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Highlights

Appellate Cases — Land Use

Validity Of Pre-1991 Consents To Annexation Is Questionable

In *Johnson v. City of LaGrande*, __ Or App __ , __ P2d __ (2000), the city approved an annexation of 155 separate properties under 127 separate ownerships, all of which were already in the UGB. Procedurally, the city used the consent annexation process set forth in ORS 222.170 to justify the annexation. The city council determined that it had sufficient "consent" to satisfy ORS 222.170, and could therefore dispense with the requirement that an election be held in the territory to be annexed. The city's "consents" had been obtained pursuant to ORS 222.115. Under that statute, residential development had been approved over the last 20 years on condition that property owners sign consents to annex as part of a contract for extraterritorial water and sewer service. The consents were not recorded.

Before addressing the Court of Appeals holdings, a review of the LUBA decision is warranted because seven of LUBA's twelve key holdings were not appealed. *See Johnson v. City of LaGrande*, __ Or LUBA __ (LUBA No. 99-053, December 17, 1999), *aff'd as modified*, __ Or App __, __ P2d __ (2000).

First, LUBA held that the annexation constituted a land use decision over which LUBA had exclusive jurisdiction because the city applied provisions of its comprehensive plan when it approved the annexation. LUBA also rejected the city's argument that petitioners did not have standing. The city argued that because the petitioners did not live within the city limits, they could not obtain standing to appeal a city decision. LUBA held that petitioners had standing because they "appeared" (testified) at the hearing. The fact that the petitioners lived outside of the city limits was irrelevant.

LUBA then held that the annexation was legislative in nature under *Strawberry Hill 4-Wheelers*. *Compare Petersen v. City of Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977). (Annexation of 141 acres initiated by the four landowners is quasi-judicial in nature.) The dual effect of this holding was that "raise it or waive it" provisions did not apply and specific findings were not required so long as there was substantial evidence in the record to support the decision.

LUBA also determined that consents the city obtained under ORS 222.115 could be counted for purposes of establishing a double or triple majority consent annexation under ORS 222.170.

LUBA then addressed whether the consents ran afoul of the one-year time limit in ORS 222.173(1). Relying on ORS 199.487(2),1 LUBA held that the time limits do not apply to consents obtained pursuant to ORS 222.115. LUBA did not seem bothered by language in the same statute, which seemingly limits the applicability of ORS 199.487 to land located within the jurisdiction of a boundary commission.

Petitioners also successfully argued two final points: (1) that consents to annex obtained pursuant to ORS 222.115 must be recorded in order to bind successors in interest, and (2) that the city must have substantial evidence in the record demonstrating the validity and presence of the consents to annex upon which its decision relies.

These seven holdings were not appealed and now are binding law. However, the parties together sought review of five of LUBA's other key holdings. First, the Court of Appeals rejected LUBA's conclusion that ORS 222.115 is the sole source of authority by which municipalities can obtain consent to annexation as part of service contracts. Petitioners argued that the legislature had not, prior to 1991, authorized cities to require consents to annex in exchange for entering into utility service contracts. The city argued in response that the 1991 law only codified existing practices, which were legal under general statutory municipal powers and duties. Citing *Bear Creek Valley Sanitary Dist. v. City of Medford*, 130 Or App 24, 880 P2d 486 (1994), LUBA held that the 1991 legislation provides the sole source of authority by which municipalities can obtain consent to annexation as part of service contracts, and therefore, the consents obtained prior to 1991 could not be used to justify annexations without an election.

The Court of Appeals clarified that *Bear Creek* only stood for the proposition that since the enactment of ORS 222.115, all exercises of authority relating to consents to annexation in exchange for government services would be governed by the provisions of the statute. The court then held that *Bear Creek* did not stand for the proposition that local governments had no authority prior to the enactment of ORS 222.115 to enter into agreements requiring consent to annex in exchange for city services. However, the effect of the court's holding on this issue is severely limited by its next holding: that prior to 1991, cities were required to present an annexation plan to those persons whose consent was obtained in exchange for city services.

On this issue, LUBA held that the city erred by not providing the landowners with an

"annexation plan," as required by *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968). LUBA held that since the city was justifying its annexation under the "consent" provisions of ORS 222.170, annexation plans are required. However, in *dicta*, LUBA stated that landowners would not have a right to have annexation plans presented to them if their consent was obtained in exchange for a contract for urban service. Slip Op. At 16.

The Court of Appeals modified LUBA's holding on this point somewhat. First, it agreed with LUBA that consents obtained prior to 1985 in exchange for services were invalid if the local government could not demonstrate that the landowner was given an annexation plan, citing *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968). In addition, the court held consents obtained between 1985 and 1991 were also invalid if these consents were obtained pursuant to ORS 222.175. The court held that this statute superceded, and (apparently) codified the *Skourtes* decision. Finally, consents obtained pursuant to ORS 222.115 (i.e. after 1991) could be used regardless of whether annexation plans were provided to the landowner, because ORS 199.487(2) provides that consents obtained pursuant to ORS 222.115 may be used in the formulating of annexation proposals under ORS 222.170 (notwithstanding the notice of annexation plan requirement contained in ORS 222.175). Therefore, the court appears to have rejected, at least in part, LUBA's distinction between consents obtained pursuant to ORS 222.170 and consents obtained in exchange for a contract for urban services.

The Court of Appeals also rejected the landowner's argument that the property of non- consenting owners cannot be included in the area to be annexed if the city uses the consensual annexation process outlined in ORS 222.115. The landowners had argued unsuccessfully that ORS 199.487(2) mandates that contractual consents obtained in exchange for the provision of services cannot be used in an annexation proceeding brought pursuant to ORS 222.170 if the landowner does not consent to the annexation.

Lastly, the court elected not to address LUBA's holding that the city's practice of obtaining consents to annexation in exchange of providing urban water services to abate a health hazard was not coercive under the rationale of *Hussey v. City of Portland*, 64 F3d 1260 (9th Cir 1995).

In conclusion, consents obtained prior to 1991 are now vulnerable on a number of grounds. As a practical matter, these consents will be invalid unless the local government can demonstrate that the landowner was provided an annexation plan. Furthermore, third party homeowners will not be bound by the consent if it was not recorded. It appears that the net effect of these two holdings is that it may provide a basis for nullifying many consents obtained prior to 1991.

Endnote

1. ORS 199.487(2) states, in relevant part:

> " * * * Notwithstanding * * * [ORS] 222.173(1), 222.175 or any other requirement for obtaining consent to annexation, a city or district may use a consent to annexation contained in contracts authorized by * * * [ORS] 222.115 in formulating annexation proposals or petitions under ORS * * * 222.170 for properties whose owners have signed such consents to annexation."

Andrew H. Stamp

Johnson v. City of LaGrande, __ Or App __ , __ P2d __ (2000)

County Forced To Follow Mineral And Aggregate Resources Rule Despite Its Pre-1972 Ordinance

Morse Bros., Inc. v. Columbia County, 165 Or App 512 (2000), is a minor episode in the saga of OAR 660-023-0180, the Mineral and Aggregate Resources Rule. In this case, the county denied an aggregate mining operator's application for comprehensive plan and zoning amendments that would allow mining on a 190-acre site. The operator appealed to LUBA, which reversed the county because the denial violated Goal 5 and the Mineral and Aggregate Resources Rule. The Court of Appeals affirmed.

This case falls in the shadow of *Port of St. Helens v. LCDC*, 165 Or App 488 (2000), which upheld the Mineral and Aggregate Resources Rule. Under the Rule, local governments must apply the Rule's criteria instead of their own in deciding post-acknowledgment plan amendments (PAPA's) relating to mineral and aggregate resources. The case expands on *Port of St. Helens* as to the role of a certain limited exception.

The Mineral and Aggregate Resources Rule has a limited exception that allows local governments to consider conflicts arising under pre-1972 ordinances that govern mining. Under ORS 517.780, pre-1972 local mining ordinances are paramount to Department of Geology and Mineral Industry (DOGAMI) mining regulations.

Local governments may consider "other conflicts" under their pre-1972 ordinances that supersede DOGAMI regulations, as provided by OAR 660-023-0180(4)(b)(F). In mining-related PAPA's, pre-1972 ordinances may provide additional approval criteria. Here, the issue arose in the county's use of its pre-1972 Surface Mining Ordinance (SMO).

The county's SMO required compliance with <u>all</u> local ordinances. This requirement had the effect of re-activating local approval criteria in the comprehensive plan and zoning ordinance that otherwise conflicted with the Mineral and Aggregate Resources Rule, and which the Rule was intended to supplant. The county used this bootstrap approach to deny the application because it did not comply with the approval criteria in the comprehensive plan and zoning ordinance. These criteria were inconsistent with the Rule.

The Court of Appeals rejected this bootstrap approach to circumventing the Mineral and Aggregate Resources Rule. The court held that the only conflicts which could be considered were those that must be considered under the terms of the SMO itself. This limited local fine-tuning to the issues directly regulated by pre-1972 mining ordinances.

Stephen Mountainspring

Morse Bros., Inc. v. Columbia County, 165 Or App 512 (2000)

9th Circuit Cases

9th Circuit Decides Significant Temporary Takings Case

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000) (hereinafter "Tahoe"), defendant Regional Agency and its governing body appealed from a judgment of the federal district court for Nevada, which ruled defendant's actions effected a taking of the plaintiff's property. The plaintiff association was composed of 450 claimants.

In 1964, Congress approved a bi-state compact which created the Tahoe Regional Planning Agency ("TRPA"). The TRPA adopted an ordinance dividing the basin into seven land capability districts, and passed regulations which later proved inadequate. In 1980, the Compact was amended and TRPA *inter alia* was required to adopt "threshold carrying capacities" for lands within the basin within 18 months, as well as a regional plan within 12 months and to provide for review of projects within the basin. The court noted the remarkable clarity of the waters of Lake Tahoe and that, to retain that clarity, it was necessary to limit erosion by various land use regulations along stream environmental zones ("SEZs").

On August 24, 1981, TRPA adopted ordinance 81-5 which restricted development on SEZs in the most sensitive three of the seven land capability districts. On August 26, 1982, TRPA adopted environmental threshold carrying capacities, but found it could not adopt a regional plan in the time allocated. The agency thus adopted resolution 83-21, halting nearly all activities pending adoption of a regional plan. The resolutions were extended for a total of 32 months, until April 26, 1984, when a regional plan was adopted by ordinance 84-1. The state of California and environmental groups contended that the plan was insufficient to meet the standards to preserve the area and sought declaratory and injunctive relief. The federal district court for the Eastern District of California granted a preliminary injunction, which remained in effect until the 1987 regional plan was adopted.

Property owners then brought suit in federal courts in California and Nevada on takings grounds and requested monetary relief. The plaintiffs were divided into two groups: those with lands in SEZs and those in the three most sensitive land capability districts. The claims were further subdivided into four time periods: (1) August 24, 1981 to August 26, 1983, while ordinance 81-5 was in effect; (2) August 27, 1983 to April 25, 1984, while resolution 83-21 was in operation; (3) April 26, 1984 to July 1, 1987, *i.e.*, the time between the effect of the 1984 Regional Plan to the 1987 Regional Plan; and (4) July 2, 1987 to the present, when the 1987 Regional Plan was in effect.

There have been numerous federal district court opinions and three 9th Circuit opinions on the takings claims. Only certain of the section 1983 claims remained and these claims were consolidated for trial in the federal district court for Nevada. The trial court dismissed some of the remaining claims, but upheld others as takings based on a determination that Ordinance 81-5 and Resolution 83-21 were facially invalid as they effected a categorical taking of plaintiffs' property during the first two time periods. However, the court found no liability for the third period while the 1984 Regional Plan was technically in effect, but was enjoined.

The 9th Circuit first turned to whether Ordinance 81-5 and Resolution 83-21 constituted categorical takings. Under *Lucas v. South Carolina Coastal Comm.*, 505 U.S. 1003 (1992), the court looked at whether a taking occurred during the period of the moratorium pending adoption of the regional plan. The court said a takings determination rested on *ad hoc* factual inquiries balancing public and private interests under the three factors of *Penn Central Railway Company v. New York City*, 438 U.S. 104, 124 (1979). The court also identified two categorical "taking" categories: when physical invasion of an owner's property occurs or when an owner is deprived of all economically viable use of the owner's property.

Plaintiff claimed they were deprived of all economically viable uses during periods 1 and 2, as found by the trial court through the "mere enactment" of the challenged ordinance and resolution. This facial challenge did not require a ripeness inquiry. Plaintiffs further claimed that use of the property over various periods was a "temporal slice," which was compensable. The court rejected this approach, finding temporal interests to be compensable only in cases of physical invasion or occupation. The 9th Circuit also rejected the theory of "conceptual severances," or, dividing property into various interests and determining whether the effect of a regulation on that interest constituted a taking. The court noted that the United States Supreme Court considers the parcel as a whole and does not focus on individual interests. The court refused to find a taking in these circumstances.

The court then analyzed whether the affected owners were deprived of all economically viable use by the temporary moratorium and concluded that they were not. Plaintiffs' property was not rendered valueless by a 32-month moratorium. The court conceded a temporary moratorium may extend long enough to constitute a taking, but said there was no reasonable basis for any plaintiff to conclude that the moratorium would last indefinitely. The court also noted that

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the average time between purchase and development of property in the Tahoe basin was 25 years. The court concluded :

> "Furthermore, the temporary moratorium did not deprive the plaintiffs of all "use" of their property. The "use" of the plaintiffs' property runs from the present to the future. (This is a simple corollary of our earlier conclusion that the plaintiffs' property interests may not be temporally severed. By instituting a temporary development moratorium, TRPA denied the plaintiffs only a small portion of this future stream; the thirty-two months during which the moratorium was in effect represents a small fraction of the useful life of the Tahoe properties."

and

> "* * * In reaching this conclusion, we preserve the ability of local governments to do what they have done for many years – to engage in orderly, reasonable land-use planning through a considered and deliberative process. To do otherwise would turn the Takings Clause into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest."

Tahoe at 782-83.

The court then turned to plaintiff's cross-appeal that defendants were not liable for takings under the 1984 plan, which was immediately enjoined by a federal district court and never took effect. The 1987 plan replaced it and the trial court found no liability because of the injunction. The 9th circuit affirmed that determination, ruling that in a 1983 action plaintiff must show defendant's conduct was the actionable cause of the claimed injury. The court reviews the trial court's determination of this mixed question of fact and law only for clear error. Here it was not foreseeable that the adoption of the 1984 Regional Plan would result in tort liability. Rather, it was the California district court that prohibited any development action to approve a project or even to accept applications. Alternatively, plaintiffs argue that if the 1984 Regional Plan were not adopted, there could have been no injury.

As to period 4 (between 1987 to the present under the 1987 regional plan), the 9th Circuit noted a previous case had found that defendants incorrectly asserted a 60 day statute of limitation in review of a trial court dismissal of claims arising under this ordinance. On remand, the trial court in this case dismissed the claims finding that the California one-year and Nevada two-year statute of limitations applied and the claims were time barred. The court affirmed dismissal of the period 4 claims on statute of limitation grounds.

It is possible that this case will be reviewed by the federal Supreme Court. On October 20, 2000, the 9th Circuit denied a motion for *en banc* reconsideration. If the case is not further reviewed, it will have resolved nearly 20 years of takings claims in the Tahoe basin. The statute of limitations and lack of responsibility for an ordinance enjoined by a court (thereby continuing a moratorium) does not appear to be of widespread importance or controversial. What is more interesting, however, is the 9th Circuit's treatment of the temporal takings claims and its distinction between a temporary regulation and a temporary taking. Finally, the fact that Judge Reinhard, a conservative, wrote this rather strong opinion, makes it even more noteworthy.

Edward J. Sullivan

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000)

Ninth Circuit Rules Fire District Cannot Impose Fee in Lieu of Taxes for Services

In *Novato Fire Protection District v. United States*, 181 F.3d 1135 (9th Cir. 1995), the United States ceased use of a military base within the boundaries of plaintiff district. The base had been in operation from 1931 through 1974, and the parties arranged for plaintiff to be paid a flat fee to provide fire protection services following the closure of the base. Because of legal concerns, plaintiff sought to detach the base from the district and provide services under contract, but the General Services Administration, the Navy, and the Coast Guard objected to the detachment. Following detachment, the parties were unable to agree on the terms of a fire protection agreement, and plaintiff sought a declaratory judgment on the validity of the detachment and to require defendant to contract with it for fire protection services. Defendant removed the case to the United States district court, contending that plaintiff was required to provide it with fire protection services. Both parties moved for summary judgment, and the trial court granted defendant's motion. Plaintiff appealed.

The court began its analysis with *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which determined that the Supremacy Clause prohibited state and local taxes against the United States or its instrumentalities. While plaintiff never attempted to tax the base for its services, it did seek to impose a fee equivalent to the taxes it would have collected had it been legally able to do so. If a fee is equivalent to a tax, a court will disregard the form of the imposition and invalidate it. A state or local government may charge fees equivalent to actual costs of services, but may not base its imposition on the property value of the federal facility on the property tax rolls as a flat fee. A "fee," which is a disguised tax that cannot be constitutionally imposed, is itself unconstitutional.

The court stated that the detachment violated the Supremacy Clause as it sought to remove a pre-existing duty to provide core governmental services to circumvent tax immunity. To detach the district would allow imposition of a fee in lieu of property taxes to provide such basic services. The district was required to participate in a statewide fire protection program under statute. When the district was formed, the base was within the district's boundaries and remained so even when the base was active in providing its own primary fire protection services. The sole purpose of detachment following decommissioning was to relieve the district of its duty. As candidly noted in the detachment proceedings, that effort was used as a bargaining position to force a higher fee for out-of-district services. The court observed at 1140:

> Given this acknowledgment of a pre-existing duty to provide an essential government service, the District cannot now contrive to tax the United States through gerrymandering. There is a balance to be struck in ascertaining when local government action is, in fact, a disguised attempt to tax the United States. Courts must be careful not to intrude on the legitimate actions of local governments. However, under the unique circumstances of this case, it is clear that the local government action was purely designed to circumvent McCulloch and its progeny. As such, the detachment violated the Supremacy Clause.

The court also found that estoppel and waiver were not adequate defenses, and the trial court did not abuse its discretion in refusing to apply them. The court declined to reach California constitutional issues, and to find the state's statute of limitations applicable to this federal right. The trial court decision was thus affirmed.

This is an important federal/state relations case regarding the duty of state and local governments to provide services to federal facilities at no more than cost.

Edward J. Sullivan

Novato Fire Protection District v. United States, 181 F.3d 1135 (9th Cir. 1995).

Appellate Cases — Real Estate

Interpreting Purchase And Sale Agreements: Innocent Misrepresentation Or Mutual Mistake?

The matter of *Lesher v. Strid*, 165 Or App 34, 996 P2d 988 (2000), involved the analysis of a technical set of facts surrounding the interpretation of an appurtenant water right. The parties entered into a transaction for the sale and purchase of real property. The purchasers desired to expand their ability to pasture horses, and relied on their impression that the property had an appurtenant water right to four acres of the property.

The earnest money agreement provided:

"*D. **Water Rights** are being conveyed to Buyer at the close of escrow.

*** Seller will provide Buyer with a written explanation of the operation of the irrigation system, water rights certificates, and inventory of irrigation equipment included in sale." (boldface in original.)

The agreement also contained the following provision:

"**THE SUBJECT PROPERTY IS BEING SOLD 'AS IS'** subject to Buyer's approval of the test and conditions as stated herein. Buyer declares that Buyer is not depending on any other statement of the Seller or licensees that is not incorporated by reference in this earnest money contract." (boldface in original.)

The Buyers were given a 1977 water rights certificate which described the Jackson County Circuit Court's 1919 Rogue River water rights decree. The 1977 water rights certificate and 1919 decree did not state that the four acres of water rights described therein were specifically appurtenant to the subject property.

The Buyers stated that a map with the water rights certificate and the existence of an approximate four acre flat area next to the creek, led them to believe that the four acres described were appurtenant to the subject property. They did not obtain the services of a water rights examiner or attorney prior to their purchase of the property.

Sellers and Buyers, at the time of trial, each had an expert testify as to their interpretation of the water rights certificate. The Buyers' expert, a certified water rights examiner and land surveyor, testified that there was only 1.2 to 1.6 acres of irrigation water rights appurtenant to the subject property. The Seller's expert, an attorney specializing in water rights, testified that the buyer's expert was "a little low" and that the water right was appurtenant to the full four acres of the subject property.

The Court held that the standard for rescission is clear and convincing evidence and found that the Plaintiffs had met that burden based on the evidence submitted. The greater issue seems to be the degree to which the Buyer is entitled to rely on the Seller's representation of the physical aspects of the property without an independent verification. The Court quoting from *Combs v. Loebner* 315 Or 444, 448-449, 846 P2d 401 (1993) stated "[t]here is no general requirement in Oregon for a purchaser to 'use reasonable care to safeguard his own interests' by independently investigating a vendor's description of the land that the vendor purports to convey" Rather "a purchaser of land generally may rely on the vendor's representation of what land the vendor is conveying where *** that representation is made part of a written executed contract of sale."

A related issue is the disclaimer. The Court held that only matters that were extrinsic to the contract could be excluded by such a disclaimer (citing *Wilkinson v. Carpenter* 76 Or 311, 314, 554 P2d 512 (1976). However, since the representation regarding water rights was intrinsic to the transaction and recited therein, the disclaimer did not apply.

Author's note: The Court did not cite the case of *Onita Pacific v. Bronson* 315 Or 149, 843 P2d 890 (1992). The Onita case was most recently cited with approval in *Cameron v. Harshberger* __ Or App ___, ___ P2d _____, (CA A102890) 2000. The holding in Onita was that a buyer cannot recover damages in the form of economic loss from a seller based on an innocent misrepresentation: "In the case at bar, defendants and their representatives did not owe any duty to plaintiffs during the negotiations by virtue of a contractual, professional, or employment relationship or as a result of any fiduciary or similar relationship implied in the law. Here the relationship was adversarial. In an arm's length negotiation, a negligent misrepresentation is not actionable. Hence, plaintiffs cannot maintain their claim for negligent misrepresentation against defendants. *Onita*, 315 Or. 149, 165. In *Cameron*, the court did not find a special relationship imposed on the seller by virtue of the disclosure statement in ORS 105.465.

While *Onita* can be distinguished on procedural grounds (action for economic loss damages based on an innocent or negligent misrepresentation while *Lesher*, supra, was for rescission based on mutual mistake), it seems that the substantive distinction between the two is not obvious. The substantive difference between innocent misrepresentation relied on by a buyer and mutual mistake relied on by both individuals, if reduced to a pin, would seem to provide precarious balance for an angel. If that be the case, it would seem that the fate of a seller or buyer in litigation could depend on their choice of remedies or characterization of identical facts. Of course, quoting a contemporary philosopher who is the most recent addition to the Monday Night Football triumvirate, "I could be wrong."

Alan Brickley

Lesher v. Strid, 165 Or App 34, 996 P2d 988 (2000)

Contractor Cannot Rely On Preliminary Title Report To Determine Easement Location

In *Womer v. Melody Woods Homes Corp.*, 165 Or App 554 (2000), defendant contractor built a house for plaintiff. The house was built partly within the "no build" zone of an easement for a natural gas pipeline. The natural gas company objected to the house's location and demanded that plaintiff remove a portion of the house. Naturally, plaintiff sued defendant.

The construction project was predicated on a survey and title report, which defendant claimed showed a 5-foot easement. The easement actually provided that the pipeline was within 5 feet of the property line, and that there was a "no build" zone of 10 feet from the pipeline. No width was given for the easement as a whole. In some portions the easement was at least 15 feet wide.

Defendant impleaded the surveyor and the title company, alleging negligence and failing to ascertain the existence of the easement. The third-party defendants moved for summary judgment, which was granted by the trial court and affirmed on appeal.

The claim against the surveyor involved the preparation of a plat map. The plat map showed the pipeline to be five feet from the boundary and stated that the easement itself was of indeterminate width. Defendant argued to the contrary, submitting an affidavit that the easement was of determinable width, namely 15 feet.

The court found the issue involved the interpretation of an express easement, which is a question of law. Since the easement did not state

the width as a whole, but only that the pipeline was 5 feet from the boundary with a "no build" zone extending 10 feet beyond the pipe, the easement width was 15 feet or less, depending on the location of the pipeline. The court concluded that the easement width was indeterminate, and the plat map was accurate. Since the issue was a question of law, defendant's affidavit was immaterial to interpreting the easement.

Turning to the claim against the title company, the court noted that the preliminary title report incorrectly stated the easement was 5 feet wide. However, the report contained a disclaimer that it was only preliminary and that the title company assumed no liability until the premium was paid and a policy issued. Defendant's affidavit stated it was a common and accepted practice to rely on preliminary title reports to determine easement locations.

The court cast the issue as a question of law: whether defendant had the right to rely on the preliminary title report despite the disclaimer. Citing precedent, the court found that defendant had no right to rely on the preliminary report because of the unambiguous disclaimer.

In this case, the apparent reason that defendant was misled was the preliminary title report, which stated the easement affected the easterly 5 feet of the property, but did not disclose a larger "no build" zone. The lesson of the case is to take out a title insurance policy, at least for a minimal amount, if one intends to rely on a title report for disclosing easement locations. Title companies would no doubt approve of such practice as standard.

Stephen Mountainspring

Womer v. Melody Woods Homes Corp., 165 Or App 554 (2000).

En Banc Appeals Court Clarifies Co-Tenants Role Under The Uniform Fraudulent Transfer Act

In *Oregon Account Systems, Inc. v. Greer*, 165 Or App 738 (2000) (en banc), the Oregon Court of Appeals held that plaintiff's pleadings were sufficient to state a claim under the Oregon Uniform Fraudulent Transfer Act (UFTA) and survived defendants' motion to dismiss.

Defendants Floyd and Linda Greer owned residential real property, which was encumbered by a $35,000 mortgage, as tenants by the entirety. Floyd transferred his interest in the property to wife Linda in October 1993. Floyd received an unsecured loan in October 1994 and later defaulted on the loan. The Greers argued that Floyd's conveyance to Linda could not be considered a "transfer" under UFTA, as plaintiff alleged, because the property fell within two exclusions from the definition of "asset" under UFTA.

UFTA's definition of "asset" excludes, among other things, "[p]roperty to the extent that it is encumbered by a valid lien." ORS 95.200(2)(a). The Court held that the words "to the extent" in this clause refer to the pecuniary value of the lien rather than to the physical portion of the property securing the lien. Therefore, the Greers' entire property was not excluded from being an "asset" under UFTA merely because it was subject to an existing encumbrance. Rather, the property could be excluded only to the extent of the value of the encumbrance.

UFTA's definition of "asset" also excludes "[a]n interest in property held in tenancy by the entirety to the extent that it is not subject to process by a creditor holding a claim against only one tenant." ORS 95.200(2)(c). The Court held that the words of this clause are clear: whether property is excluded depends on the extent to which state law permits a co-tenant's interest to be subject to collection process. It is long settled law in Oregon that some interests of a co-tenant in a tenancy by the entirety are subject to collection process. Therefore, the Greers' entire property was not excluded from being an "asset" under UFTA merely because the Greers held the property as tenants by the entirety.

Susan Glen

Oregon Account Systems, Inc. v. Greer, 165 Or App 738 (2000)

Appellate Cases — Landlord-Tenant

Introduction Of Evidence At Trial Does Not Preserve A Legal Theory That Was Not Presented To The Trial Court

In *Roseburg Investments, LLC v. House of Fabrics, Inc.*, 166 Or App 158 (2000), the Oregon Court of Appeals held that the introduction of evidence at trial does not preserve a legal theory that was not presented to the trial court. The Court upheld the trial court's decision in this commercial forcible entry and detainer (FED) action that defendants were not in default for failure to pay rent because defendants were entitled to designate the application of its lease payments.

This case involved a commercial lease for space in a small shopping center between plaintiff as landlord and defendants as tenant. The written lease required defendants to make monthly payments of rent and monthly payments of defendants' pro rata share of common area maintenance (CAM) expenses. The monthly payments of CAM charges were advance payments based on estimated charges. At the end of the year, the lease required the landlord to provide tenant with an itemized statement of actual annual CAM expenses and the tenant's pro rata share. At that time, the parties would settle up any difference between the amounts of the advance payments and the actual pro rata share.

In 1997, defendants requested a refund or credit for an alleged overpayment of CAM charges of $6,100 by defendants, which was refused by plaintiff. Defendants then withheld an equal amount each month from its monthly payment for four months, for a total of $6,100. During those months, defendants' payment was more than the "minimum rent" required by the lease. However, pursuant to its own accounting practices, plaintiff first applied the payments to the CAM charges before applying the balance to the rent. Plaintiff's allocation of defendants' payments resulted in an alleged underpayment of rent of $6,100. When defendants refused to pay the alleged overdue "rent" or vacate the premises, plaintiff filed the FED proceeding.

At trial, plaintiff filed a memorandum that maintained that defendants had failed to timely pay the rent due under the lease, which automatically terminated the lease under ORS 91.090. Relying on *Fowler v. Courtemanche*, 202 Or 413 (1954), Plaintiff argued that it was entitled to credit defendants' payments first to CAM charges with the remainder to rent, resulting in unpaid rent. The failure to pay rent terminated the lease, which meant that defendants held the premises with "force" under ORS 105.115, and that plaintiff was entitled to recover possession of the premises pursuant to ORS 105.110.

The trial court concluded that defendants were not in default due to nonpayment of rent because the monthly payments exceeded the amount of "minimum rent" required by the lease. The trial court determined that plaintiff was required to apply the payments to rent rather than CAM charges because defendants' conduct had made clear they intended the payments to be applied to rent.

Plaintiff moved for a new trial, arguing that the basis of defendants'

default – whether nonpayment of rent or failure to pay CAM charges – was immaterial to plaintiff's right of recovery. Plaintiff contended that it was only required to prove that defendants were in default under the lease in order to prevail. In denying plaintiff' motion, the trial court noted that "Plaintiff now requests a new trial to reexamine the facts under a new theory – that plaintiff is entitled to relief because defendant breached a covenant of the lease." 166 Or App at 163. The trial court held that plaintiff's theory was not grounds for a new trial because the issue had not been raised at trial. Plaintiff subsequently appealed the trial court's decision.

On appeal, plaintiff essentially repeated the arguments in its motion for a new trial. Plaintiff argued it was entitled to judgment because the evidence showed that defendants had failed to pay either the minimum rent or the CAM charges. Defendants responded that the trial court correctly understood plaintiff's exclusive theory at trial to be that defendants were in default for failure to pay rent. Defendants contended that plaintiff was bound by its legal theory at trial, regardless of the sufficiency of the evidence to prove another theory.

The Court of Appeals disagreed with plaintiff's assertion that "the mere introduction of evidence preserves a legal theory that was not prosecuted to the trial court." *Id.* at 164. "To the contrary, 'the pleadings, the prayer and the arguments at trial' reveal the legal theories plaintiff presented to the trial court in support of its claim. A theory of recovery raised for the first time at trial in a post-trial motion is not an 'argument at trial.'" *Id.* (cites omitted). The Court observed that a party is not entitled to a new trial based on an issue that was not raised at trial.

In this case, the Court determined that plaintiff's pleading did not identify the legal theory that supported its claim that defendants unlawfully held the premises with force. The Court therefore decided to examine the arguments made at trial in order to determine the theory, or theories, advanced by plaintiff in support of its claim. Upon review of the available record, the Court concluded that nothing contradicted the trial court's determination that the plaintiff's current theory of recovery had been presented for the first time in plaintiff's motion for a new trial. Rather, the Court found it evident that "plaintiff's sole theory at trial was that it was entitled to judgment due to nonpayment of rent." *Id.* at 165. Therefore, the denial of the motion for a new trial based on plaintiff's new theory of breach of lease covenant was not in error.

The Court ultimately concluded that defendants were not in default for nonpayment of rent because defendants were entitled to designate lease payments as rent rather than CAM charges. Citing *Fowler v. Courtemanche*, *supra*, the Court stated that a debtor with two or more claims with the same creditor may designate the claim to which the payment is to be applied. The Court pointed out that plaintiff did not appeal the trial court's finding that defendants had designated the disputed payments as rent by their conduct. The Court then affirmed the trial court's decision because plaintiff had not demonstrated that the trial court had erred.

It is important to note that the Court did not review the entire record in ascertaining plaintiff's theories of the case. Although plaintiff had designated the record of all oral proceedings, consisting of three audiotapes, plaintiff did not set out the pertinent portions of the record. The Court noted that to determine plaintiff's trial theories, "…would require us to search for the pertinent portions of the record. We are not obligated to perform such searches and decline to do so." *Id.* Under the provisions of ORAP 5.45(3), an error that "would require the court to search for the pertinent portion of the record … shall not be considered." Thus, this requirement is as important for successful appeals as the better-known requirement of ORAP 5.45(2) that errors be preserved at trial.

The results in this case clearly point out the perils of failing to raise all relevant, alternative legal theories at trial, and failing to properly prepare the record on appeal. The legal theories available on appeal were severely limited by plaintiff's failures regarding the record. Practitioners must be aware that even the most meritorious assignment of error can be rendered moot if not properly preserved at trial and presented on appeal. An argument not considered will never bring your client success on appeal.

Raymond W. Grey Cloud

Roseburg Investments, LLC v. House of Fabrics, Inc., 166 Or App 158 (2000)

Negligent Tenants Held Liable For Their Own Mistakes

The issue in *2606 Building v. MICA OR I Inc.* 165 Or App 240 (2000) was whether or not the lessees' conduct was excusable negligence or whether the lessors could forfeit the remainder of the lease.

The original lease was entered into on November 1, 1984. In September of 1997 the lessors learned that there was no casualty insurance on the leased premises as required by the terms of the lease. The lessors purchased the insurance as they were authorized to do under the lease.

On November 12, 1997 lessors sent a letter to lessees demanding payment of accrued late charges and reimbursement for cost of insurance. The letter demanded payment by November 22nd, more than the three days required by the lease. The lessees sent a check for the demanded sum via overnight letter. However, it was returned to the lessees on November 25, 1997 as undeliverable. The label read "464 Ridgeway Road" when the correct address was "434 Ridgeway Road".

The lessees cite various cases relieving the tenants from breach based on excusable accident or mistake. However, the Court distinguished between those cases cited in which the mistake was caused by the influence of the landlord or agent and the case before them which was based solely on the negligence of the tenant. In this instance "...Defendant's mistake, while small, was nevertheless "completely uninfluenced" by lessors, a third party, or other circumstances that might invite equitable intervention" *2602 Building* supra at p 245.

Therefore, forfeiture of the remainder of the lease was allowed.

Alan Brickley

2606 Building v. MICA OR I Inc., 165 Or App 240 (2000)

Land Use Board of Appeals Cases

Farm and Forest Lands

In *League of Women Voters v. Coos County*, *LUBA No. 2000-006 (8/18/00)*, petitioners challenged the county's approval of a private park for off-highway vehicles (OHV) on land zoned for both farm and forest uses. As approved, the OHV park would occupy 225 acres of a 531 acre tract and would include up to six miles of trails within the main trail system, additional trails on the outer perimeter of the property and a motocross skill training and riding area on 25 acres in the northwest portion of the property. In addition to year-round operation, the park would host up to 12 special events per year. Half of these events would last three days and half would last two days.

During the local proceedings on the OHV park, petitioners testified that noise from the park would negatively affect two livestock activities on their adjacent ranch: a champion Limousin cattle breeding operation and a wild mustang adoption and training operation. Both activities are noise sensitive and petitioners complained that the OHV park would require changes in their operations, which could result in a significant financial loss. In response to petitioners' expressed concerns, the county board approved the OHV park with conditions prohibiting OHV trail riding within 100 feet of petitioners' property and prohibiting noise from any one OHV or combination of OHVs to exceed DEQ standards within 1000 feet of the OHV.

Of the four assignments of error petitioners raised at LUBA, the first assignment of error is of greatest interest because it required LUBA to sort through differing statutory and administrative rule standards for parks on farm and forest lands. Petitioners argued the county erred in determining the OHV park is allowed in farm and forest lands because the applicable statutes and rules allowing "private parks" do not include uses of such high intensity as the proposed park.. LUBA noted that neither ORS 215.283(2)(c) nor OAR 660-006-0025 defines the terms "park" or "private park." Instead, the county relied on LUBA's decision in *Spiering v. Yamhill County*, *25 Or LUBA 695 (1993)* to determine the proposed OHV park is a private park. In *Spiering*, LUBA concluded a 24-acre paintball park in the center of a 108-acre parcel zoned for exclusive farm use (EFU) was a "park" for purposes of ORS 215.213(2)(e).

The county concluded the OHV park would be similar in intensity to the paintball park approved in *Spiering* and distinguished the OHV park from other intensive recreational uses that LUBA has determined are not permitted on forest lands under Goal 4 or its implementing rules. For example, in *Tice v. Josephine County*, 21 Or LUBA 371 (1991), LUBA concluded a motorcycle race track on 77 acres of forest land is not a permitted "outdoor recreational activity" allowed under Goal 4. The county argued that *Tice* involved a race track with concession stands, ticket booths and massed vehicles racing against each others. In contrast, the county characterized the OHV park as a primarily off-road trail system with vehicles dispersed in time and space and no permanent structures, although the county acknowledged its approval allows competitive events at the park..

LUBA sided with the petitioners and agreed the county misconstrued the applicable law. Noting that at first glance its rulings in *Spiering* and *Tice* appear to be contradictory, LUBA observed that on closer scrutiny they involved slightly different statutory schemes and administrative rules. *Tice* involved Goal 4 and its administrative rules, OAR 660-00006- 0025(1)(b), which requires that recreational activities on forest lands be "appropriate in a forest environment." LUBA characterized the *Tice* line of cases as standing for the proposition that "not all recreational activities that might otherwise fall within the scope of 'park' or 'private park' are appropriate on forest lands."

In contrast to *Tice*, the *Spiering* case recognizes that there is no similar qualification in the statutes or rules governing nonfarm uses on agricultural lands. LUBA noted that petitioners, DLCD and amicus curiae Oregon Farm Bureau argued that such a qualification should be inferred, at least with respect to recreational uses allowed in "private parks" under ORS 215.283(2)(c). DLCD argued that "park" should refer to only those low intensity uses with a low impact on the property. Moreover, petitioners and DLCD noted that applicable administrative rules limit the activities that can take place on "public parks" on agricultural and forest lands without a Goal 3 or 4 exception to recreational trails, including motorized off-road vehicle trails. Accordingly, they argued that OHV trails are permitted on farm or forest lands without a goal exception only in public parks and that they are not allowed in private parks without approval of an exception.

LUBA declined to read into the applicable statutes and rules the inferred qualification petitioners and DLCD advanced. Based on its review of the language of the applicable administrative rules, LUBA concluded "nothing in LCDC's rules purports to apply the limitations applicable to public parks to private parks." Additionally, LUBA refused to read into ORS 215.2283(2)(c) and its related rule any inherent limitation on the types of recreational activities allowed on agricultural lands as private parks, stating:

> Unlike Goal 4 and the Goal 4 rule, the EFU statute and the Goal 3 rule contain no express language that can be read to restrict the types of recreational activities allowed on agricultural land. In the absence of such language, we do not believe it appropriate to rely on general statutory and rule-based policies as a basis to import such restrictions.***In other words, the text of ORS 215.283(2)(c) contains no suggestion that "park" means something different than the plain, ordinary sense of that term. As we stated in *Spiering*, the plain meaning of "park" includes land set aside for public recreational activities. Petitioners do not dispute that riding OHVs on trails or on a motocross track falls within that broad definition.
>
> The foregoing has the result that activities permissible in private parks on agricultural land may not be permissible on private parks on forest lands. However, that difference reflects the text of the relevant statutes and rules: as noted above, Goal 4 and the Goal 4 rule expressly limit recreational activities on forest lands to those appropriate for the environment, while the EFU statutes, Goal 3 and the Goal 3 rule contain no corresponding limitation.
>
> We further recognize the difficulty in applying the foregoing to the present case, because the subject property is comprised of both agricultural and forest land, and the applicants propose placing OHV trails and the motocross track on both types of land. However, as a consequence of our analysis, to the extent those recreational activities occur on agricultural land, they are permissible under ORS 215.283(2)(c), subject only the criteria at ORS 215.296. To the extent those activities occur on forest land, they are permissible only if, in addition, they are "appropriate in a forest enviroment." (Slip Op. At 11-12)

Turning to each of the challenged activities in the proposed OHV park, LUBA agreed with petitioners that the motocross race track on forest land is inappropriate in a forest environment. On the other hand, LUBA agreed with the county that the proposed OHV trails, which the county described as "a low-intensity, single-file OHV trail system" dispersed over more than 200 acres, is a recreational activity appropriate in a forest environment and permissible on forest lands in private parks under the Goal 4 rule.

Disposing of the remaining assignments of error, LUBA agreed with petitioners that the county's findings on noise impacts are inadequate and fail to address petitioners' evidence concerning noise impacts on their farm operations. The findings also fail to establish methods for complying with the conditions of approval, particularly concerning cumulative noise impacts, and provide no basis for concluding the conditions will be effective to mitigate these impacts. LUBA also agreed with petitioners that a condition prohibiting ridgeline trails appeared to be inconsistent with an approved map that showed several ridgeline trails, warranting a remand to enable to the county to explain or resolve this inconsistency. LUBA remanded the decision to the county to address each of the assignments of error it sustained.

■ *Luba's Jurisdiction: Street Vacation*

The significant impact test for LUBA's jurisdiction is alive and well as illustrated in LUBA's order denying a motion to dismiss in *Mekkers v. Yamhill County, LUBA No. 2000-067 (8/30/00)*. Petitioners in *Mekkers* appealed a county decision vacating a portion of Redmond Hill Road,

a graveled county road with a 21 foot travel lane in a 33 foot right-of-way. The developer, an intervenor-respondent, proposed to develop a new subdivision within the adjacent McMinnville city limits north of Redmond Hill Road. The subdivision includes creation of a new city street and vacation of a portion of Redmond Hill Road, which provides (and will continue to provide) access to several residential properties. Although the street vacation is not necessary to develop the subdivision, it will eliminate a potential safety hazard in the street system and will facilitate development of intervenor's and other property farther to the east. The vacated portion of Redmond Hill Road ultimately will be annexed into McMinnville.

The county and intervenor moved to dismiss the appeal, arguing it satisfied neither the statutory nor the significant impact test for a land use decision and that LUBA lacked jurisdiction to hear the appeal. None of the parties contended the street vacation was a statutory land use decision and LUBA agreed it was not. Based on its review of applicable case law, however, LUBA concluded the county's decision has a significant impact on present or future land uses and is a land use decision subject to LUBA's jurisdiction. LUBA based its conclusion on *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), *Carlson v. City of Dunes City*, 28 Or LUBA 411 (1994) and *Harding v. Clackamas County*, 16 Or LUBA 224 (1987). Among the impacts of the street vacation that LUBA determined to be significant are: (1) the vacation will alter the traffic pattern of adjacent property owners that have a right of access to the vacated street and to the nearby transportation system; and (2) the vacation "facilitates and sets the stage for further development that will alter the character of the surrounding land uses." Since the street vacation will significantly change the *status quo* of the area, LUBA denied the motion to dismiss.

Standing to Appeal Post-Acknowledgment Plan Amendment

LUBA's order denying a motion to dismiss in *Old Town Cornelius Neighborhood Association v. City of Cornelius*, LUBA No. 2000-089 (8/30/2000) (Order on Motion to Dismiss), illustrates the perils of failing to adhere strictly to the procedures for processing a post- acknowledgment plan amendment (PAPA). As in most procedure -oriented appeals, the facts are critical.

On June 27, 1997, the city sent DLCD notice of a proposed amendment to the city's comprehensive plan text and map and the zoning map to create a "Main Street" planning district affecting 86 acres in and near the city's downtown. The notice stated that the final hearing on this PAPA would be on August 4, 1997, 38 days from the date of the notice. In fact, the final hearing did not occur until February 2, 1998. Petitioners did not participate in any of the city proceedings leading to adoption of the PAPA. The city did not give DLCD notice of the adopted amendments until May 25, 2000 and on June 2, 2000 DLCD issued a notice of adopted amendment indicating that the notice of proposed amendment was submitted to DLCD less than 45 days before the city's final action. DLCD's notice stated the deadline to appeal to LUBA was June 16, 2000 and petitioners filed their LUBA appeal on that day.

The city moved to dismiss the appeal, arguing that none of the petitioners appeared during the city proceedings on the PAPA and that they lack standing to appeal. The post- acknowledgment statutes waive the appearance requirement if the local jurisdiction fails to give DLCD 45 days advance notice of a PAPA. Nevertheless, the city argued the appearance requirement applies because the final hearing on adoption did not occur until long after the 45 day time period expired as DLCD asserted.

LUBA rejected the city's argument and agreed with petitioners that the statutory appearance requirement is waived. LUBA noted that under relevant case law, violation of the post-acknowledgment procedures can be a substantive, rather than procedural, error. Turning to DLCD's rules for processing PAPAs, LUBA noted that the applicable notice form requires a local jurisdiction to identify the date of final hearing. In LUBA's view, "[t]he evident purpose of that rule requirement is to allow DLCD and other interested parties at least 45 days notice of the last opportunity to participate in the proceedings of the local government. Because nothing in the relevant statute or rules appears to compel local governments to notify DLCD of subsequent changes that affect that opportunity, the notice of the date of final hearing provided to DLCD has considerable significance in safeguarding that opportunity." (Order at 5)

The fact that the city's final hearing on the PAPA occurred more than 45 days after it sent notice to DLCD did not excuse the City's untimely notice in LUBA's view. Accordingly, LUBA concluded that the consequence of the city's failure to notify DLCD at least 45 days before the final hearing is to open up standing to appeal to DLCD and any other person who received notice of the city's decision from DLCD. LUBA added that "[i]f local governments wish to avoid that consequence, nothing of which we are aware prevents them from sending additional notice to DLCD proposing a date for final hearing on adoption that complies with ORS 297.610(1)." (Order at 6)

Kathryn S. Beaumont

UGB Case Applies ORS 197.298 To Resource Land

In *1000 Friends of Oregon v. Metro and Ryland Homes*, LUBA No. 2000-002 (9/6/2000), LUBA remanded a UGB amendment for 109 acres of land zoned Exclusive Farm Use (EFU). The case is noteworthy for its discussion and application of (1) ORS 197.298(3) exceptions to the priority categories of land for UGB amendments, (2) Goal 14 factors 1 and 2 as the basis for subregional "need," and (3) Goal 2 exception crietrion (ii) determinations of whether a need can be "reasonably accommodated" on exception lands.

LUBA repeated the principle that Goal 14, factors 1 and 2 "need" factors are interdependent. A subregional need may be identified using these factors. Determination of a subregional or geographically specific "need" must consider "the role played by that need and efforts to meet it in the context of the entire UGB." (Slip Op. at 6.) LUBA held that was done in this case.

Goal 14 was applied first, then the "priority scheme" in ORS 197.298 was addressed. Accepting a need for housing to address a subregional jobs/housing imbalance as the identified need, LUBA held that increasing the quantity of residential lands in a subregion is not a "specific type of identified land need." This interpretation of "specific type" of land need differs from LCDC's interpretation of that phrase in the 1992 Urban Reserve Rule. In 1996, the Commission amended the Rule to include subregional jobs/housing needs as a "specific type of identified land need." All exceptions to priority land categories were removed from the 2000 Urban Reserve Rule. However, the 1996 LCDC interpretation is included in the June 26, 2000 draft of the Goal 14 rule for UGB amendments at OAR 660-014-0040(3). The Department has placed emphasis on it as a substitute basis for "subregional need" UGB amendments. The proposed Goal 14 "need factors" would no longer contain the basis for "subregional need."

A jobs/housing exception to the priority land categories under ORS 197.298(3)(a) was held to be available, consistent with *D.S. Parklane Development v. Metro*, 35 Or LUBA 516 (1999) (*Parklane I*). However, it is a narrow and limited exception to adding lower priority lands that "as a practical matter can operate only in the context of an amendment to the entire UGB." (Slip Op. at 39.) Adding land to the UGB to increase the quantity of residential land for a subregion involves only ORS 197.298(1). Higher priority lands that meet urbanization rules

are examined for a sufficient quantity of residential lands to satisfy the identified need before resource lands may be considered under (1)(d).

ORS 197.298(3)(c) was applied to affirm findings and evidence that adjacent exception areas in this case cannot be provided for urban services without the inclusion and prior development of this EFU zoned land. (Slip Op. at 42.)

The Goal 2 legal standard for evaluating alternative sites in OAR 660-04- 0010(1)(c)(B)(ii), called "exception criterion (ii)," was applied. If exception lands can "reasonably accommodate" the identified need, those lands must be added to the UGB before alternative resource lands. LUBA repeated the principle that such exception lands must be added to the UGB even if alternative resource lands would "better" accommodate the need.

Significantly, LUBA held that exception criterion (ii) does not place any restrictions on the categories of considerations for whether land can "reasonably accommodate" an identified need. Facts concerning parcelization, development patterns, steep topography, absence of adjacent urban density development, and absence or scarcity of urban facilities can be considered. However, a "finding that the resource land has relatively fewer development constraints or a higher percentage of buildable lands than an alternative site is not sufficient to satisfy the 'reasonably accommodate standard'." (Slip Op. at 20.)

These issues may be appealed in this case. The same issues are currently the subject of proposed amendments to LCDC Goal 14 and its implementing rule. LCDC has scheduled public hearing on the proposed goal and rule amendments for October 26, 2000 and November 30, 2000.

Larry Shaw

1000 Friends of Oregon v. Metro and Ryland Homes, LUBA No. 2000-002 (9/6/2000)

Cases from Other Jurisdictions

United States Supreme Court Opposes Nude Dancing Ban

City of Erie v. Pap's A.M., 529 U.S.277 (2000), involved a city ordinance banning public nudity, which respondent, a nude dancing establishment, challenged on First and Fourteenth Amendment grounds in state court. Ultimately, the Pennsylvania Supreme Court found the ordinance violative of the First Amendment. The ordinance required female dancers to wear "pasties" and a "G-string." The Pennsylvania Supreme Court saw nude dancing as expressive conduct entitled to some protection, as found by eight Supreme Court Justices in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The Pennsylvania Supreme Court found four non- harmonious opinions in *Barnes* and, determining no clear or binding precedent, proceeded to determine the ordinance was not content neutral, but related to the suppression of erotic speech and, thus, invalid.

Since the state supreme court determined the ordinance was content based, it was subject to strict scrutiny. The ordinance failed that strict scrutiny test as the Court found criminal penalties for sex crimes to be a less drastic means of combating the alleged evil. The Pennsylvania Supreme Court severed the anti-nudity provisions from the remainder of the ordinance and did not reach other First Amendment issues or the Pennsylvania constitutional issues.

On review by the United States Supreme Court, Justice O'Connor's majority opinion stated that nude dancing was within the outer reaches of expressive conduct, and the Court's analysis began with whether the ordinance was related to the suppression of expression. The Court admitted there was no single rationale from the *Barnes* case in which the Court upheld a "strikingly similar" regulation banning public nudity. The city asserted that the ordinance regulated conduct, rather than speech. The respondent, however, insisted that the ordinance targeted nude dancing and, therefore, must be justified under the strict-scrutiny test.

The Court stated the ordinance was a ban on all public nudity. However, the majority noted the Pennsylvania Supreme Court found a basis to limit the scope of the ordinance. The law's preamble set forth the purpose of suppressing an atmosphere conducive to violence, sexual harassment, public intoxication, and the spread of sexually transmittable diseases. The majority construed this to mean the City's intent was to combat the negative secondary effects of free speech.

However, the Pennsylvania Supreme Court also found, based on Justice White's dissent in *Barnes*, that there was an unmentioned primary effect: the suppression of erotic expression. The ordinance allowed dancing with pasties and a G-string, but prohibited it otherwise. The majority rejected Justice White's dissent and said that it would not look at an alleged illicit motive for the ordinance if there was an adequate secondary-effect basis for it.

Justice O'Connor's opinion relied on *United States v. O'Brien*, 391 U.S. 367 (1968), in which a draft card burner was successfully prosecuted, notwithstanding his claim of immunity under the First Amendment's free expression provisions. Such expression did not prevent criminalization of the secondary effects of the same (i.e. destruction of the Selective Service System) even if it did have incidental effects on expression. The majority found that the prevention of harmful secondary effects was unrelated to suppression of expression and characterized these incursions into free speech as "de minimis."

The majority then proceeded to apply the *O'Brien* factors to this case and found that the ordinance was within the constitutional power of the city to enact as a "police power" regulation. The majority also found the ordinance furthered a substantial governmental interest: the control of unwanted secondary effects. No studies were required to show these effects within the jurisdiction, so long as the enacters reasonably believed that the ordinance would be so related. The majority also determined the ordinance was to a content-neutral restriction on conduct, rather than on First Amendment expression, and was "unrelated" to the expression of free speech.

While the G-string and pasties may not "cure" the unwanted secondary effects, they need not do so. They need only further the governmental interest in curing the same. Finally, the majority rejected Justice Souter's suggestion that zoning might be a better means of dealing with the issue by stating, "It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirements implemented here." The decision of the Pennsylvania Supreme Court was thus reversed and remanded.

In a separate opinion, Justice Scalia joined by Justice Thomas, concurred in the judgment, but found the case was moot. He noted that the building that housed the nude dancing activities had been sold and the owner prepared an affidavit stating that the corporation was no longer presenting nude dancing or adult entertainment. The city stated that respondent *could* get back into the business. In Justice Scalia's opinion, however, that is not sufficient under the "reasonably likely to occur" standard the Court has previously used. Moreover, termination of the business occurred before the city's petition for certiorari was filed. Under these circumstances, it is unlikely that respondent was attempting to insulate a favorable judgment. Justice Scalia also suggested that with only one interested party there was no longer a case or controversy under Article III of the federal Constitution.

Having disagreed on mootness, the opinion of Justices Scalia and Thomas concurred in the result that the judgment of the Pennsylvania Supreme Court must be reversed. This opinion noted that the statute in *Barnes* was upheld by these same two Justices because it regulated

conduct, rather than expression. Moreover, the problem was apparently not mere nudity but lap dancers. Yet, the text of the ordinance makes no distinction between the two, and the city's counsel stated that the only reason the ordinance was not enforced against a production of *Equus* was that no one complained. As a result, the city took the position that it would not enforce the ordinance against activities found by the United States Supreme Court to be free expression. Finally, the Scalia-Thomas opinion would have no trouble singling out nude dancing for regulation so long as the Court was unpersuaded that the ban was prompted by the communicative character of such dancing. These Justices would not find a need to deal with "secondary effects" of nude dancing. If the city found this dancing to be immoral and banned for that reason, there would be no First Amendment relief.

Justice Souter concurred and dissented, finding that it was legitimate for the city to regulate the secondary effects of nude dancing; however, he would have required an evidentiary record to show that the remedy for the evil identified would, in fact, be advanced. In past cases involving First Amendment concerns and adult entertainment, the Court has required such justification. To Justice Souter, mere speculation was insufficient, and the issue might be dealt with through zoning regulations.

Justice Stevens, joined by Justice Ginsburg, dissented, stating that the doctrine of secondary effects should not be used to completely suppress certain forms of expression. The dissent also rejected the distinction between the speech and conduct effect of the regulation. It emphasized the majority's more lenient view that, if the motive of the ordinance were both legitimate and illegitimate, the Court would infer that it was legitimate. The dissent concluded:

> The Court cannot have its cake and eat it too—either Erie's ordinance was not aimed at speech and the Court may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the Court can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.

Indeed, the dissent would classify nude dancing as expressive conduct protected by the First Amendment: the nudity of the dancers was both protected expression, the specific target of the challenged ordinance, and related to the message conveyed. The dissent also noted the purposes of the ordinance included stopping nude dancing at this establishment and that the Pennsylvania Supreme Court did not, as in *Barnes*, attempt to give the ordinance a limiting construction.

This case is another product of the Tower of Babel that passes for First Amendment jurisprudence in our highest court. The shifting concepts, imprecise words, and result-driven decisions show only that there is no stability in free speech these days—only an attempt to position the court for the next case.

Edward J. Sullivan

City of Erie v. Pap's A.M., 529 U.S.277 (2000)

Seventh Circuit Decides Case Under "New" Equal Protection Interpretation

In *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000), plaintiff sued for an injunction and damages, alleging violation of his civil rights by two of defendant's police and social workers. The claims were based on alleged interference with a petition for redress of grievances and equal protection. The trial court granted defendant's motion for summary judgment.

Plaintiff had been engaged in disputes with his neighbors over alleged breaches of the peace and disorderly conduct and had made dramatic appearances before the local city council to make known his grievances with the police. Plaintiff had been arrested 15 times for disorderly conduct, battery, violation of a noise ordinance and the like. Plaintiff did not deny there was probable cause for each of his arrests; rather, he believed the police had not fairly arbitrated his frequent neighborhood altercations (some 80 police reports over seven years).

The court noted the right to petition the government for redress of grievances found in the First Amendment and incorporated as a right applicable against state and local governments in the due process clause of the Fourteenth Amendment. Judge Posner, the author of the opinion, characterized this right as a "negative liberty," or the right to be left alone. While federal courts protect the right to petition, they do not direct the allocation of public resources to require the response desired by the petitioner. Nor is every government employee a petition receiver. The dismissal of the right-to-petition claim was affirmed.

As to the equal protection claim, there may be ground for relief if police services were withdrawn and, under the United States Supreme Court decision in *Olech v. Village of Willowbrook*, 120 S.Ct. 1073 (2000), there may be a case based on malice. At best, the plaintiff alleged the police exercised their broad discretion in favor of plaintiff's neighbors. Whether the police did so from an improper motive was unproven in this record. Judge Posner's opinion in *Olech* sustained the possibility of an equal protection violation involving a "class of one," a position upheld by the United States Supreme Court.

Judge Posner reflected on the role of motive in equal protection cases from the *Olech* opinion. He noted that the equal protection clause prohibited intentional differences in treatment without a rational basis. However, the court also said the disparate treatment need not be based on a selective ill will if the difference in treatment was "irrational or wholly arbitrary." Similarly, Judge Posner found that courts would not be the arbitrator of equal protection claims arising out of unexplained treatment by police of similar complaints by different people. To do so, would be to draw federal courts "deep into the local enforcement of petty state and local laws." The court thus interpreted "no rational basis" in a "class of one." To make out a prima facie case in a "class one" equal protection claim, plaintiff must show that defendant deliberately sought to deprive plaintiff of equal protection for reasons of a personal nature unrelated to the discharge of defendant's operations. The action must be vindictive or with a totally illegal animus toward plaintiff. The court concluded that if plaintiff had claims against his neighbors, there were adequate civil remedies available. There is no equal protection claim against the government in this case.

While not a land use case, the Seventh Circuit opinion here will control some cases of alleged disparate treatment of zoning violations. This case, and *Olech*, may show a move toward increasing the volume of equal protection cases brought in federal courts for alleged vindictive disparate treatment in local land use enforcement.

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Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir. 2000).

Washington Apellate Court Finds "No Changing the Goalposts" Rule Inapplicable to Fee Impositions

In *New Castle Investments, Inc. v. City of LaCenter*, 98 Wash.App. 224, 989 P.2d 569 (1999), plaintiff developer convinced a trial court that defendant city's transportation impact fee ("TIF") is subject to a statutory provision prohibiting application of "new land control ordinances" following the filing of a completed application. The Washington impact fees are akin to, and patterned on, the same model as Oregon's Systems

Development Charge ("SDC"). The issue before the court was the date of calculation of the TIF. Both sides recruited amicus help from the development and municipal communities in presenting this case. The development community wished to fix the calculation at the time a completed land use application was filed, while the municipalities wished it to be calculated at the time the building permit was issued. Defendant further contended that this was a tax, rather than a land use control, and was not subject to the prohibition of changing regulations.

The court approached the matter as a question of law, using statutory construction principles and Washington precedent. Under Washington caselaw, the plain meaning of words used in a statute is given weight in the absence of contrary legislative intent. The developer stated that TIFs were authorized as part of the state's Growth Management Act and applied only to development projects, but the city stated that the TIFs do not "control" development in any way. The court agreed with the City, pointing out that the state legislature expressly stated that the TIF was applicable at the time of the issuance of building permits, as opposed to normal statutory vesting of requirements at the time of an application. The court analyzed the governor's veto of a section of the TIF law and used the veto message to show the legislative history favorable to the city's position.

The court also examined Washington precedent regarding "common law," and determined that state policy did not preclude application of the TIFs. Vested rights should not be more broadly applied than intended, stated the court, and there is less of a legitimate expectation that the costs, rather than the rules of development, should be fixed at the beginning. Because a TIF does not regulate land use, it is not a type of vested right under Washington law. Moreover, the purpose of the ordinance was like a tax—to raise revenue to pay for public facility needs, rather than to offset the costs of regulation.

The developer then argued that, although the fees are "reasonably related" to the costs of all development, they are not individuated for each development and, under the "heightened scrutiny" of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the city had not borne its burden of proof. However, the court pointed out that *Dolan* does not apply to taxes and, even if it did, the TIFs need only be roughly proportional to the impacts created by the development. The fact that the fees must be segregated and used only for certain purposes did not change their classification. Regardless of their characteristics as taxes, these fees are not "land use control ordinances" to which the restrictive statute applies. Finally, the court found the public reasons for not vesting were more weighty in assuring that fees for growth are consistent with the pace and weight of growth occurring. The court stated at 576:

> To freeze the calculation of the impact fee at the time of application would disconnect planning and financing from the actual effects of growth. The Legislature has stated that the indirect effects of growth can be recovered. If the fee were frozen, then new growth could take place without the developer paying its fair share for improving public facilities. The developer could be paying an impact fee that reflects a planning effort and a cost that is no longer relevant. The TIFs must be calculated when the growth is to occur, at the time of the building permits; otherwise cities could be underfunded to pay for the indirect costs of new growth.

The trial court decision was reversed, and the Washington Supreme court denied review of this matter.

This case is instructive in Oregon, for there is a good argument that fees are not "standards and criteria" that freeze at the time of application. Incidentally, Dan Kearns, a former student editor of this publication, successfully represented the city in this matter.

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New Castle Investments, Inc. v. City of LaCenter, 98 Wash.App. 224, 989 P.2d 569 (1999).

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