OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 23, No. 1 • February 2001

Highlights

Appellate Cases — Landlord-Tenant

Signpost is a Fixture Under Lessee's Control

In *Oldham v. Fanno*, 168 Or.App 573(2000), the Court of Appeals reversed the trial court's holding that a signpost on leased property is in the control of the lessor of that property, and upheld the trial court's holding denying damages to the lessee for loss of a sign on that property.

The property in question was improved with a building that contained two businesses: a flea market and secondhand store. A signpost and a roof-mounted sign on the exterior of the building advertised both businesses. The defendant bought both businesses and leased all of the property. Later, the parties agreed the defendant would continue to lease only the portion of the property used for the secondhand store. The lease did not address the signs. The lessor later removed the roof-mounted sign as ordered by the City of Grants Pass because it was deteriorated. The lessor did not replace that sign.

At trial, the lessor sought and received a declaration that it retained control of the signpost, including the right to move and alter it. The lessee counterclaimed for damages for loss of the roof-mounted sign. Although the trial court agreed that removal of the roof-mounted sign violated the lease, it refused to grant relief because the defendant's evidence of lost profits was not sufficient.

The Court of Appeals concluded that the trial court's judgment regarding the signpost is contrary to established landlord-tenant law. It relied on *Sproul et al. v. Gilbert et al.*, 226 Or 392, 359 P.2d 543 (1961) for the proposition that, "if the lease contains no explicit reservations in favor of the landlord, the landlord has only the right to enter the premises to make repairs and collect rent. In all other respects, the lessee retains the right of exclusive possession." 168 Or.App. at 576-577. The court also relied on the law of fixtures to find that, by setting the signpost in concrete in a permanent manner when the building was completed, the signpost was physically annexed to the real property and was intended to become a part of it. Because the signpost was a fixture, the tenant had an exclusive right of possession to it for the duration of the lease.

Regarding the lessee's claim for damages due to loss of the roof-mounted sign, the court found the lessee failed to preserve that claim by making the appropriate motion at trial, i.e., for a ruling as a matter of law on their entitlement to damages for plaintiff's breach of the lease, citing *Bend Tarp and Liner, Inc. v. Bundy*, 154 Or.App. 372, 961 P.2d 857, *rev. den.*, 327 Or. 484 (1998). Therefore, the court affirmed that part of the trial court judgment.

Larry Epstein

Oldham v. Fanno, 168 Or.App. 573, 7 P.3d 672 (2000)

Appellate Cases — Real Estate

Court of Appeals Revisits Requirements for Adverse Possession

In *Zambrotto v. Superior Lumber Company*, 167 Or App 204, 4 P.3d 62 (2000), the Court of Appeals revisited adverse possession and reiterated the importance of making the record for *de novo* review of such claims. The parties owned adjacent parcels in Douglas County that were steep and heavily wooded. The Zambrottos were located to the north and Superior Lumber Company ("Superior") to the south. The boundary between the properties was not marked, but a fence ran from the east boundary, at a tangent from the deed line, and ended before the opposite end of the property. The fence line continued as a "blaze line" (a series of cuts or marks on tree trunks) trending south, away from the boundary line, and ending at an iron pipe 118 feet south of the deed line boundary.

The dispute began when the Zambrottos attempted to log the parcel. Superior objected, and the Zambrottos initiated a quiet title action, arguing that they had acquired the title by adverse possession to the property between the deed line and the fence/blaze line. The trial court agreed with the Zambrottos and entered judgment quieting title. On appeal, Superior

argued that the evidence was insufficient to establish actual use and open and notorious use. The Court of Appeals reversed the trial court's determination.

The Court of Appeals relied on *Hoffman v. Freeman Land & Timber, LLC*, 329 Or 554, 559, 994 P2d 106 (1999), and noted that plaintiffs bear a "heavy burden" in establishing ownership by adverse possession. *Id.* The Court looked first to whether the Zambrottos established actual use of the land. The Court noted that the property is rural and mostly forested. Evidence indicated that the Zambrottos and their predecessors occasionally hiked in the area and hunted for rattlesnakes. There is also evidence that the area had been logged, but there was no evidence as to who did the logging. In addition, there was evidence that the Zambrottos and their predecessors occasionally repaired the fence. The Court of Appeals concluded that there is evidence of actual use, not much use, but "given the nature of the land," the court concluded "that hiking, rattlesnake hunting, and the like constitutes actual use." 167 Or App at 209.

The Court then turned to the question of whether that use was open and notorious. The Court stated that the use of the disputed area must have been "of such character as to afford the [owner] the means of knowing it and of the claim," *Hoffman*, 329 Or at 560. The Court noted that occasional use of rural property may suffice, but only if it can be shown that the true owner was on notice that his or her title was being challenged. The Zambrottos noted that the record contained evidence of logging, the existence of the blaze line, evidence of hikes and rattlesnake hunts and evidence of fence repairs. However, the Court noted that there was no evidence as to who actually did the logging, fence repairs or the blaze line. In addition, the Court noted that the use of the disputed area for hiking and rattlesnake hunting was not sufficient to put Superior on notice that their title was being challenged. Finally, the Court noted that the fence extended to only a small portion of the disputed area. Accordingly, the Court decided there was not sufficient evidence of open and notorious use or that the Zambrottos were mounting a title challenge.

This case demonstrates the importance in adverse possession cases of creating a record. Simply satisfying the trial court that all of the elements for adverse possession have been met is insufficient; the evidence must be sufficient to satisfy the appellate court as well. Both this case and the *Hoffman* case demonstrate the appellate court's expansive reach in *de novo* review of adverse possession cases.

William Kabeiseman

Zambrotto v. Superior Lumber Company, 167 Or App 204, 4 P.3d 62 (2000)
Mr Kabeiseman is an attorney with Preston, Gates and Ellis LLP in Portland.

Swim at Your Own Risk

In *Brewer vs. Dep't of Fish and Wildlife*, 167 Or App 173, 2 P.3d 418 (2000), plaintiffs, personal representatives of the estates of Pamela and Caitlin O'Connor, appealed from dismissal of their wrongful death action against five state defendants and the Swackhammer Ditch Improvement District ("Swackhammer"). Pamela and her daughter, Caitlin, died while swimming below a fish migration dam on Catherine Creek, which was owned, operated, or maintained by the defendants. Plaintiffs claimed that defendants were negligent because the dam was built in a manner that created a dangerous undertow in which the O'Connors were caught.

The trial court dismissed plaintiffs' case, finding that all defendants were immune from liability under the Public Use of Lands Act, ORS 105.672, *et seq*. ("Act"). The Act provides, in relevant part, "an owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes . . .when the owner of the land either directly or indirectly permits any person to use the land for recreational purposes . . . ."

The defendants in this case were either fee owners of Catherine Creek and the dam, or the entities responsible for operation and maintenance of the dam. Plaintiffs alleged that the Act could not bar recovery from all defendants because they were not all "owners" of real property entitled to immunity. The Court of Appeals disagreed, finding that the Act applies to fee owners of the dam as well as to the waters below the dam. 167 Or. App. at 178. The Court further found that Oregon Department of Fish and Wildlife ("ODFW") and Swackhammer, as operators and maintainers of the dam, were entitled to immunity under the Act because they qualified as the "occupant[s] or other person[s] in possession of the land" under the definition of "owner" in ORS 105.672 (4). 167 Or App at 179. Accordingly, all of the defendants were immune from liability and the case was properly dismissed.

Plaintiffs also alleged that, the state's immunity under the Act is inconsistent with the Tort Claims Act provisions of ORS 30.265. According to Plaintiffs, sovereign immunity for tort liability is necessarily waived unless specifically excepted under the Tort Claims Act, and there is no specific exception for recreational land immunity under ORS 30.265. They contend that there is a conflict between ORS 30.265 and ORS 105.682 which must be resolved in favor of waiving the state's immunity. Otherwise, Plaintiffs are left without a remedy in violation of the Oregon Constitution. However, the Court found that the legislature need not act affirmatively to "bestow" sovereign immunity. ORS 105.682 provides recreational land immunity to the state, as well as to other qualified landowners. There is no inconsistency between the statutes that would implicate the remedies clause of the Oregon Constitution.

Plaintiffs further claimed that the Recreational Land Act is unconstitutional because it serves to bar their claims against all defendants, in violation of Article I, Section 10 of the Oregon Constitution ["remedies clause"]. The remedies clause of the Oregon Constitution provides that every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

The Court of Appeals struggled to harmonize the Oregon case law dealing with the remedies clause of the Oregon Constitution. The Court recognized that the legislature has the right to abolish remedies so long as there is some "trade-off" that is intended to benefit the injured party. *See Kilminster vs. Day Management Corp.,* 323 Or 618, 919 P2d 474 (1996) (Workers' Compensation statute eliminates traditional tort liability, but grants no-fault compensation for certain injuries); *Hale vs. Port of Portland*, 308 Or 508, 783 P2d 506 (1989) (Legislation allowed tort actions against municipal corporations, but limited the amount of recovery); *Sealy vs. Hicks*, 309 Or 387, 788 P2d 435 (1990) (Products liability statute of ultimate repose balanced abolition of legitimate claims against the public interest in establishing a definite time to end potential litigation).

In reviewing the Oregon Supreme Court's case law, the Court of Appeals acknowledged that "not every injury must be remedied by monetary compensation for a statutory scheme to pass constitutional must under Article I, Section 10." 167 Or App 190. The Court recognized the legislature's ability to strike some sort of balance between competing interests by redefining rights, including rights of action, even when such a redefinition alters or abolishes a remedy under some circumstances. 167 Or App at 189-190. The "balance" or "trade-off" in this case permits recreational landowners to limit their liability if they choose to open their lands to the public for recre-

ational purposes without charge. The Court of Appeals found that this trade-off "strikes an acceptable balance by conferring certain benefits and certain detriments on both the landowners involved, and on the recreational users of that land." 167 Or App at 190-191. Accordingly, the Recreational Land Act does not violate the remedies clause of the Oregon Constitution.

Peggy Hennessy

Brewer vs. Dep't of Fish and Wildlife, 167 Or App 173, 2 P.3d 418 (2000)

Appellate Cases — Land Use

City's Procedurally Confusing Treatment of Decision Does Not Entitle Appellants to Relief

In *Buckman Community Ass'n v. City of Portland*, 168 Or App 243, 5 P.3d 1203 (2000), the Court of Appeals affirmed LUBA in concluding that that lack of a clear process before the City of Portland (the "City") did not entitle petitioners' to any relief.

LUBA had affirmed the City of Portland's determination that certain residential treatment facilities were permitted uses in a single-family dwelling residential zone. Petitioners' first assignment of error in the Court of Appeals challenged the decision on procedural grounds based on certain city code provisions. Those provisions did not specifically apply to the application, but the City had referred to them as a basis for the city's action below. The second assignment of error was that LUBA failed to evaluate whether the challenged decision involved discretion. Petitioners argued the decision was a "permit" under ORS 227.160(2), which required the city to follow certain notice and hearing requirements.

LUBA concluded that use determinations of the kind in question are not permits under ORS 227.160(2)(b), which provide a specific exception to the definition of "permits" for decisions that "determine the appropriate zoning classification for a particular use." The Court noted four arguments that the petitioners did not make. First, that LUBA was mistaken in its interpretation of ORS 227.160(2)(b). Second, that ORS 227.160(2)(b) is not applicable by its terms to the two decisions. Third that the city's mis-reference to its code provisions is a reversible error, apart from the procedural rights and, finally, that the planner incorrectly interpreted each of the substantive zoning provisions. The Court expressed doubt that the petitioners could demonstrate reversible error given that setting. Nonetheless, the Court turned to the petitioners' arguments.

The court stated that even if petitioners were correct about each of their arguments, they demonstrated only procedural error and, given their failure to challenge LUBA's conclusion that the City was substantively correct, they have not established prejudice to any substantial right required by ORS 197.835(9)(a)(B). Nonetheless, the court concluded that petitioners' arguments were incorrect. Specifically, the court noted that none of the code provisions the city cited apply specifically to the use determination. These code provisions do not require zoning classification determinations to be made as discretionary decisions or carry additional procedural rights beyond what petitioners actually received.

Given that posture, the Court noted that petitioners only argument was that the city nominally followed a code provision that petitioners themselves contended was inapplicable, rather than a statute that permitted the city to do exactly what it did. The Court noted

Oregon Real Estate and Land Use Digest

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

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

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that the city's processing of the decision was less than clear, but stated that the petitioner had shown no basis for reversal.

This decision re-emphasizes the court's requirement for a showing of some prejudice to a substantial right before a procedural defect will lead to a reversal or remand.

William K. Kabesieman

Buckman Community Ass'n v. City of Portland, 168 Or App 243, 5 P.3d 1203 (2000).

Court Clarifies Consent Required for Annexation

The Court of Appeals clarified the type of consents, and the procedure for obtaining the consents, that a legislative body may use to annex land without an election. The decision reconciled ORS Chapters 199 and 222, which were arguably in conflict following Oregon Laws 1991, Chapter 137 (enacting ORS 222.115 and 199.487(2)).

The City of La Grande proposed annexation of an area to which it had provided water and sewer services since the early 1970s. The parties did not fully develop the record; however, the City apparently relied on consents obtained in different ways – consents obtained as a contractual exchange for city services, both before and after the effective date of ORS 222.115, and voluntary consents received from landowners.

After declining to address the landowners' argument that the City's practices were "coercive" and therefore unconstitutional under *Hussey v. City of Portland*, 64 F3d 1260 (9th Cir 1995), the Court held: Consents obtained in exchange for providing city services pursuant to ORS 222.115 may count toward the majority of landowners required by ORS 222.170 and other incorporation statutes.

The City was required to present an annexation plan to all landowners from whom consents were obtained before the 1991 Act took effect, regardless of whether consents were obtained outright or as part of a contractual exchange for city services. After adoption of the 1991 Act, no annexation plan is required for consents obtained as part of a contract for city services.

Cities had the authority to require consents to annexation in exchange for city services prior to the 1991 Act.

The Court affirmed LUBA's remand of the annexation decision to the city.

Tod Northman

Johnson v. City of La Grande, 167 Or App 35, 1 P.3d 1036 (2000)
Mr. Northman is an attorney with Tooze, Duden, Cramer, Frank and Hutchinson in Portland.

Automatic "Reversion" to Comprehensive Plan Map Designation is Invalid

In *Neighbors For Livability v. Beaverton,* 168 Or.App 501, 4 P.3d 765 (2000), the City of Beaverton approved comprehensive plan map amendments changing the zoning of certain land from residential to commercial and of other land from commercial to residential subject to conditions of approval.

One of the conditions required the applicant to make substantial progress toward the ultimate development of the properties in question by, among other things, filing applications for corresponding changes to city zoning maps within two years of the effective date of the plan map amendment. If the applicant failed to make such progress, the city decision provided that the plan map designations for the subject properties would automatically revert to their former designations. Project opponents appealed the city's decision to LUBA on four grounds. They prevailed on none of those grounds before LUBA, but the Court of Appeals held LUBA erred in its disposition of one of the opponent's claims.

First opponents argued the city should have allowed testimony about the merits of the ultimate use of the commercially-designated property: a supermarket. LUBA disagreed, and the Court of Appeals affirmed LUBA's analysis. The ultimate use of the property was not before the city when it considered the plan map designation. Zone change and development review applications would have to be filed and approved before such use could occur, and the opponents could raise issues related to those applications in future proceedings.

Second opponents argued that the city could not apply a commercial designation to the property because it had no zoning district that would allow its development consistent with that designation. The court relied on the language in Statewide Planning Goal 2, that comprehensive plans "shall be the basis for specific implementation measures. These measures shall be consistent with and adequate to carry out the plans." LUBA and the Court of Appeals rejected that argument, finding the goal does not require adoption and implementation of plans to be simultaneous. *Marracci v. City of Scappoose*, 26 Or.App. 131, 552 P.2d 552, *rev. den.* (1976).

Third, opponents argued that the decision fails to establish a public need for the plan map amendment as required by the city code. LUBA and the Court of Appeals rejected that argument, noting that the city's decision includes an extensive comparative analysis.

Lastly, opponents argued that it would violate ORS 197.610, *et seq.* for the plan map designations to revert automatically to their former status if the applicant failed to make substantial progress toward ultimate development within two years. Although LUBA rejected this argument, the Court of Appeals had no trouble sustaining it by finding that the reversion "to former designations would be—in substance if not in name —a comprehensive plan amendment. Accordingly, it must comply with the procedural and substantive requirements of state and local law for the promulgation of plan amendments." 168 Or.App. at 506.

The court remanded the matter to the city to decide whether it would allow the plan map amendment without the invalid reversionary condition.

Larry Epstein

Neighbors For Livability v. Beaverton, 168 Or.App 501, 4 P.3d 765 (2000).

Rules Not Inconsistent With Statutes Are To Be Upheld

A property owner, Veenker, applied for County approval of a "lot-of-record dwelling" under ORS 215.705. That statute allows for the establishment of a dwelling on a lot in a farm or forest zone if, among other criteria, the lot was lawfully created and acquired by the current

owner (which is defined to include family members) prior to 1985. In 1998, LCDC adopted an administrative rule which generally tracks the statute, but adds the additional hurdle that the lot-of-record dwelling cannot be approved if there was already a dwelling on a contiguous lot under the same ownership on November 4, 1993 (the effective date of the statute). Veenker's application met all the requirements of ORS 215.705 itself. However, because on November 4, 1993 his parents had owned both the lot in question and an adjoining lot with a residence, approval of a new dwelling would violate the administrative rule.

The County land use hearings officer approved the dwelling, stating that the administrative rule impermissibly limited what the legislature had allowed in the statute. On appeal by Bruggere (a neighbor who opposed the application), LUBA that held the rule was valid and reversed. The Court of Appeals affirmed LUBA's decision.

The major issue on appeal was the application of the Oregon Supreme Court's decision in *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997) to this situation. In that opinion, the court upheld LCDC rules prohibiting certain uses on high-value farmland, which would otherwise have been allowed by statute, noting that LCDC has been granted "broad policymaking and regulatory authority" by the legislature. The court was not persuaded by Veenker's attempts to distinguish *Lane County*. It held that the administrative rule was not "contrary to the statute" where it simply prohibited a use that would have otherwise been allowed by the statute. The court also rejected the argument that the rationale of *Lane County* should be limited to rules relating to the preservation of high-value farmland. The bottom line appears to be that if an LCDC rule is not directly inconsistent with the underlying statute, it is likely to be held valid.

Michael Judd

Bruggere v. Clackamas County, 168 Or App 692, 7 P.3d 634 (2000).

■ City's Pre-TSP Comprehensive Plan Ammendments Must Comply With State Goals and Rules

In *Volny v. City of Bend*, 168 Or App 516, 4 P.3d 768 (2000), the Court of Appeals held first that the city may lawfully amend its comprehensive plan's transportation provisions, despite the fact that it failed to adopt a Transportation Planning System Plan (TSP) within the time-line required by the Land Conservation and Development Commission's (LCDC) Transportation Planning Rule (TPR), OAR 660-012-0000 *et seq*. The court also held that the amendment must comply with statewide planning goals, LCDC rules, and existing provisions of the city's comprehensive plan. The court discussed the role of the Department of Land Conservation and Development (DLCD), which is summarized below.

The city adopted amendments to the transportation provisions in its comprehensive plan on November 18, 1998, which was after the May 8, 1997 deadline for adopting a TSP pursuant to the TPR. These amendments apparently addressed the same subjects covered by the TSP, but did not amount to a TSP. The petitioners argued the city's failure to adopt a TSP precluded the city from enacting *any* legislation that pertains to the same subject that would be covered by a TSP. The court, however, found that both the relevant statute (ORS 197.646) and rule (OAR 660-012-0055) specifically address this situation, and provide that pre-TSP enactments are subject to review for direct compliance with "unimplemented" rules. (Note this case was not an enforcement proceeding under ORS 197.319 to redress the city's failure to adopt a TSP.)

The city cross-petitioned, challenging LUBA's holding that the city failed to demonstrate compliance with statewide planning goals, LCDC rules, and existing plan provisions. The city argued that LUBA should have given a letter from DLCD some "evidentiary weight" to demonstrate compliance with goals, rules and plan provisions. The DLCD letter recommended approval, and purported to defer the TSP until periodic review. The court determined that the city's conclusion must follow from any one of three premises: (1) that there existed resolution of factual matters, (2) that DLCD is a decision-maker in post-acknowledgment plan amendment settings, or (3) that DLCD's position is entitled to deference.

The court disagreed that any of these premises existed. First, there were no factual issues since LUBA's decision ruled that the city failed to make necessary findings and, as a result, didn't need to address substantial evidence issues. Second, DLCD's role is that of an advisor to local governments and LCDC and as a party in local proceedings and on appeal— not that of a decision-maker. Third, DLCD is not entitled to deference, although a decision-maker may certainly find its positions persuasive.

Mark Jurva

Volny v. City of Bend, 168 Or App 516, 4 P.3d 768 (2000).

Cases from Other Jurisdictions

■ Court of Federal Claims Finds Taking in Temporary Denial of Mineral Rights

In *Pettro v. United States*, 47 Fed. Cl. 136 (2000), plaintiff claimed a temporary taking under the United States Forest Service's ("USFS") denial of plaintiff's mineral rights for portions of three years. There was also an issue as to whether any remedy should be based on the fair rental value of the property or the lost profits of the claimant.

Plaintiff owned property in Utah and within a national forest. The property has been used for sand and gravel extraction under a USFS special use permit. In 1989, the USFS found that the terms of the special use permit were being violated because equipment and other items were being stored on the site and not being used in mining operations. However, in 1991, the USFS issued a new special use permit. At this time, USFS investigated the possibility of installing a hiking trail, in or around the area in which it had granted mineral rights to plaintiff. In 1995, the USFS informed plaintiff that he was in violation of the permit as there was no approved development plan or plans to restore the site after mining. Later in 1995, the General Counsel for the United States Department of Agriculture issued a title opinion indicating that title to the mineral rights had passed to the United States. In any event, the parties stipulated that, for the periods at issue, plaintiff would be deemed the property owner with respect to the mineral rights.

In 1995, the federal government ordered plaintiff to cease mining operations and remove its equipment from the site. At this time, plaintiff had oral contracts for more than 200,000 tons of sand and gravel to be extracted from the site through agents. The government wrote a similar letter to the agents in early 1996, which caused those agents to remove their equipment and to not commence mining. Plaintiff took an administrative appeal on the title issue and brought suit after an adverse administrative result. The litigation resulted in a

stipulation among the parties that allowed plaintiff to pursue the instant claim as if it were the owner. Plaintiff subsequently filed this suit in the Court of Federal Claims.

The court stated that this claim would be subject to a two-step analysis: 1) whether plaintiff had a compensable property interest, and 2)whether that interest had been taken. The court declined to try title to the site, relying on the settlement agreement, which described plaintiff as the owner of the mineral rights for the period in question, thus satisfying the first prong of the analysis.

Turning to whether plaintiff's mineral rights were taken, the court analyzed this question as a physical takings claim, rather than as a regulatory takings claim. While there was no physical invasion of plaintiff's property, the court held plaintiff was deprived of property interests when the government refused to allow mining and instructing plaintiff to remove equipment from the site. Under the stipulated settlement agreement, plaintiff and his contractors were excluded from the site for 703 days over a three-year period. The court found that the threat of legal action was equivalent to a physical invasion and that the government's role as a regulator or proprietor was of little importance. The court looked to the effect of the government's conduct—prevention of mining. Like a private property owner, the government could have gone after the profits of the mining if it had prevailed or, alternatively, could have sought an injunction. It did neither, and chose to use its regulatory power to threaten a civil or criminal penalty. In this case, the government's actions were equivalent to a physical taking.

The court then turned to the issue of just compensation and concluded that the fair rental value of the property was an appropriate measure for a temporary taking. The court rejected plaintiff's claims for lost profits based on two oral contracts. The plaintiff had not begun to mine the site and did not prove that it had consummated these arrangements, so that plaintiff was able to sell the sand and gravel again and a double recovery was avoided. The court stated that the Fifth Amendment only requires compensation for what was taken and not consequential damages, and awarded damages based on the fair rental value of $2,500 per month, or $57,779.59, plus interest from the time of the taking until paid. Moreover, the court compounded the interest because the mineral rights had been used for commercial purposes and could have provided income for the plaintiff. The court set the prejudgment interest rate at that for Treasury bills, as those rates award for inflation, while avoiding unjustified awards for risks not taken by plaintiff.

This is a troubling case. The government chose, at its peril, to prevent the mining inconsistent with its perceived property interests. Because the government settled the property claim (through a partition of the property), that issue was never litigated. Indeed, plaintiff bought himself a claim based on a stipulation that mining was precluded from property in which he held the mineral rights. While cases like this will not arise often, the choice for the taxpayer is untenable.

Edward J. Sullivan

Pettro v. United States, 47 Fed. Cl. 136 (2000).

■ More Takings from the Land of Lucas

In *Westside Quick Shop, Inc. v. Stewart*, 341 S.C. 247, 534 S.E.2d 270 (2000), the South Carolina Supreme Court decided a takings claim in a non-land use setting. The case involved the potential seizure of video gaming machines, the possession of which was made unlawful by statute. Plaintiffs owned a number of these services and claimed the effect of the law constituted a "takings" under the federal and state Constitutions, unless compensation was paid.

The court rejected this contention and added that the devices were lawfully subject to forfeiture as contraband. As such, there was no "taking" under the due process clause of the Fourteenth Amendment or similar provisions of the state Constitution. The court pointed to a long legal history that saw gaming devices as within the regulatory or police power of the state to control or take by forfeiture, citing *Lawton v. Steele*, 152 U.S. 133, 136 (1894), a substantive due process case. More recently, in *Bennis v. Michigan*, 516 U.S. 442 (1996), forfeiture was upheld as serving a deterrent purpose by preventing further illicit use of property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable. Moreover, plaintiffs had seven months after the legislation in this case was passed but before its effective date to dispose of the devices. Injury to a business dependent on confiscated property is not compensable under either the state or federal Constitutions, said the court.

Plaintiffs also claimed a taking of the real property on which the devices were located. The court considered the three-factor test of *Penn Central*, but ultimately used the two-prong *Agins* test for its analysis. Under that test, the court found that the gaming statutes did not deprive plaintiffs of all economically viable use of the land in question and that those statutes did, indeed, substantially advance legitimate governmental interests (the prevention of illicit gambling). Even if there was no economically viable use of the land, the court added, the legislation would still be valid as there were no reasonable-investment expectations in this highly regulated field. The court cited two cases involving economic regulation outside of the land use context: *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), and *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). The result in this case may not appear surprising, but a half eyebrow might be raised over the resurrection of the "nuisance exception" thought to have been struck down in another famous case from South Carolina: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). It is likely this case will escape the selective indignation of the federal Supreme Court because it involves "bad property," as opposed to developer expectations.

Edward J. Sullivan

Westside Quick Shop, Inc. v. Stewart, 341 S.C. 247, 534 S.E.2d 270 (2000).

Federal Land Use Statutes

■ Congress Passes (And the President Signs) Religious Land Use and Institutionalized Person Act of 2000

Without hearing or debate, the 106th Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000) (hereinafter "Act"), co-sponsored by Senators Kennedy and Hatch and signed by President Clinton on September 25, 2000. The general rule provided under the Act states:

"No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exer-

cise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of that burden on that person, assembly or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest."

The effect of this general rule is to restore the test for restrictions on religious exercise to the status that existed before the United States Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The verb "demonstrates" under the Act requires the government to bear both the burden of persuasion *and* the burden of proof in the case. The land use scope of the Act applies to any imposition of a substantial burden on a program or activity receiving federal financial funds, even if the burden results from a rule of general applicability (e.g., flood regulations required by FEMA, police or education activities that are federally funded and the like); the substantial burden, or removal thereof, is part of interstate commerce; or the substantial burden is part of a land use scheme in which individualized assessments of proposed uses are made, either formally or informally. This last category may mean that general standards, applicable to all similar uses, may be imposed, assuming no federal assistance or interstate commerce issues arise.

The second part of the restrictions placed on land use regulations by the Act prohibits treatment of a religious assembly or institution on "less than equal terms" than non-religious assemblies or institutions; prohibits discrimination against any religious assembly or institution on the basis of religion or religious denomination; and prohibits total exclusion of religious assemblies from a jurisdiction or "unreasonable limits" on such "assemblies, institutions or structures" within a jurisdiction.

As to institutionalized persons, governments are prohibited from opposing a substantial burden on the religious exercise of such persons, even if the burden results from a rule of general applicability, unless the government demonstrates that the imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest. The scope of this restriction extends to the program or activity receiving federal assistance or engaged in interstate commerce.

Judicial relief is permitted to anyone with a claim or defense in federal court and is governed by general rules of standing under Article III of the Constitution. If a *prima facia* case of substantial burden is made by a claimant, the burden of persuasion is shifted to the government. Moreover, if the claim or defense is made in a non-federal forum, it shall not be entitled to full faith and credit in federal court unless the claimant has had a full and fair opportunity to litigate the same in the non-federal forum. The court may award attorney fees to its successful claimants, and the United States may enforce the Act by direct action or intervention. The state or local government may prove lack of a substantial effect on interstate commerce as a defense to an action under the Act.

Finally, there are a number of general definitions, declarations and rules of construction adopted as part of this legislation. In the Act, Congress declares that the Act shall not be construed to authorize any governmental burden on religious belief. Similarly, the Act shall not create any basis for restricting or burdening religious exercise, or for claims against a religious organization not acting under cover of law. Finally, the Act neither makes not precludes a right of any religious organization to receive funding or assistance from government for religious activities. However, the Act recognizes that it may cause state or local governments to incur expenses to avoid imposition of a substantial burden on religious exercise. The Act allows governments to alleviate burdens by eliminating or exempting religious activities from state or local provisions. Congress expressly stated that the Act shall be construed broadly so as to provide full protection of religious exercise. The term "religious exercise" is defined to specifically include all exercise of religion, whether or not compelled or central to a system of religious belief. The broad definitions may allow church-affiliated schools, hospitals, housing or office buildings to demand different (or no) regulations to apply to those uses. Such reverse discrimination is specifically endorsed by the Act.

Notwithstanding the joint declaration of Senators Kennedy and Hatch that accompanied congressional action, this legislation is a solution in search of a problem. The use of anecdote without a pattern and the lack of demonstrated deficiency in current remedies make it appear that the Act is the result of politics, rather than piety. The joint declaration assures that the "real" reason for denial or conditions imposed on religious uses is discrimination, something mere mortals in the trenches of the land use process may well not accept. Like the Bourbons, Congress appears to have remembered nothing (such as the "bloody nose" administered to it by the federal Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated the Act's predecessor (the Religious Freedom Restoration Act of 1993)) and to have forgotten nothing (i.e., the political jolt enjoyed by politicians seeking to prove their worth in an election year). The history of religion relying on the power of the state to survive and prosper is a history of corruption of both institutions.

Edward J. Sullivan

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000).

LUBA

Existing Law at Time of Application Controls Zoning Standards

Petitioner had applied for a variance for a duplex as a permitted use in the zone. The City approved the variance, and the approval gave Petitioner up to two years to get a building permit. Then the City amended the ordinance, effective in 30 days, to prohibit duplexes in the zone. Before the ordinance went into effect, Petitioner applied for a building permit for a duplex which conformed to the variance. The City used Clackamas County for building permit administration, so the City sent a memo to the County stating that the City's zoning approval expired on the effective date of the new ordinance. Although the County began to process Petitioner's building permit application, the ordinance went into effect before the County could issue the building permit, and Petitioner was effectively prevented from building the duplex.

In its defense, the City claimed its hands were tied because it no longer had authority to approve the zoning as of the date of the new ordinance, and that the City's zoning approval expired on the date of the ordinance, which meant that the County could not issue the building permit to Petitioner. The City based its case on two theories: (1) it claimed that its decision to apply the amended ordinance was not a "land use decision" under an exception in the definition of that term in ORS 197.015(10) for "building permits" issued under "clear and objective standards" and therefore LUBA lacked jurisdiction; and (2) it claimed that the decision was not a "permit" under an exception in the definition of that term in ORS 227.160(2)(b) for a "zoning classification" and therefore was not subject to the requirements of ORS 227.178(3), which provides that if the application is complete,

"approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

LUBA disagreed and found that: (1) the question of whether the existing or amended ordinance controls a building permit is a debatable legal issue and is by no means "clear and objective" and therefore is a "land use decision," so LUBA had jurisdiction; and (2) the initial variance approval was a "permit" and the City was required to treat the building permit application as part of the application for the variance permit. Thus, the City's decision on the building permit must be consistent with the standards in effect when the application for a variance was first submitted. Therefore, LUBA concluded, the City erred in determining that the amended ordinance controlled the building permit for the proposed duplex.

The decision was not appealed by the City. The opinion may provide future guidance to local governments insofar as it provides a framework for determining what standards apply at the building permit stage where there has been a prior land use application. For applicants, the opinion may provide a basis for determining whether the local government is changing the rules "in the middle of the game."

John C. Pinkstaff

Gagnier v. City of Gladstone, — OR LUBA — , LUBA No. 2000-044 (Oct. 20, 2000).

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