establish an effective prohibition, a wireless service provider must first show a significant service gap. The city pointed out to the court that because Voice Stream was merely trying to improve already existing service, it was incapable of claiming an effective service prohibition. The city also pointed out that Voice Stream had proposed only one plan for improving its service, and had not considered any other preliminary plans. The court correspondingly found that Voice Stream did not satisfy its burden of exploring other potential solutions to the purported problem.

Voice Stream's last claim was that the denial was unlawful discrimination under the Telecommunications Act. Voice Stream charged that the city had previously granted conditional use permits in residential areas and had denied its application simply because it was located in an affluent area. In response, the city distinguished the physical characteristics of the other towers in residential zones.

The court held that the Telecommunications Act allows for some discrimination if it is supported by evidence that the discrimination is reasonable. Based on its conclusion that the city's basis for denying the application was reasonable, the court dismissed Voice Stream's final claim.

Joan Kelsey

Voice Stream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251 (D. Or. 2004).

Appellate Cases—Real Estate

■ COURT OF APPEALS CONSTRUES EXCEPTION TO HOMESTEAD EXEMPTION

In *Maresh and Maresh*, 190 Or App 228, 78 P3d 157 (2003), the Oregon Court of Appeals upheld a trial court order granting a sheriff's sale of the parties' former residence after the appellant failed to pay a judgment lien entered as a part of the property division portion of a judgment dissolving the parties' marriage. The decision turned on the court of appeals' interpretation of the exception to the homestead exemption in ORS 23.240(1).

Paragraph 18 of the judgment dissolving the marriage awarded the marital residence and real property to appellant "free of any interest of Respondent." However, the judgment further provided that respondent "was awarded a judgment lien against the property awarded to [appellant] in the amount of $25,700 to be paid as set forth in paragraph 14 above." Specifically, paragraph 14 of the judgment provided,

> 14. PROPERTY DIVISION JUDGMENT.
>
> (a) Respondent is awarded a judgment against [appellant] in the amount of $25,700 on account of property division.
>
> (b) This judgment shall be a lien on the real property awarded to [appellant] in Paragraph 17 herein.
>
> (c) This judgment shall be secured by a note and trust deed, which shall be executed by [appellant].
>
> (d) This judgment shall not bear interest if paid on time. If this judgment is not paid on time, then this judgment shall bear simple interest at the rate of 9% per year until paid in full.
>
> (e) This judgment shall be payable as follows:
>
> (1) $5,000 to be due and payable on February 23, 2001.
>
> (2) $20,700 to be due and payable February 23, 2002.

The appellant paid a total of $1,652.50 on the judgment. On April 3, 2002, the respondent filed a petition for sale of the real property to satisfy the remaining balance owed on the judgment. The trial court rejected the appellant's argument that the real property, including a manufactured home that the respondent conceded was the appellant's residence, was exempt under ORS 23.240 from execution.

The question for the court of appeals was whether exception language in the homestead exemption precluded its application. The court used the methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993), to answer that question. It looked to both the text of the exemption, ORS 23.240(1), and the context, including ORS Chapter 107, the statutory source of a trial court's authority to craft a dissolution judgment.

ORS 23.240(1) provides, in part,

> A homestead shall be exempt from sale on execution, from the lien of every judgment and from liability in any form for the debts of the owner to the amount in value of $25,000, except as otherwise provided by law . . . . The homestead must be the actual abode of and occupied by the owner, or the owner's spouse, parent or child . . . .

(Emphasis added.)

The appellant asserted that any levy of execution on the judgment awarded to respondent was subject to the $25,000 exemption, because none of the statutes mentioning exceptions to the exemption, *e.g.*, ORS 23.242(2) (exception for child support judgments), ORS 23.250 (limiting the quantity of land subject to the exemption), and ORS 23.260 (excepting construction liens, purchase money liens, and mortgages), mentions property division judgments. The respondent countered that such a construction of ORS 23.240(1) would defeat the purpose of the dissolution judgment, which was to balance the division of the parties' property, and the court of appeals agreed.

The court of appeals' conclusion turned on the construction of the phrase "except as otherwise provided by law" in ORS 23.240(1). While the appellant argued that nothing in ORS Chapter 107 empowered a court to "thwart . . . the statutory right implemented via ORS 23.240," the court disagreed. ORS 107.105(1)(f) states, in part, that a dissolution judgment may provide

> [f]or the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all circumstances. . . . Subsequent to the filing of a petition for annulment or dissolution of marriage or sepa-

ration, the rights of the parties in the marital assets shall be considered a species of coownership, and a transfer of marital assets under a decree of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property."

According to the court of appeals, the first sentence authorized the trial court to award the parties' real property to one of them while creating an "adjusting money lien" against the property in favor of the other. 190 Or App at 233. The court concluded that the trial court's duty to make the division of property "just and proper in all the circumstances" depended upon this authority to make financial adjustments "without the unbalancing effect that would result from later application of the homestead exemption." *Id.* This was especially true in this case, because the parties owned only one parcel of real property, thus creating the likelihood that one spouse would ultimately receive that property free of any ownership interest of the other.

The language in ORS 107.105(1)(f) describing the division of the parties' real property as a "partitioning of jointly owned property" reinforced the court of appeals' conclusion that the homestead exemption did not apply. That language implements the purpose of the equitable division of property: a complete severance of common title so that each spouse's portion is free from claims of the other. *See Engle and Engle*, 293 Or 207, 217, 646 P2d 20 (1982); ORS 107.105(6) (providing for supplemental proceedings after dissolution judgment for partition of undivided interests in property).

The court of appeals added that a primary consideration for a court in a partition proceeding when determining whether to permit an owner to acquire an interest of another owner is preventing the diminution in value of the transferor's interest in the property. The objective of properly partitioning the parties' property would be frustrated if the judgment lien was subject to the homestead exemption.

Accordingly, the court concluded that the "except as otherwise provided by law" language in ORS 23.240(1) allowed the trial court to craft a division of marital property that was not subject to the homestead exemption, and affirmed the trial court's decision.

Susan N. Safford

Maresh and Maresh, *190 Or App 228, 78 P3d 157 (2003).*

■ WHO BREACHED FIRST? A LAND SALE CONTRACT CUTS BOTH WAYS

The Oregon Court of Appeals' recent decision in *Kim v. Park*, 192 Or App 365, 86 P3d 63 (2004), makes it clear that the terms of a land sale contract cut both ways. Vendors of a land sale contract must live up to their bargain, or they may lose judicial remedies for nonpayment by vendees. The risks of litigation are increased when both parties are in breach and it is unclear either who breached first or whether the breach is material. Materiality in *Kim v. Park* turned on whether the breach ultimately prevented the parties' intended use of the subject property.

Kim v. Park involved a land sale contract for an apartment complex. The terms of the contract required the plaintiff vendor to repair plumbing deficiencies in the apartments within eight months of sale, with cooperation from the defendant vendees. After 12 months had passed, the plaintiff finally sent workers over to cut holes and expose the bad plumbing in the apartments. Seven weeks later, the plaintiff's plumbers arrived unannounced to begin repairs. The defendants ordered the plumbers to leave and refused to allow the plaintiff to send other plumbers to the property thereafter. The defendants then stopped all contract payments, whereupon the plaintiff filed an action for strict foreclosure.

The defendants asserted as an affirmative defense that the plaintiff's failure to perform was a material breach excusing the defendants' obligation to make further payments. The defendants also counterclaimed for damages. The counterclaim was submitted to a jury, which awarded damages to the defendants. The trial court tried the foreclosure claim. The trial court found that the plaintiff's breach was not material, and therefore awarded strict foreclosure. The defendants appealed.

Referencing well-settled principles of contract law, the appeals court held that an unjustified material breach of a land sale contract will prevent a party from obtaining strict foreclosure, and will excuse the other party's obligation to perform. The court reviewed the record *de novo* and found that the defendants' refusal to allow the extensive disruption to their tenants by the plaintiff's plumbers was reasonable. The plaintiff had no valid excuse for his failure to perform under the contract. The evidence showed that the defendants had lost some tenants during this time period and that city fines continued to accrue. The court held that the plaintiff's failure to perform prevented the defendants from using the building as intended under the parties' agreement, and that this failure constituted a material breach of contract as a matter of law.

Once the plaintiff committed this material breach, the defendants had two alternative remedies: they could have sought rescission and restitution of monies paid, or they could have affirmed the contract and sued for damages resulting from the breach. The plaintiff's failure to repair the plumbing temporarily suspended the defendants' obligation to pay, until such time as the plaintiff had either performed, excused, or cured his nonperformance. The defendants' obligation to pay could have been discharged entirely had they sought and obtained a rescission.

By filing the counterclaim for damages, however, the defendants chose to affirm the contract. Because they obtained an award for the damages resulting from the plaintiff's material breach, the breach will be cured, and the defendants' obligations to make payments will resume once the money judgment is satisfied. Until that time, there was no obligation for the defendants to pay, and no remedy available to the plaintiff in strict foreclosure. The trial court's award of strict foreclosure was therefore reversed, attorney fees were awarded to the defendants under the contractual attorney fee provision, and the case was remanded to determine an appropriate amount of fees.

Christopher Schwindt

Kim v. Park, 192 Or App 365, 86 P3d 63 (2004).

Appellate Cases—Landlord/Tenant

■ USE OF "TESTERS" TO ENFORCE FAIR HOUSING LAWS ALLOWED

In *Smith v. Pacific Properties & Development Corp.*, 358 F3d 1097 (9th Cir. 2004), the Ninth Circuit held that a disabled person seeking to enforce rights under the Fair Housing Amendments Act (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (1988)), is not required to have an interest in actually purchasing or renting a particular property or dwelling in order to allege discriminatory violation.

In late 1997, Robert Smith, a wheelchair-bound polio victim, began investigating conditions at housing developments in Clark County, Nevada, as part of a program to test compliance with federal fair housing laws. The tester program was organized and implemented by the Disabled Rights Action Committee (DRAC), a non-profit organization promoting the rights of disabled persons in Utah and Nevada. Smith discovered discriminatory design and construction defects in four properties designed and built by defendant Pacific Properties, including inaccessible interior doorways, pathways, and thermostats.

Plaintiffs Smith and DRAC filed suit, claiming that conditions in the Pacific Properties developments violated a provision of the FHAA that prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—[*inter alios*] that person." 42 U.S.C. § 3604(f)(2). The district court granted the defendant's motion to dismiss for failure to state a claim, finding that neither plaintiff had standing to assert rights under the FHAA. During this time, Smith passed away. DRAC subsequently sought reconsideration of the dismissal and leave of the court to file an amended complaint to establish DRAC's own representational and organizational standing. The district court denied DRAC's motions without specifying its rationale, and DRAC appealed.

DRAC claimed two bases for its standing. First, DRAC claimed standing as the representative of one of its members. The district court found that DRAC lacked organizational standing because none of DRAC's members, including Smith, had any interest in actually purchasing or renting property from Pacific Properties, and therefore had no standing under 42 U.S.C. § 3604(f)(2).

The court of appeals disagreed, noting that testers have played a long and important role in the enforcement of fair housing laws. The court found that the language of section 3604(f)(2) was similar to language in section 3604(d), which had been interpreted by the United States Supreme Court to give testers standing to sue. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The Ninth Circuit stated that it "refuse[d] to accept the notion that Congress could somehow have intended different standing requirements for identical provisions." 358 F.3d at 1103. The Ninth Circuit believed that interpreting the statute to deny standing under these circumstances would undermine the specific intent of the FHAA to prevent disabled individuals from feeling as if they were second-class citizens. The Ninth Circuit held that the district court's decision to deny reconsideration or leave to amend was an abuse of discretion.

The Ninth Circuit also agreed with DRAC that it had organizational standing to assert a claim under FHAA. In *Fair Housing of Marin v. Combs*, 285 F3d 899 (9th Cir. 2002), *cert. denied*, 537 U.S. 1018 (2002), the Ninth Circuit held that an organization has standing if it can demonstrate frustration of its organizational mission and diversion of its resources to combat the particular housing discrimination in question. In this case, DRAC alleged that the defendant's violations of the FHAA constituted frustration of its stated mission to eliminate discrimination against disabled persons. DRAC maintained that it had diverted resources from other public awareness efforts in order to monitor the defendant's violations in this case and educate the public regarding the issues. The trial court had dismissed DRAC's complaint without leave to amend for failure to state a claim.

The Ninth Circuit found that the decision to deny leave to amend was an abuse of discretion because plaintiff DRAC was willing and able to establish the diversion of resources with greater specificity. The Ninth Circuit noted that leave to amend should be granted unless the pleading could not be cured by the allegation of other facts.

This case is important to developers and landlords because it make clear that the class of potential plaintiffs with fair housing claims is much broader than bona fide purchasers or renters. Questionable housing conditions now present more exposure to potential liability given that watchdog organizations have standing to sue developers and landlords under the FHAA. This case also makes it clear the need for careful evaluation of possible accessibility issues in the design and construction phases in order to minimize the chances of future legal challenges.

Raymond W. Greycloud

Smith v. Pacific Props. & Dev. Corp., 358 F.3d 1097 (9th Cir. 2004).

Appellate Cases—Takings

■ COAST RANGE CONIFERS UPDATE

On February 11, 2004, the Oregon Court of Appeals denied reconsideration of its regulatory takings holding in the *Coast Range Conifers* case. *Coast Range Conifers, LLP v. State ex rel. Bd. of Forestry*, 189 Or App 531, 76 P3d 1148 (2003) (summarized in the Dec. 2003 issue of the *RELU Digest*), *recons den*, 192 Or App 126, 83 P3d 966 (2004). In the original holding, the court of appeals reviewed the Oregon State Board of Forestry's denial of Coast Range Conifer's request to log nine acres of a 40-acre tract, and held that the denial was inverse condemnation that required compensation under the Oregon constitution. In so holding, the court rejected application of the federal "parcel as a whole"

rule to the Oregon constitution.

The state petitioned the court of appeals to reconsider its decision on two grounds. First, the state asserted that Coast Range Conifer's claim was not ripe. Second, the state asserted that, even if the claim were ripe, the court should have only denied summary judgment for the state, and should not also have granted summary judgment for Coast Range Conifers.

The court first stated that the term "'ripeness' tends to be used somewhat loosely." 192 Or App at 129. The court distinguished between two possible meanings of the term. The first meaning is the requirement that the case involve an actual, present injury. This meaning is jurisdictional, and it can be raised at any time, including in petitions for reconsideration. The second meaning of "ripeness" involves the requirement that a complaining party allege or prove all elements of a claim. A challenge to this second ripeness requirement must be raised as required in ORCP 21 G(3), and cannot be raised for the first time on appeal.

The court of appeals decided that the state's ripeness argument fell into the latter category. The state argued that the claim was not ripe because Coast Range Conifers had failed to seek potentially available "approvable alternatives" that would allow some logging within the nine acres. The court interpreted the state's argument as another way of saying that Coast Range Conifers had not established that it had been deprived of *all* economically viable use of the nine acres. According to the court, this was an attack on the required elements of a regulatory takings claim, and not an argument that the alleged injury was abstract or hypothetical. Accordingly, the court rejected the state's ripeness defense as having been untimely raised.

Next, the court turned to the state's summary judgment argument. In the court's original opinion, it stated that the "state apparently does not dispute [Coast Range Conifer's] assertion that the restriction does, in fact, deprive the nine-acre parcel of all economically viable use," and therefore issued summary judgment in favor of Coast Range Conifers. 189 Or App at 550. The state objected to the court's assumption, and cited U.S. Fish and Wildlife Service (FWS) documents suggesting that three of the nine acres could possibly be logged. The court held that the FWS documents were hearsay, and that the state had never once raised this argument at trial or on appeal, and could not do so now. Accordingly, the court determined that summary judgment for Coast Range Conifers was proper.

The state has petitioned the Oregon Supreme Court for review of the court of appeals' original decision in this matter. Several *amici* filed briefs urging the supreme court to take the case and resolve the issue of whether the "parcel as a whole" rule applies in Oregon.

Editors' Note: The author represents Friends of the Columbia Gorge, which joined six other conservation groups in filing an amici *brief in support of the petition for review.*

Nathan Baker

Coast Range Conifers, LLP v. State ex rel. Bd. of Forestry, 189 Or App 531, 76 P3d 1148 (2003), *recons den*, 192 Or App 126, *83 P3d 966 (2004).*

Cases from Other Jurisdictions

■ HAWAII FEDERAL DISTRICT COURT FINDS RLUIPA CONSTITUTIONAL

In *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003), the federal government filed suit under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5. The defendant filed a motion to dismiss. This case paralleled two previous federal decisions applying RLUIPA, both entitled *Hale O Kaula Church v. Maui Planning Commission*, 229 F. Supp. 2d 1050 (D. Haw. 2002), and 229 F. Supp. 2d 1056 (D. Haw. 2002).

The court first turned to the defendant county's claim that the case should be dismissed because a state two-year statute of limitations applies to civil rights claims. The federal government relied on 28 U.S.C. § 1658, which contains a four-year statute of limitations unless otherwise provided by law. The court agreed with the federal government and said that RLUIPA created a new cause of action, rather than amending existing statutes. Moreover, RLUIPA was passed after the adoption of 28 U.S.C. § 1658, so that statute applies in any event. Finally, the suit was filed within two years of the date the planning commission's final order was signed, so it was timely even under a two-year statute of limitations.

The defendant also claimed that the United States lacked standing because (1) the United States was not injured by the permit denial and/or (2) zoning is an area of traditional local responsibility under the Tenth Amendment. The court cited Article III of the Constitution for the proposition that Congress may statutorily create injury and found specific authority within RLUIPA for federal participation in local zoning matters.

Next, the court noted that three circuits, including the Ninth, had upheld RLUIPA against the claim that it violates the Establishment Clause. The court declared itself bound by the Ninth Circuit precedent. Similarly, the court noted that it had already decided in the first two *Hale O Kaula* cases that RLUIPA does not violate the Commerce Clause, especially because the statute contains a jurisdictional element.

For the same reasons, the court found no Tenth Amendment violation either. Although the act intrudes "to some extent" on local land use decision making, it does not violate the principles of federalism and, in fact, RLUIPA was adopted, in the view of the court, to vindicate federally protected rights. 298 F. Supp. 2d at 1015. The court construed RLUIPA as enacted under especially enumerated congressional powers and noted that these powers have supported other intrusions into local functions, such as the Americans with Disabilities Act, the Telecommunications Act of 1966, and the Fair Housing Act.

Finally, the court found no violation of the powers granted Congress under paragraph 5 of the Fourteenth Amendment, citing decisions from other courts and finding that Congress had acted with "'congruence and proportionality'" in codifying the strict scrutiny rule for the individualized assessments made in land use applications. *Id.* at 1016 (quot-

ing *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)). The court thus denied the county's motion to dismiss.

The decision in this case is consistent with the Hawaii District Court's opinions in the two previous cases finding RLUIPA to be constitutional. This case may be the one to go "all the way" to the United States Supreme Court for a determination of constitutionality.

Edward J. Sullivan

United States v. Maui County, 298 F. Supp. 2d 1010 (D. Haw. 2003).

■ CALIFORNIA APPELLATE COURT ENJOINS ENFORCEMENT OF CYBERCAFE ORDINANCE

In *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004), the defendant city enacted a moratorium on new cybercafes and an ordinance requiring cybercafes to obtain a conditional use permit to remain in business and also regulating their operations. The ordinance prohibited the use of cybercafes by unaccompanied minors during school hours, specified the number of adult employees required in the cafes at certain hours, and required uniformed security guards during times of high-volume activity and video surveillance. The ordinance was passed in response to a request by the chief of police, who cited an increase in the number of cybercafes (from three to twenty cafes in two years) and a higher incidence of gang-related and criminal activities therein.

Five cybercafes owners filed the instant action, contending that the ordinance violated their free speech and privacy rights under the California and federal constitutions and seeking an injunction. The trial court struck certain provisions of the ordinance. The parties treated this ruling as a preliminary injunction against application of the ordinance.

The appellate court found free speech and expression issues implicated by the ordinance and found no reason why cybercafes should receive less protection than book publishing enterprises, video arcades, and movie theatres. However, such free expression may be subject to reasonable time, place, and manner regulation, so long as the regulations advance a substantial governmental interest and sweep no more broadly than necessary to protect those interests. The court also said that when a permit or license is required, precision of the regulation is necessary and grants of excessive discretion to the government are prohibited.

In evaluating the balance of hardships, the court turned to the challenged provisions of the ordinance. The first challenge was to the conditional use permit requirement, which was imposed on existing uses (although the fee for filing the conditional use permit had been waived), and which allowed the government to establish different conditions for cybercafes than would be expressly required under the new ordinance. The plaintiffs alleged that this discrimination violated their free expression rights protected by the state and federal constitutions. The ordinance requires an applicant to show that a cybercafe will not "jeopardize the public welfare," which may allow for any number of conditions, including software filters, given that the ordinance contains no limit in the discretion bestowed on the city for imposing conditions. The court concluded that the plaintiffs were likely to prevail on the merits on this issue.

Based on the city's findings and police reports, the court found the daytime curfew requirements for minors during school hours unless accompanied by a parent or guardian to be a reasonable time, place, and manner regulation. The curfew was viewed as a narrowly tailored requirement that advances the city's interests in public safety and the well-being of minors. The court added that the city chose those means necessary to advance its interests in a reasonable way. The city is not required under a "narrowly tailored" standard to choose the least restrictive means of achieving its interests; however, the court did not find the means chosen to be broader than necessary for the ends in any event and noted that there are many other channels for reaching the Internet, including home computers and libraries.

The court then turned to the employee and security guard regulations, finding them only tenuously related to free expression rights, and reviewed them to determine whether they were valid time, place, and manner restrictions, and whether they left open alternative avenues for communication. The court affirmed the trial court's decision upholding these restrictions and also found that the city's substantial interest in public safety was advanced by the requirements for adult supervision on weekends and school times and for the presence of two adults if more than 30 computers were available for use. The court also upheld the uniformed security guard requirement during periods of high volume, reiterating that the city is not obligated to use the least restrictive alternative in advancing its interests. The court concluded that the city had considered evidence of crime problems at cybercafes and that the trial court should not have second-guessed the city in its choice of means for dealing with the problem, especially as to staffing requirements. The court found that these portions of the ordinance are content-neutral, are narrowly tailored to serve a significant governmental interest, leave open alternative avenues of communication, and sweep no more broadly than necessary to achieve the city's objectives. The trial court's invalidation of these requirements was thus reversed.

As to the provisions requiring video surveillance and requiring cafe owners to hold surveillance tapes for 72 hours, making them subject to city inspection during that time, the court noted that the city had agreed that the tapes held by the owners would not be subject to city inspection unless normal warrant or subpoena processes were used. The court noted that the surveillance did not extend to email activity or Internet images, concluding that, like the guardian, employee, and security guard requirements, the regulation is a content-neutral manner restriction that is narrowly tailored to advance the city's legitimate interests in public safety and abatement of gang violence.

The court then considered whether the requirement violated the cybercafe customers' right to privacy under the California constitution. The court said there is no protected privacy interest for activities at public retail premises.

The court thus affirmed in part and reversed in part the trial court judgment, but kept the preliminary injunction against the ordinance in force. There was also a lengthy con-

currence and dissent by Judge Sills, who objected with much colorful language to the video surveillance portions of the ordinance.

This is a good case for analysis of the extent to which expression may be regulated by local land use laws. The majority opinion respects precedent and deals with the matter practically.

Edward J. Sullivan

Vo v. City of Garden Grove, 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004).

■ INDIANA COURT REJECTS "SPLIT ZONING" OF PARCEL AND ORDERS REZONING

In *Borsuk v. Town of St. John*, 800 N.E.2d 217 (Ind. Ct. App. 2003), the plaintiff appealed a trial court grant of summary judgment for the defendant in a challenge to the denial of the plaintiff's request for rezoning. The plaintiff alleged that the denial was arbitrary, capricious, and unreasonable, and resulted in a taking. The appellate court noted that there was viable economic use of the property and, while not specifically reaching the taking claim, indicated that it would fail.

The plaintiff's parcel was split-zoned; a portion was designated residential and the remainder commercial. All similarly situated property on the block was designated commercial. When plaintiff sought rezoning, the neighborhood voiced overwhelming opposition, chiefly on transportation grounds, and the application was denied. When the plaintiff filed suit to challenge that decision, the town successfully moved for summary judgment, based in large part on affidavits of the planning commission chair and the town engineer giving reasons for the denial.

The court said it would give due deference to the town's decision and would reverse it only if it were arbitrary, capricious, or an abuse of discretion. The court found that the trial court improperly admitted the affidavit of the planning commission chair. The planning commission speaks only through its minutes and orders, not through extra-record affidavits, which may be seen as attempts to create evidence. Moreover, the court determined that the town engineer's affidavit contradicted the town's zoning ordinance and was inconsistent with the engineer's testimony at the planning commission proceedings.

On the merits, the court noted five factors under the ordinance and state law to which the town must pay "reasonable regard":

(1) the comprehensive plan;
(2) current conditions and the character of current structures and uses in each district;
(3) the most desirable use for which the land in each district is adapted;
(4) the conservation of property values throughout the jurisdiction; and
(5) responsible development and growth.

800 N.E.2d at 222–23.

The plaintiff pointed out that the zoning map was inconsistent with the comprehensive plan map, which designated the entire block as commercial. In addition, the plaintiff contended that the town ignored current conditions and surrounding uses in the area. The court called the situation "spot zoning" that effectively prevented the plaintiff from making commercial use of the site because a residence already existed on the lot. As such, the decision was not based on substantial evidence to support the conclusion. The court found the decision to be arbitrary, unreasonable, and capricious. The court concluded,

> In this unique situation, the Town's Comprehensive Plan called for the area to be zoned commercial at some point in the future. Borsuk's parcel was the only plot of land on the entire block that was not zoned in such a manner. In such a circumstance, the municipality must—absent a compelling reason—comply with its comprehensive plan's vision and rezone the area for commercial use. Failure to do so would be equivalent to ignoring the [five above-listed factors] and, moreover, would render a comprehensive plan meaningless.

Id. at 223.

This case illustrates the increasing credence given comprehensive plans in jurisdictions where such plans have long been conflated with the zoning maps. This result occurred under a statute in which the plan is a factor in judging the validity of a rezoning application. The court dealt well with the misguided attempts to shape the record following the close of the hearing. Both conclusions auger well for a more thorough and efficient form of judicial review.

Edward J. Sullivan

Borsuk v. Town of St. John, 800 N.E.2d 217 (Ind. Ct. App. 2003).

■ NORTH CAROLINA COURT VINDICATES EASEMENT DEDICATION

In *Stanley v. Laughter*, 590 S.E.2d 429 (N.C. Ct. App. 2004), an investment company purchased a 118.62-acre tract from a landowner, who retained a 60-foot wide easement through a portion of the site. The investment company then sold off 111.87 acres in six parcels. The company denoted on the plat a 30-foot-wide road, located entirely within the aforementioned 60-foot-wide easement, to serve the six parcels, one of which was conveyed to the plaintiff and another to the defendant. A smaller remainder parcel of 1.46 acres was conveyed to another party. That conveyance referenced the plat, but not the easement. The 30-foot strip was vegetated with a thick screen of trees and shrubs when the plaintiffs purchased their land, providing them with some seclusion.

The defendant bulldozed the 30-foot strip to get access to the 60-foot easement. The plaintiff filed suit to prevent further clearing, but the trial court granted the defendants' motion for a directed verdict.

The appellate court found that the easements on the plat were for the benefit of all property owners, as well as for the public. Citing North Carolina case law to the effect that a plat

showing access easements dedicates these easements to the public when the plat is filed, the court found that the purchaser of a lot in a plat has access rights across these easements. Further, the sale deeds referenced the plat.

The court also awarded no damages to the plaintiff for the defendant's clearing of the vegetation. The court determined that, when land is dedicated, the adjacent property owners are entitled to have that land cleared to the full length of the easement so as to attain access.

This case is consistent with case law of other states to the effect that the dedication of land in a plat provides access and is a sufficient basis for self help in clearing the land to achieve that access.

Edward J. Sullivan

Stanley v. Laughter, 590 S.E.2d 429 (N.C. Ct. App. 2004).

LUBA Cases

In *Sievers v. Hood River County*, 46 LUBA ___ (LUBA No. 2003-200, Mar. 29, 2004), LUBA addressed standing, jurisdictional, and substantive challenges to a county ordinance adopted by initiative that would have required voter approval for development of 25 or more residential units on certain forest lands. LUBA concluded that the ordinance was inconsistent with and preempted by state land use laws and reversed the ordinance.

The summary of the challenged ordinance, which was adopted by the county voters in November 2003, provided in part as follows:

> This ordinance would require that voter approval be required for any residential development that cumulatively totals 25 or more residential units or overnight accomodation units, if the development is to occur on certain forest lands. The forest lands affected by this ordinance are any lands specifically zoned for "Forest" or "Primary Forest" uses, or [that] were State or Federal Forest lands as of January 1, 2003.

The petitioner, who owns land zoned for forest uses, filed a timely appeal with LUBA following the county elections director's certification of the election results.

The intervenor-respondents, chief petitioners for the initiative, argued that the petitioner was not adversely affected by the ordinance and lacked standing to appeal because development of his property for a major residential development was speculative and depended on a future rezoning of his property. The petitioner argued that the ordinance imposed an obstacle to future residential development of his property that exceeded the requirements of the county's comprehensive plan and zoning regulations.

In LUBA's view, the fact that the petitioner owns forest-zoned land that was subject to the adopted ordinance was sufficient to give the petitioner standing. Even though the petitioner currently had no plans for residential development on his property, the imposition of "additional impediments" to development by the ordinance was sufficient to render the petitioner sufficiently adversely affected to appeal to LUBA.

The intervenors also asserted that the ordinance was not a land use decision and that LUBA lacked jurisdiction to review it for two reasons. First, they contended that the ordinance was not a comprehensive plan provision, land use regulation, or new land use regulation and did not "concern" the adoption, amendment, or application of any such rule. Second, by analogy to annexations, they argued that future operation of the ordinance would not result in a land use decision. City annexations often involve two separate steps: (1) the city council's decision that an annexation is consistent with applicable land use standards (which is a land use decision), and (2) the voters' decision to approve or reject the annexation (which is not a land use decision). The intervenors argued that the challenged ordinance simply creates a similar two-step process.

LUBA's jurisdictional ruling depended on its resolution of the petitioner's key assignment of error, in which the petitioner argued that the ordinance was invalid because it allowed the county voters to nullify quasi-judicial decisions to approve certain residential developments that county decision makers have determined are consistent with the county's comprehensive plan and land use regulations. Specifically, the petitioner contended that the ordinance exceeded the constitutional initiative and referendum powers because it did not concern a legislative matter. Additionally, the petitioner asserted that the ordinance authorized the county voters to approve or deny quasi-judicial discretionary permits without complying with applicable statutory requirements. LUBA disagreed with the petitioner on the characterization of the ordinance for initiative and referendum purposes, but agreed with the petitioner that the ordinance was invalid because it was preempted by statutory requirements for quasi-judicial decision making.

Article IV, section I(5) of the Oregon constitution reserves to the voters the ability to make decisions on legislative matters, but "does not allow the electorate to make an 'administrative' decision, or to overturn a previous administrative decision made under a general legislative scheme." 46 Or LUBA at ___ (slip op at 7–8). The Oregon Court of Appeals applied these principles to land use decisions in *Dan Gile & Assocs., Inc. v. McIver*, 113 Or App 1, 831 P2d 1024 (1992), where the court held that a voter referendum to overturn a zone change was invalid because it allowed the voters to overturn a quasi-judicial or administrative decision in violation of the procedural and substantive requirements of state land use statutes.

The intervenors acknowledged that the *Gile* decision would not allow the voters to approve or reject a quasi-judicial county approval of a major housing development. They distinguished *Gile*, however, arguing that a referendum would be allowed pursuant to the challenged ordinance, not pursuant to the state constitution. The intervenors relied on other appellate decisions, including *State ex rel Dahlen v. Ervin*, 158 Or App 253, 974 P2d 264, *rev den*, 329 Or 357 (1999), to argue that the voters can constitutionally adopt a legislative scheme that provides for automatic referral of future administrative decisions to the voters.

LUBA agreed with the intervenors that the challenged ordinance was legislative in nature because it created procedures for making "administrative" decisions, but without

itself making such a decision. The more difficult question, in LUBA's view, was whether the ordinance was invalid because its provisions were inconsistent with or preempted by state land use statutes. Even if the ordinance were characterized as legislative and a proper subject of the initiative power, it could still be invalid or unenforceable if its substantive provisions violate or are preempted by state law. LUBA concluded that these circumstances were present here, stating,

> Ordinance 14-15 appears to apply exclusively to quasi-judicial "permit" decisions subject to the statutory requirements of ORS 215.402 to 215.437. We cannot conceive of a circumstance where approval or denial of "major housing development" in a forest zone for purposes of Ordinance 14-15 would not constitute a "permit" as defined by ORS 215.402. That being the case, we agree with petitioner that Ordinance 14-15 is incompatible with, and is therefore preempted by, state statute. Under Ordinance 14-15, approval and denial of some permit applications would be based on standardless, unexplained, up or down votes by the electorate, rather than on applicable land use standards and findings explaining why the proposal complies with or fails to comply with those standards.

46 Or LUBA at ___ (slip op at 11).

LUBA also rejected the intervenors' analogy to annexations, noting that annexations are not "permits" and that they are governed by a different, comprehensive statutory scheme that expressly provides for referral of certain annexation decisions to the voters.

For purposes of jurisdiction, LUBA concluded that the ordinance, which adopts "a decision-making process that allows quasi-judicial application of the county's land use regulations to be nullified on a case-by-case basis[,] 'concerns . . . the application' of the county's land use regulations" and is therefore a land use decision. 46 Or LUBA at ___ (slip op at 7) (quoting ORS 197.015(10)(a)). Given the ordinance's inconsistency with and preemption by state law, LUBA reversed the decision.

Kathryn S. Beaumont

Sievers v. Hood River County, 46 LUBA ___ (LUBA No. 2003-200, Mar. 29, 2004).