OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

Announcements

Staff Attorney, Land Use Board of Appeals.

($3,257-$4,555/mo. DOE) Some land use experience is preferred, but strong writing and organizational skills are more important. You will be working directly with LUBA Board members to analyze legal issues in appeals and drafting orders and opinions to resolve those issues. The position is based in Salem. Excellent benefits. For more information, visit the State website at www.oregonjobs.org, and look for **Announcement Number LE000858**. This website also makes available the necessary application forms. Or you can call (503) 373-1368 (voice) or (800) 648-3458 (TTY) between 8 a.m. and 5 p.m. Monday through Friday, and ask for a copy of the job announcement. Completed applications must be received by 5:00 p.m. on July 31, 2000.

Authors' Needed

The *Digest* needs attorneys willing to write articles on real estate and landlord-tenant cases of interest to Section members. The time commitment is small, but the benefit to the Section is significant. If you're interested, please contact Kathryn Beaumont at (503) 823-3081.

Goodbye And Hello To Student Editors

A key to publishing each issue of the *Digest* is the editing and production assistance provided by a law student editor. Darren Nienaber, a recent graduate of Northwestern School of Law, has faithfully served the *Digest* as student editor for the past two years. His assistance has been invaluable and the Section has benefited greatly from his services. Replacing Darren is Brian Pasko, who recently completed his first year at Northwestern School of Law. Articles and questions about the *Digest* can be directed to Brian at pasko@lclark.edu. On behalf of the *Digest*, sincere thanks to Darren and welcome to Brian!

Appellate Cases — Land Use

County's Vacation Within City Limits Applies City Standards To This Land Use Decision

In *Oregon Shores Conservation Coalition v. Lincoln County*, 164 Or App 426 (1999), the Court of Appeals reversed and remanded LUBA's decision to remand a county road vacation approval under ORS 368.361.[1] In 1890 Lincoln County platted a 60-foot right-of-way for County Road 804 along the coast between Waldport and the Yachats River. The road was never developed and, in 1953, Ocean Crest subdivision was platted over the right-of-way. County Road 804 does not appear on the subdivision plat and many of the lot owners erected structures over the right-of-way. In 1997, several of the Ocean Crest property owners filed a petition with the County to vacate the portion of County Road 804 that runs through the Ocean Crest subdivision.

The County and the land owners moved to dismiss the LUBA appeal, claiming that a street vacation was not a land use decision over which LUBA had jurisdiction. However, both LUBA and the Court of Appeals agreed that because this decision was subject to compliance with Goal 17 (Coastal Shorelands) and its implementing requirements (either directly or through the City's land use legislation), the County's decision qualifies as a "land use decision" and was properly before LUBA. *Id.* at 430-431.

Under the applicable standards, vacation of rights-of-way on the subject property is permitted to allow redevelopment of shoreland areas so long as public access across the affected site is retained. This provision is essentially the same under Statewide Goal 17 implementing requirement (IR 6) and Yachats Comprehensive Plan Policy No. 6. LUBA found that the IR 6 version of this standard could not be satisfied by considering other access points in the "vicinity" of the site, and that the findings were defective because they did not identify the "affected site." *Id.* at 431-432.

Notwithstanding the fact that the vacated portion of the county road was entirely

within the City of Yachats, LUBA found the City's land use legislation inapplicable and looked to those of the County. Because the County had not implemented Goal 17 and IR 6 in its comprehensive plan or land use regulations, LUBA concluded that these provisions must be applied directly, pursuant to ORS 197.646.

However, the City of Yachats had enacted local legislation that implements Goal 17 and IR 6, and because the vacated portion of the county road was entirely within the City's boundaries, the Court of Appeals found that the County is required to apply and be consistent with the City's plan and implementing legislation. *Id.* at 434. The Court further found that the County's failure to adopt its own Goal 17 implementing legislation does not trigger direct application of Goal 17 and IR 6 under ORS 197.646, when the City had adopted such legislation. "To hold otherwise would effectively make the city's acknowledged legislation inapplicable to its own territory . . ." *Id.* at 435. The County, in essence, stands in the shoes of the City and is required to apply the City's legislation to property that is entirely within the City.

Endnote

1. The subject property is located entirely within the City of Yachats, but because 804 is a county road, the vacation was conducted pursuant to ORS 368.361, which gives the County jurisdiction to act within the City limits.

Peggy Hennessy

Oregon Shores Conservation Coalition v. Lincoln County,
164 Or App 426 (1999)

Washington County Community Development Code Only Restricts Development In Wetlands Identified In Community Plan

In *Plotkin v. Washington County*, 165 Or App 246 (2000), the Oregon Court of Appeals held that a provision of Washington County's Community Development Code (CDC) regarding development in rural/natural resource areas applies only to resource lands that have been inventoried pursuant to Goal 5 and identified in the county's acknowledged plan documents.

A Washington County hearings officer issued a preliminary approval for a 12-lot residential subdivision on a five-acre parcel. The parcel is located in designated "wildlife habitat" that contains two wetland areas that were not identified as resource lands in the county's comprehensive planning documents. Petitioners appealed the hearings officer's decision to LUBA. LUBA rejected two of petitioners' arguments, but agreed that the hearings officer erred in concluding that the proposed subdivision was not subject to a CDC provision regulating development in "riparian zones."

The Court of Appeals quickly rejected petitioners' only assignment of error, finding that there was substantial evidence in the record to support the hearings officer's decision. However, the county's and respondent Powne's cross-petitions presented what the Court described as a "more complicated question," the interpretation of CDC 422-2 and 422-3.

CDC 422 regulates "significant natural resources." It provides, in part:

> "*422-2 Lands Subject to this Section*
>
> "Those areas identified in the applicable *Community Plan or the Rural/Natural Resource Plan Element* as Significant Natural Resources.
>
> "Significant Natural Resources have been classified in the Community Plans or the Rural/Natural Resource Plan element by the following categories:
>
> "422-2.1 Water Areas and Wetlands - 100 year flood plain, drainage hazard areas and ponds, except those already developed.
>
> "422.2.2 Water Areas and Wetlands and Fish and Wildlife Habitat - Water areas and wetlands that are also fish and wildlife habitat.
>
> "422-2.3 Wildlife Habitat - Sensitive habitats identified by the Oregon Department of Fish and Wildlife, the Audubon Society Urban Wildlife Habitat Map, and forested areas coincidental with water areas and wetlands.
>
> "422-2.4 Significant Natural Areas - Sites of special importance, in their natural condition, for their ecologic, scientific, and educational value."
>
> (alteration in original). CDC 422-3 describes the criteria for development. CDC 422-3.3A provides, in part:
>
> > "No new or expanded alteration of the vegetation or terrain of the Riparian Zone (as defined in Section 106) or a significant water area or wetland (as identified in the applicable Community Plan or the Rural/Natural Resource Plan Element) shall be allowed [subject to exceptions.]"

Petitioners argued that the wetlands on the proposed development area were "riparian zones" that were subject to the development restriction of CDC 422-3.3A. The county responded that section 422 was only applicable when wetlands or other natural resources had been identified as such through Goal 5 and designated as such in the county's comprehensive plan documents. 165 Or App at 250. LUBA agreed with petitioners' interpretation. But the Court of Appeals, looking to the context and then text of CDC 422-3.3A, as required by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993), disagreed.

The Court of Appeals concluded that the significant natural resources that are subject to the protection of CDC 422 are those that are identified in the relevant component or components of the comprehensive plan. The Court said the word "section" in 422-2, refers to CDC 422 in its entirety. Consequently, the Court concluded, "lands that are not identified in the plan, and that are therefore outside the regulatory ambit that CDC 422-2 defines, are not subject to regulation under CDC 422-3.3A or any other subsection of CDC 422." *Id.* at 251.

The text of 422-3.3A did not fit neatly into that context. The Court said the text of 422-3.3A could be read, as LUBA did, to protect only those wetlands that are listed in a community plan or all riparian zones, regardless of whether they are listed in a community plan. Section 106 defines a riparian zone as "[t]he area, adjacent to a water area, which is characterized by moisture dependent vegetation." CDC 106.185. However, the Court concluded that the reference to riparian zones in CDC 422-3.3A does not extend protection to all riparian zones. Rather, the Court said, "the reference makes clear that if a wetland or water area is listed in a community plan, then the adjacent moisture dependent vegetation, as defined in section 106, will also be protected from development." *Id.* The Court

explained that the regulation of riparian zones in CDC 422-3.3A is limited in the same way that all of the regulations in the section are limited: they apply only to resource areas identified in the plan. Id. at 252.

Finally, the Court said that *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986) confirmed that the county's interpretation was consistent with the goals reflected in both CDC 422 and Goal 5.

Chief Judge Deits dissented from the majority's holding that the developmental restrictions of CDC 422-3.3 were not applicable. Judge Deits concluded that CDC 422-3.3 expressly includes "riparian zones among the areas for which it establishes developmental criteria, notwithstanding the fact that riparian zones are not among the areas referred to in CDC 422-2 as being identified in the plan. 165 Or App at 254. The majority's decision, Judge Deits wrote, rendered the term "riparian zones" in CDC 422-3.3 meaningless. She described *Urquhart* as applying the general principle that, after acknowledgement, the land use decisions of a local government are measured for compliance with its own plan and land use regulations rather than statewide goals. *Urquhart*, she said, had no bearing on the decisive issue in the case, which involved statutory interpretation.

Susan N. Safford

Plotkin v. Washington County, 165 Or App 246 (2000)

If The Claim's Not Ripe, It's Not Going Forward

In *Boise Cascade Corp. v. Board of Forestry*, 164 Or App 114 (1999), the court held that state regulations protecting a breeding spotted owl on private property did not constitute a *per se* taking by physical occupation, but was a regulatory taking requiring just compensation. The court also held that plaintiff Boise Cascade (Boise) may maintain an inverse condemnation claim against a state agency in state court based on alleged violation of the Fifth Amendment to the federal constitution and that the cutting down of a tree with birds does not constitute a nuisance. Most importantly, the court held that the plaintiff's claim was not yet ripe, because Boise failed to attempt to obtain an incidental take permit from the US Fish and Wildlife Service and that therefore a jury award of damages must be reversed.

In 1992, Boise sought approval from the State Forester of its plan to harvest timber on a 64-acre parcel, which included a breeding pair of spotted owls and accompanying nest. *Former* OAR 629-24-809 provided that when there is a conflict between proposed logging and a spotted owl nest, a plan must provide for "a 70-acre area of suitable spotted owl habitat." The State Forester did not approve Boise's plan because it did not provide for the protection of 70 acres of spotted owl habitat. The Board of Forestry upheld the denial. A subsequent plan was approved which permitted logging on several acres of the site during times when no spotted owls were nesting there. The appeal was concerned with the remaining acreage of the site. The case had previously been to the Oregon Supreme Court. *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185 (1997). Meanwhile, one of the owls died, the other left, and all logging restrictions were removed. On remand, a jury provided a verdict for Boise and awarded damages for $2,279,223 for the temporary taking of its logging rights on the site.

The state raised several issues on appeal. First, the Board of Forestry argued that there is no direct right of action under the

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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.

Fifth and Fourteenth Amendments to the judicial constitution against a state in state court. At issue was the United States Supreme Court's recent decision on states' sovereign immunity: In *Alden v. Maine*, 527 US 706, 119 S Ct 2240 (1999), state employees attempted to enforce the Fair Labor Standards Act against a state in state court. The court held that "the powers delegated to Congress under Article I do not include the power to subject non-consenting states to private suits for damages in state court." 119 S Ct at 2246. But the Alden court noted that the enactment of the Fourteenth Amendment required the states to surrender some of their sovereign immunity. Congress may allow suits against nonconsenting states under section 5 of the Fourteenth Amendment, which provides Congress the power to enact legislation to protect the constitutional rights made applicable to the states under section 1 of the Fourteenth Amendment.

The only enactment which might abrogate a state's sovereign immunity in state court is 42 USC section 1983. However, suits under that section may only be brought against persons, and a state is not a person for section 1983 purposes. Thus, the Oregon Court of Appeals phrased the question as whether an inverse condemnation claim against a state in state court may be maintained in the absence of an explicit congressional enactment. It noted that the US Supreme Court had commented on the sovereign immunity question in *First Lutheran Church v. Los Angeles County*, 482 US 304, 107 S Ct 2328 (1987). Although apparently not raised directly by a party, the Solicitor General, as amicus to the case, did raise the argument that states have sovereign immunity under such circumstances. The Supreme Court responded that the Constitution *itself* dictates the remedy for a taking claim. Thus, the Oregon Court concluded that Boise could maintain a taking claim because of the "self-executing" nature of the Fifth Amendment, as applied by the Fourteenth Amendment.

The state also argued that the trial court erred in denying its motion to dismiss for failure to state a claim. The state had moved to strike Boise's allegation that it had suffered a *per se* taking by physical occupation. The court agreed that administrative regulations protecting a spotted owl nest was not a physical invasion. The nest was more like a natural flood than the construction of a dam or the installation of a cable television box, the court said. However, the court held that the case could properly proceed under a *Lucas* theory of regulatory deprivation of all beneficial use of the land.

The court then considered the state's argument that the proposed logging would constitute a nuisance and is thus a permissible regulation under *Lucas*, not requiring just compensation. The court suggested that not every harm to *ferae naturae* is a nuisance. The court did not consider that the state may have a greater interest in protecting endangered species than in protecting ordinary *ferae naturae*. Nonetheless, the court concluded that the logging was not a nuisance.

The final issue was whether Boise's regulatory taking claim was ripe, though Boise failed to attempt to obtain an incidental take permit from the US Fish and Wildlife Service. *Former* OAR 660-24-809(5) provided that "exceptions to the requirements for protecting the northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit" from the US Fish and Wildlife Service. The rule is that federal takings claims are not ripe until a government entity has reached a final decision regarding the application of the regulation to the property. *Williams Planning Comm'n v. Hamilton Bank*, 473 US 172, 105 S Ct 3108 (1985). A court should not have to haphazard a guess as to whether a proposal would have been approved had the takings plaintiffs sought variances or waivers.

Boise responded to the ripeness issue by noting that even if it had obtained an incidental take permit, Oregon would not have been obliged to approve its logging plan. The court readily dispatched this argument, noting that constitutional takings law does not require a waiver be a "sure thing." Boise also argued that an incidental take permit does not cover habitat modification like the destruction of a spotted owl nest. This proposition was rejected by the court as not being supported by the weight of authority. Furthermore, Boise's claim that seeking the permit would have been futile was not supported by the evidence.

This case is interesting for several reasons. First, spotted owl litigation continues to have far-reaching impacts more than a decade after the earlier decisions. Second, a takings claim may be worth 2 million dollars to the client, but if it's not ripe, it's not going forward. Lastly, the spotted owl/takings litigation may foreshadow takings claims in the future regarding salmon and other endangered species.

Darren Nienaber

Boise Cascade Corp. v. Board of Forestry, 164 Or App 114 (1999)

Mr. Nienaber graduated from Northwestern School of Law of Lewis and Clark College this past May 2000.

Cases From Other Jurisdictions

Eleventh Circuit Finds No Jurisdiction To Determine Constitutional Challenges To Florida Moratorium

In *Horton v. Board of County Commissioners of Flagler County*, (11th Cir., Feb. 1, 2000), plaintiffs challenged defendants' development moratorium in Florida state courts on substantive and procedural due process and equal protection grounds. Plaintiffs also alleged violations of the Florida constitution and statutes. Defendants removed the case to federal court, which dismissed the equal protection and substantive due process claims on the merits and remanded the federal procedural due process and state law claims to the state court, relying on the Eleventh Circuit decision in *McKinney v. Pate*, 20 F.3d 1515 (11th Cir. 1994). The trial court also noted that the federal constitutional claims were pending before the state court when the case was removed, and determined that it was appropriate to remand the procedural due process claim to the state court for resolution.

The Eleventh Circuit phrased the question before it as "whether a federal court should remand a judicial procedural due process claim to state court on *McKinney v. Pate* * * * grounds." The appeals court concluded the answer is "no" and that the district court's remand was based on a misunderstanding of the *McKinney* case.

In the Eleventh Circuit's view, the district court mistakenly viewed *McKinney* as based on ripeness or exhaustion principles under which constitutional claims must be presented to the state court before being pursued in federal court. However, *McKinney* turns on the existence of an opportunity to pursue an adequate remedy for a procedural deprivation in state court. The court added that any evaluation of the "process" provided by the state includes not only the administrative proceedings, but also that provided for on judicial review. If a judicial review remedy is available, there is likely no due process violation, assuming the due process clause applies to

the case at issue in the first place. If the due process clause applies and the state court provides no available remedy, then the federal court may provide such a remedy under the Constitution. Either way, the case is not remanded to the state court.

In this case, the Eleventh Circuit found it didn't matter that plaintiffs were seeking a remedy in state court when the case was removed. The court's analysis focused on the availability of the state remedy. There is no danger that plaintiffs, who have been deprived of property without the procedural protections of the 14th Amendment, will be left without a remedy under McKinney. Under that case, the existence of an adequate state law remedy for the alleged deprivation is a prerequisite for the application of the rule. If such a remedy exists, there is no procedural due process violation and *McKinney* does not apply. The court added:

> "* * * If the rule of *McKinney* were otherwise, we would have had to hold that McKinney's claim should have been dismissed as unripe. We would have had to do that because McKinney himself had never presented his federal due process claim in state court.* * * But we did not tell McKinney his federal claim was unripe and dismiss it without prejudice to his pursuing that claim in state court. Instead, we told him that he lost. We told McKinney that he did not have a viable federal due process claim, and we told him the reason he did not is that Florida law provided an adequate remedy for the type of procedural deprivation McKinney claimed to have suffered, even though he had not taken advantage of that state remedy."

Based on this reasoning, the Eleventh Circuit said that the trial court should not have remanded the federal due process claim to the state court, but should have used *McKinney* to reach a decision on the merits. Yet, because the trial court remanded the case on ripeness or exhaustion grounds, the Eleventh Circuit found it lacked jurisdiction to hear the appeal. The Court also noted that its statements on the applicability of *McKinney* were *dicta*, but hoped that this *dicta* would be useful for future cases.

This case is based on careful examination of federal jurisdiction over what are often broadly stated procedural due process claims. The court found no due process claim if there is a state process to provide a remedy. In that case, the federal court lacks jurisdiction over claims like those presented in this appeal.

Edward J. Sullivan

Horton v. Board of County Commissioners of Flagler County, (11th Cir., Feb. 1, 2000)

Denial Of Certiorari Provokes Outburst By Losers

In *Lambert v. City and County of San Francisco*, 120 S.Ct. 1549 (2000), the United States Supreme Court denied certiorari to hear a California case after the petition had languished before it for many months.

The case involved a hotel owned by plaintiffs in San Francisco. The hotel had 24 residential and 34 tourist units. Plaintiffs said they had trouble renting the residential units and requested a conditional use permit to convert them to tourist units. Under the applicable ordinance, such a conversion may be allowed only if there is a one-for-one replacement of the units or an administrative fee paid for replacement of each unit. If the unit conversion was approved, the staff report indicated that cost of the replacement units would be in the neighborhood of $600,000. Plaintiff offered $100,000, but the city rejected the offer and then later denied the conditional use permit.

Plaintiffs contended the fee was unconstitutional under both *Nollan* and *Dolan*, because it was not "roughly proportional" to what was needed to eliminate the harm. The California Court of Appeals upheld the denial, stating that it was based on grounds beside the fee dispute. The California court added that because of the denial, defendant did not demand a property right of money from plaintiffs as a condition of the use permit and, thus, there was no basis for review under *Nollan* and *Dolan*. The alternative grounds cited in the city's decision included increased traffic, the effect on long-term housing stock and compatibility.

In his dissent from denial of the petition for *certiorari*, Justice Scalia suggested that the "real" reason for the denial was the insufficiency of plaintiff's offer, concluding: "* * * It is simply and absolutely not true that the [planning] commission ignored [plaintiff's] refusal to satisfy its fee demand."

He suggested that the California Court of Appeals' decision was internally inconsistent, as it discussed this "real" reason for denial, even as it pointed to the other grounds. Justice Scalia termed the denial a "gross distortion of the record." If, alternatively, the denial rested on both land use and rough proportionality grounds, it is clear that the zoning grounds would be used to uphold the denial and, the dissent suggested, *Nollan* and *Dolan* would be evaded. If the failure to pay the fee were a "motivating factor," that factor would itself run afoul of *Nollan* and *Dolan* in that it would allow the "outright plan of extortion" to be cloaked as a condition subsequent, rather than as a condition precedent in those two cases.

The dissent concluded that any alternative basis "so implausible as to call into question the state court's willingness to hold state administrators to the Fifth Amendment standards" set forth by the federal Supreme Court suggested that such extortion was not an isolated phenomenon among local governments.

Edward J. Sullivan

Lambert v. City and County of San Francisco, 120 S.Ct. 1549 (2000)

Third Circuit Finds Cognizable Substantive Due Process Claim In Local Zoning Case

In *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3rd Cir. 2000), plaintiff brought a Section 1983 Civil Rights claim against a Pennsylvania township and its officers for denial of its application for development approval. Plaintiff sought approval of a housing development on a 75-acre parcel and wished to use low-income housing tax credits for 100 units. The tax credits would have expired on December 31, 1997. Plaintiff's 1996 application was opposed by neighbors who did not want that housing and who insisted the application be treated as a planned-unit development, which involved substantially more discretion, rather than as a subdivision. The Planning Commission's comments at the hearing echoed those of the neighbors, even though socio-economic considerations were not relevant to the subdivision approval criteria. Even though the Planning Commission's attorney found the application approvable, the Planning Commission found the application incomplete.

A second application was submitted, which the Planning Commission's attorney also found met the completeness concerns of the Planning Commission. After taking no action for six months, the Planning Commission recommended denial to the township's

supervisors, who followed that recommendation. When the neighbors' attorney found the supervisors' decision indefensible because it gave no reason for the denial, that attorney suggested several bases for denial, which were included in a revised order adopted by the Board. The project lapsed as the tax credits were not in place before the deadline passed. Plaintiff filed suit in federal district court and appealed the dismissal of its substantive due process claims as a matter of law.

While admitting that substantive due process was complex, the court said the developer has a "right" to be free of "arbitrary and irrational zoning activities." The court turned to whether plaintiff has a property interest protectable under the Fourteenth Amendment. Plaintiff asserted that it met all the approval standards, but defendants said the township Board still had the discretion to deny the application. In this case, the court found that the township requirements for subdivision approval were clear and the developer had a right under these circumstances to an approval under Pennsylvania law. The court determined that the application thus constituted a protectable property right against which a substantive due process claim was viable.

The court said that the matter should have been submitted to a jury with plaintiff's evidence that the governmental action was "arbitrary, irrational and tainted by improper motives." If the evidence shows that the "real" reasons for denial was unrelated to the approval criteria, judgment as a matter of law against those claims was reversible. At trial, plaintiff presented evidence that there was no legitimate basis for the denial and the socio-economic backgrounds of future residents and tenants were not legitimate considerations. Plaintiff also showed that the township Board of Supervisors used a letter from the opponents' attorney as the basis for its ultimate denial order and that defendants knowingly and intentionally blocked realization of the project through delay, which resulted in deprivation of the tax credits.

The court also rejected defendants' contentions that they should have a qualified immunity because they relied upon the advice of the Planning Commission and the township attorney. The court said that when the evidence is viewed most favorably to the plaintiff, defendants could not have reasonably believed that their conduct did not violate plaintiff's rights. Similarly, the Planning Commission members were not entitled to the defense of qualified immunity either. In conclusion, the court said that there was a sufficient factual basis to send the matter to a jury.

Substantive due process is indeed tricky, but irrationality is inherent in a system that neither provides a standard for judicial review nor procedural safeguards for participants. Before it can build substantive due process "castles in the air," courts might make a better or a more lasting contribution to the law by insisting on proper procedures, rather than engaging in the heady waters of substantive due process in which standardlessness from the courts is every bit as confusing as that of local government.

Edward J. Sullivan

Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3rd Cir. 2000)

Federal Supreme Court Affirms Seventh Circuit's Determination Of Equal Protection Violation In Local Government Exaction

In *Village of Willowbrook, et al. v. Olech*, 2000 W.L. 201157 (U.S., February 22, 2000), the United States Supreme Court affirmed the Seventh Circuit's determination that a local government had violated plaintiff's equal protection rights through a series of decisions involving exactions and provision of municipal services.

Plaintiff and her late husband requested defendant Village to connect their property to the municipal water system. Defendant first conditioned the connection on dedication of a 33-foot easement along the public right-of-way to accommodate the water pipe. Plaintiff objected, saying that the Village only required a 15-foot easement from other property owners seeking access to the same water supply. Following a three-month delay, the Village relented and exacted only the 15-foot easement.

Plaintiff then sued, claiming the defendant's demand of an additional 18-foot easement violated the Equal Protection Clause and that the larger-easement demand was "irrational and wholly arbitrary and motivated by ill will" resulting from plaintiff's filing of an unrelated successful lawsuit against the Village, which, plaintiff claimed, acted either with the intent to deprive plaintiff of her rights or in reckless disregard of the same. The District Court dismissed the suit, saying that the plaintiff had failed to state a cognizable claim for relief under the Equal Protection Clause. The Seventh Circuit reversed, saying that a plaintiff could allege an equal protection violation by asserting that local government's action was "motivated solely by a spiteful attempt to 'get' a plaintiff for reasons wholly unrelated to any legitimate state objective." The Supreme Court took the case to determine whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where plaintiff did not allege membership in any class or group.

The Supreme Court said that it had previously recognized successful equal protection claims brought by a "class of one" in which the plaintiff alleged that he or she has been intentionally treated differently from others similarly situated and there is no rational basis for the different treatment. The Court explained that it allowed these claims to proceed because the purpose of the Equal Protection Clause is to protect every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of the statute or its improper execution by duly constituted agents. The Court found that reasoning applicable to this case because the plaintiff's complaint can be construed as alleging that the Village intended to demand a 33-foot easement as a condition of connection to the town's water supply, whereas it had only required a 15-foot easement from others. The complaint also alleged that the village's demand was irrational and wholly arbitrary and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the Village's subjective motivation, were sufficient to set up a claim under traditional equal protection analysis. However, the Court expressly did not reach the Seventh Circuit's alternative equal protection theory of "subjective ill will." Justice Breyer concurred in the result, noting that the local government's concern over transforming traditional zoning cases into equal protection claims was minimized by the facts and law in this case, in which there was an element of animus by the local government to "get" the plaintiff

This case is an unusual equal protection case in which a "class of one" successfully alleged that she was given differential treatment. However, the particular facts of this case make it unlikely that any general rule of constitutional law will be emerge as a result.

Edward J. Sullivan

In Village of Willowbrook, et al. v. Olech, 2000 W.L. 201157 (U.S., February 22, 2000)

Wisconsin Federal Court Grants Governmental Defendants Summary Judgment In "Exotic Dancing" Case

In *Mentzel v. Gilmore*, 54 F.Supp.2d 896 (E.D. Wisc., 1999), plaintiff, the owner of an "exotic dancing" club that presented some semi-nude performances, brought suit against governmental defendants for violating and conspiring to violate plaintiff's civil rights. Plaintiff sought an injunction and damages under the federal Civil Rights Act. The governmental defendants asserted that plaintiff failed to show any material fact was disputed; thus, the government should prevail as a matter of law.

There were two groups of government defendants: county law enforcement personnel and town officials. Both the county and the town had cabaret ordinances that prohibited certain "lewd and indecent" acts. Plaintiff was denied a license under the town ordinance three times, but operated the club as a "juice bar," otherwise complying with the cabaret ordinance. However, plaintiff was cited three times for violating that ordinance. Plaintiff was also convicted of keeping a house of prostitution at the club. The county then denied plaintiff's liquor license renewal because plaintiff failed to meet a condition that liquor be served at least three times a month.

A Wisconsin state court found that the county cabaret ordinance was facially unconstitutional as a denial of free expression. Plaintiff alleged defendants attempted to put him out of business because he exercised his free speech rights. The federal district court said plaintiff's claims depended upon whether his activity involved the exercise of a free speech right. The court said that that right was not determined by an earlier state court judgment because that judgment found his activity was not protected speech, and plaintiff was barred by the doctrine of issue preclusion from asserting otherwise. Plaintiff prevailed in the state court only because the ordinance was determined to be facially overbroad and not because the nude dancing was protected under *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the latest United States Supreme Court authority at that time.

The court added that, even if the dancing was protected, the doctrine of qualified immunity applies to the governmental defendants as they did not violate "clearly established" law, i.e., *Barnes*. Further, as plaintiff's Fourth, Fifth and Fourteenth Amendments claims were based on the same predicates as those of his First Amendment claims, i.e., the plaintiff was punished for exercising his First Amendment rights, these claims too were dismissed.

The court said that plaintiff bore the burden of presenting a material issue of triable fact in each of the issues to be proven at trial. As plaintiff presented no contrary evidence to defendants' affidavits that county officers sought only to prevent non-protected dancing and prevent prostitution, plaintiff cannot prevail.

The court also dismissed the claims as to the town defendants, as they did not seek to enforce the cabaret ordinance. Their only activity was to deny the renewal of the liquor license, which was justified, as plaintiff failed to sell liquor three times a month as required by the terms of his license.

Further, the court denied an injunction against future enforcement because the town ordinance was repealed and the invalid county ordinance was no longer being enforced. There was no basis for concluding that plaintiff's First Amendment rights would be violated in the future. Plaintiff 's condition of probation on the prostitution charge preventing him from engaging in adult entertainment did not provide any support for his assertion that defendants hold animus for constitutionally protected dancing, nor did plaintiff identify any ordinance that may be so construed. Such a claim was either moot or unripe. Accordingly, the motion for summary judgment was granted.

This case presents a good example of the use of issue preclusion from state court cases and related federal court proceedings, analogous to that in *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir., 1998).

Edward J. Sullivan

Mentzel v. Gilmore, 54 F.Supp.2d 896 (E.D. Wisc., 1999)

California Court Finds Lengthy Planning Delay Noncompensable

In *Calprop Corp. v. City of San Diego*, 2000 W.L. 17303 (Cal. App. 4th Dist., January 12, 2000), plaintiffs claimed a taking arising out of a series of decisions and delays by defendant City over the appropriate general (comprehensive) plan and one permit application for portions of a former military base sold at the beginning of 1964 to plaintiffs and their predecessors-in-title. The trial court granted the City's motion for summary judgment on the grounds that the claims were not ripe. Plaintiffs appealed.

The East Elliott Community Plan was adopted for the area in 1971, generally allowing five units per acre on the residential portion and contemplating a mixture of estate housing and open space in the area. In 1981, the City agreed the plan should be revised and encouraged property owners to hire a consultant who would work with City staff. This was done and, by 1987, a draft plan was submitted to the City.

Between 1987 and 1992, City staff attempted to work out perceived conflicts among the plan, the California's State Environmental Act ("CEQA") and the City's resource protection ordinance ("RPO"). The association was unable to pay the costs of revising the plan further and contended that the City's RPO did not apply to their plan area. In 1993, the City Council directed the planning staff to cease processing the plan as it was considering siting a landfill in the area. Some landowners withdrew from the association and filed an application for plan amendment and a conditional use permit for a landfill, which was ultimately denied. The City subsequently abandoned its own plans for a landfill in 1996. Landowners then filed three actions for inverse condemnation. In 1997, the City adopted a "Multi-Species Conservation Plan" ("MSCP") and entered into an agreement with the United States Fish & Wildlife Service, under which the City was required to follow this plan. The City amended its 1971 plan, which reduced the intensity of permissible uses.

On review of the trial court's decision, the appellate court fist addressed the issue of ripeness. For a taking claim to be ripe, the landowner must have a final and authoritative decision from the planning authority of the type and intensity of development legally

permitted on the subject property so that a court may gauge whether the regulations have gone "too far." At least one meaningful development application and necessary variances must be rejected before an application is ripe, unless the process is disjointed, repetitive and unfair. The futility exception for this situation is very narrow and requires a showing that the probability of denial must be near-certain. To test ripeness, the application must conform to the local general plan, so as not to require a modification of the same. The initial rejection of a grandiose development plan will not trigger a takings claim, as the applicant must make some effort to pursue compromise with the local authorities to allow some level of development.

Similarly, normal delays in the development process are non-compensable. As that process often involves the application of complex statutory and administrative schemes or threshold questions of jurisdiction, the period for their resolution is often viewed as "normal delay" so long as the local government did not fabricate the dispute or act in bad faith.

In light of these two limitations on takings claims, the court found plaintiffs' claims were not ripe. No plaintiff asked for development approval for a specific project, and the rejection of the plan amendment for the solid waste disposal site does not preclude applications for more appropriate plan amendments or for development under the existing plan designations. The rejection of the landfill application does not mean that another less-intensity development could not have been allowed. Nor does the adoption of the MSCP preclude development, although it does require the local government to consider acquisition as an alternative. However, this consideration is only required when a specific development proposal is made. Thus, requesting development approval is necessary, and the futility exception does not apply.

Similarly, the absence of a development proposal precludes consideration of a taking claim based on the admitted need to update the 1971 plan. The delay in adopting a new plan may be part of the normal development process if there is a legitimate governmental interest or reason for the delay, judged on an objective basis. The dispute between the neighborhood association and the City over the level of proper regulatory activity for the area is part of normal delay, and there is nothing in the record to suggest that the reasons based on CEQA, RPO, or MSCP were illegitimate. The court also attached significance to the failure of plaintiffs to demand their version of the plan update be brought forward to the City Council. The trial court's grant of defendant's motion for summary judgment was thus affirmed.

This case illustrates two defenses to takings claims, i.e., the need for a meaningful development application and calculation of normal development delay if done in good faith on an objectively reasonable basis. Those defenses should be fairly clear under California takings jurisprudence by this time.

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Calprop Corp. v. City of San Diego,
2000 W.L. 17303 (Cal. App. 4th Dist., January 12, 2000)

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