OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

Measure 7 Update

This note provides an update on Measure 7. The first part summarizes the litigation. The second part provides an overview of the Legislature's activities related to Measure 7.

I.

Two cases were filed in Marian County Circuit Court to challenge the validity of Ballot Measure 7. The first case was filed by Audrey McCall (the widow of Tom McCall) and several other individuals. The second case was filed by the League of Oregon Cities, several local governments (including Eugene, Beaverton, Portland, and Multnomah County), Vera Katz and Beverly Stein. Following the filing of the League case, the cases were consolidated and proceeded together.

On February 22nd, Judge Lipscomb issued his decision on the parties' cross-motions for summary judgment. The decision first addressed the jurisdictional-related issues raised by the State and the Intervenor. Both the State and the Intervenor argued that the cases were not timely filed: they were filed too late as a pre-election challenge and too early as a post-election challenge. The cases were filed during the 30-day window following the election, and before the Secretary of State canvassed the vote. The State and the Intervenor argued that under ORS 250.044, the cases could not be filed until after the Secretary of State canvassed the votes. The Court quickly dispensed with that argument by noting that other cases that also had challenged the constitutionality of ballot measures had been filed post-election and prior to the canvassing of the votes, including the recent Court of Appeals decision in *Swett v. Keisling*.

The Intervenor (but not the State) also challenged the standing of all of the plaintiffs in the two cases. The plaintiffs included electors, taxpayers, property owners, public officials, and local governments. In other words, if anyone could challenge the constitutionality of Measure 7, it would be one of the plaintiffs in the two cases. With respect to the local governments, the Intervenor argued that cities and counties cannot sue the State since they are political subdivisions of the State. The Court disagreed. Under the declaratory judgment statutes, any "person" (defined to include a municipal corporation) can file a lawsuit seeking a determination from the court of the validity of a constitutional provision. The Supreme Court has held that persons have standing under the declaratory judgment statute if, among other interests, they have a foreseeable financial interest, which local governments certainly have.

The final procedural issue that the Court addressed was the Intervenor's contention that the Court could not prevent Measure 7 from going into effect, arguing that, in fact, Measure 7 already had gone into effect pursuant to Article IV, section 1(4)(d) of the Oregon Constitution. The Court disagreed, noting section 1(4)(d) must be read in harmony with the provisions in Article XVII, section 1, related to the initiative process. Article XVII, section 1 provides, in part, that the Secretary of State must canvass the votes before the Governor declares whether an amendment has passed. Until that happens, the Court concluded that the Measure cannot take effect.

Turning to the merits, the Court agreed with two of the plaintiffs' four challenges: the "full text" challenge and the "separate amendment" challenge. The Court rejected the plaintiffs' challenges based on Article XVII's prohibition on initiated "revisions" to the constitution, and based on the one subject rule.

Article IV, section 1(2)(d), of the state constitution requires that an initiative petition include the full text of the proposed law or amendment to the constitution. Measure 7 added several subsections to Article I, section 18. In addition, Measure 7 modified part of the existing section 18. For example, Article I, section 18 provides for "just compensation" to be paid to property owners whose property is taken by government. The provisions of Measure 7 defined "just compensation" for purposes of "this section" i.e., section 18, and not just measure 7. (Measure 7 defined "just compensation" to include "reasonable attorney fees and expenses")

The Court noted that "much mischief could be hidden, inadvertently or not, in seemingly innocuous new language that amended other existing provisions of the constitution without disclosure of the effect of those changes in the text of the measure." The Court concluded that the "full text" requirement is designed at least in part to prevent that mischief. The Court therefore concluded that Measure 7 did not

comply with the full text requirement for amendments to the constitution.

The Court also concluded that Measure 7 violated the "separate amendments" provision of Article XVII, section 1. That requirement states that when two or more amendments to the constitution are submitted to the voters at the same election, "they shall be so submitted that each amendment shall be voted on separately." In the case of *Armatta v. Kitzhaber*, 327 Or 250 (1998), the Oregon Supreme Court stated that this provision prohibited a proposal for making two or more changes to the constitution that are "substantive and that are not closely related." Here, Judge Lipscomb concluded that Measure 7 made a number of substantive changes to the constitution that were not closely related.

The Court then addressed the plaintiffs' challenges based on the one subject requirement and the prohibition on initiated "revisions" to the constitution. With respect to the one subject requirement, the Court agreed with the State that Measure 7 can be sheltered under one single subject umbrella: expanding the circumstances under which just compensation will be due property owners affected by governmental action. With respect to the rule against revisions by initiative, the Court noted that the case law in Oregon had failed to establish any clear standard for determining what constitutes a "revision" and what constitutes a mere amendment. Nevertheless, the Court concluded that Measure 7 did not violate the prohibition on revisions.

Final judgment recently was entered and the case now is headed to the Court of Appeals. As of March 12th, no agreement had been reached on how quickly briefing and argument might be expedited in the appellate courts.

II.

As activities have slowed down in the judicial branch, the Measure 7-related activities in the legislative branch picked up. During the last week of February, the Speaker of the House established a new committee called the Land Use and Regulatory Fairness Committee to work on Measure 7-related issues. The Committee is chaired by Max Williams (R-Tigard), and also includes Kurt Schrader (D-Canby), Chris Beck (D-Portland), Betsy Close (R-Albany), Kathy Lowe (D-Milwaukee), Karen Minnis (R-Wood Village), and Susan Morgan (R-Myrtle Creek). To help guide the work of the Committee, the Speaker adopted seven principles: (1) honor the intent of the voters: (2) avoid windfalls; (3) treat all property owners fairly; (4) remain focused on measure 7 issues: (5) create a statewide procedure for processing claims; (6) clarify ambiguities; and (7) include Oregonians in the solution.

As of March 12th, the Committee had met only one time. At that meeting, the Committee primarily heard from invited guests (although some public testimony also was allowed). The invited speakers included the Attorney General; LCDC; the League of Oregon Cities; the Association of Oregon Counties; Oregonians in Action; and 1000 Friends of Oregon. At this point, the Committee is merely receiving information, and is not working through any particular draft legislation. Interested groups (such as some of those invited to testify) have been meeting for the past couple of months to try to identify common ground, but thus far, remain far apart.

Any bill passed out of this Committee likely will need to answer a series of questions:

• Should the action be a legislative referral for a constitutional amendment, or adoption of state statute?

• Should the legislation require payment of compensation (such as in Texas and Florida), or require assessment of possible takings as in many other states?

• Should the legislation cover existing as well as future regulations, or only regulations adopted in the future?

• What regulations should be covered (*e.g.*, land use codes, building codes, health and safety codes, pollution control laws)?

• What exceptions should be allowed: Federal requirements? Nuisances? Others?

• Should there be a minimum amount of reduction in property value as a result of regulation before becoming eligible for compensation?

• Where local governments are implementing requirements of state law, should the state or local governments be required to pay?

• What source of revenue should be used to fund the compensation?

• Should government be allowed to forego enforcement of a regulation in order to avoid liability for compensation?

• What process should be used for filing and administering claims?

• Who should be able to file a claim: Just the owner of fee title? A lessee? Others?

Assuming that the House can pass a bill, it now appears that the Senate will at least consider that legislation. Up until recently, the Senate President had said that he was not interested in dealing with Measure 7 issues until after the courts completed their work. More recently, the President is indicating a willingness to at least look at legislation passed by the House.

Glenn Klein

Glenn is Chair of the Environmental and Land Use Practice Group at Harrang Long Gary Rudnick PC. He is the lead attorney in the Measure 7 litigation filed by the League of Oregon Cities and other local governments, and is working with the League on legislative issues related to measure 7.

Appellate Cases - Land Use

City Does Not Have To Compensate Citizen For Destroying Private Property

If anyone is still wondering why Measure 7 (the Takings Measure) passed in November, read *Vokoun v. City of Lake Oswego*, 169 Or. App. 31 (2000). This case is the emotional poster child for the Yes On 7 forces. *Vokoun* involves damage to a property owner resulting from a City's decision to build a storm water system, but not to adequately inspect or maintain that system.

Vokoun's house was built along a ravine near Tryon Creek State Park in the southwest hills outside Portland and in the city limits of Lake Oswego. An underground storm water pipe runs along the western border of Vokoun's property, emptying into a ravine that flows into Tryon Creek. The pipe carries storm water from a subdivision into the ravine.

In 1986, a City worker reported excessive erosion in the ravine. In 1989, the City conducted repair work by loading rocks and asphalt into the eroded area. No further maintenance checks were scheduled or performed. The City determined that due to limited staff and resources, it would not adopt a prevention or maintenance plan of its storm water system. Instead, the

City decided to adopt a reactive plan that called for it to respond to complaints of property owners.

In 1996, the area received over eight inches of rain within a four day period. The extraordinary amount of rain created unstable soil conditions and caused severe erosion below the pipe outfall. As a result, part of Volkoun's land shifted several feet causing total property damage in the amount of $69,205.00.

The appellate court reversed a jury award based on inverse condemnation and negligence theories. The Court held that inverse condemnation requires a finding that a "taking" of property occurred. After defining a "taking" as the "destruction, restriction, or interruption of the necessary use and enjoyment" of private property for a public purpose, the court held, without explanation, that the mere damage to property is not a "taking." The court did not discuss the meaning of "destruction", "interruption", or "damage."

Furthermore, the Court held that a "taking" is the interference with property rights in the natural and ordinary consequence of a lawful government action. It then assumed, again without explanation, that the lawful government action involved in this case was the building of the storm water system.

Since the City had decided to not routinely inspect the storm water system, the damage to Vokoun's land was not a "natural and ordinary consequence" of putting in the storm water pipe. Rather, the City's decision to not inspect the system was at most negligent. For both of these reasons, no compensable taking occurred.

Although the City may have been negligent, the Court held that the legislatively adopted doctrine of discretionary immunity barred Vokoun from recovering damages. Discretionary immunity applied because the City made a choice between alternatives in deciding to not regularly inspect its storm water system.

The Court declared that discretionary immunity can serve as a shield to protect the City from failing to act on its duty of care as long as the City acknowledged and assessed the various risks to public safety and made a decision based on an understanding of those risks in light of the City's objectives. Although there was no evidence that the City assessed the various risks to public safety or even knew what the risks to public safety were, the Court nonetheless assumed the City knew about the risks. Thus, the City was shielded from a negligence claim.

C. Edward Gerdes

Vokoun v. City of Lake Oswego, 169 Or. App. 31 (2000).

Conveyance of Right to Remove Lateral Support is not Implied

In *ODOT v. Winters*, 170 Or. App. 188 (2000) (hereinafter "*Winters*"), defendant appealed from the judgment of the trial court for the Department of Transportation ("ODOT"), assigning error to the dismissal of his inverse condemnation counterclaims and certain evidentiary and discovery rulings.

Defendant owned farm and timber property between State Highway 125 and the Sandy River. In 1990 a bluff on the landowner's property collapsed and showered 30,000 cubic yards of rock onto the highway. The landowner conveyed to ODOT a permanent slope easement and an access easement

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running from the end of a nearby county road to the slide area to facilitate the repair of rock slides and prevent further sloughing.

In 1996, ODOT proposed to condemn a narrow strip of landowner's property to mitigate further rockslides and to "relocate, construct, improve and maintain" the highway. The plan called for use of the earlier access easement. ODOT filed a condemnation suit in 1996 and also sought the right to enter and use the landowner's remaining property to facilitate the project. ODOT alleged the value of the condemnation at $20,500. After lengthy and unsuccessful negotiations, ODOT reduced the scope of the project because the condemned area was not large enough to make the project feasible.

At a bifurcated trial, the court first determined that the taking was lawful. Afterwards, ODOT amended its complaint to allege that the value of the property was $8,050. Landowner objected to the reduced value and alleged: 1) that ODOT was liable for a taking a temporary work easement as a result of ODOT's surveyors' entry onto the property after commencement of the suit without permission; 2) an alternative claim for trespass on the same facts; (3) a taking claim for overuse of the 1991 easement and for damages of $5,000 and; (4) a taking claim on the ground that ODOT's use as originally planned would cause a loss of lateral support and erosion to landowner's adjacent property resulting in a $150,000 property loss.

The landowner moved for a directed verdict on his first counterclaim and ODOT moved for a directed verdict on landowner's fourth counterclaim. The court denied landowner's motion and granted ODOT's motion. The remaining claims were tried to the jury, which returned a verdict for ODOT on the first and third counterclaims, found a trespass on the second counterclaim and awarded $2,000 damages, and awarded $28,888 compensation for taking of the strip of land.

On appeal the landowner argued the trial court erred in denying the motion for a directed verdict on the first counterclaim because the surveyors' presence deprived the landowner of the right to exclude others. The evidence in the record showed only that the surveyors walked and parked vehicles on portions of the landowner's property on a few occasions during the project. The court held that such intrusion, with no physical damage and no use of a particular portion for an extended period, entitled the jury to find that the interference was insubstantial. As a result, denial of the motion was proper.

The landowner also argued that the trial court erred in granting ODOT's motion for a directed verdict on the fourth counterclaim seeking condemnation damages for loss of lateral support, and dismissing the claim with prejudice. The appeals court found that the landowner's counterclaim assumed that the interest acquired by ODOT through condemnation includes the right to remove lateral support. Citing *Mosier v. Oregon Navigation Co.*, 39 Or. 256, 261-62, 64 P.453 (1901), the court clarified that destruction of lateral support was a compensable taking which was not included in the condemnation itself, and therefore a dismissal was appropriate, but without prejudice.[1] The appeals court distinguished the later Supreme Court case of *Kropitzer v. City of Portland*, 237 Or. 157, 390 P.2d 356 (1964), on the ground that in that case the landowner's contractual dedication of land to a municipality for construction of a street implicitly included an easement to remove adjacent support. Where the court orders conveyance in a condemnation proceeding, no implied intent to include rights to remove lateral support exists and the landowner may later seek compensation if the government's later action on the condemned property causes a destruction of lateral support.

Finally, the landowner objected that the trial court erred in excluding ODOT's first written offer to purchase for $20,500 and an "acquisition summary" which included ODOT's determination of fair market value. The landowner argued the denial prevented the jury from drawing an appropriate inference from the reduction in alleged value. The court affirmed, noting that because the price proposed in a written offer may reflect anticipated litigation costs, such information does not constitute an admission of value. Moreover, the documents were excludable as prelitigation offers of settlement under OEC 408.

The *Winters* opinion, when read with the earlier Supreme Court opinion in *Kropitzer*, suggests that parties in negotiated condemnation cases for rights-of-way and easements clearly spell out the intent with respect to lateral support in their agreements and assign value to those rights. *Winters* also illustrates the limits of temporary takings, the courts' reluctance to find such takings, and the overlap with ordinary trespass to land. Where the intrusion is limited in impact, not limited to a specific area, and intermittent, the interference with the use and enjoyment of the land, including the right to exclude others, can be so insubstantial to not result in a temporary "taking."

[1]Note that loss of support was not alleged to have already occurred; only that the condemnation included the value of the right to destroy such support.

Eric J. TenBrook

ODOT v. Winters, 170 Or. App. 118 (2000).

Goal 9 Inapplicable to Amendments that Restrict Particular Commercial or Industrial Uses

In *Home Depot U.S.A., Inc. v. City of Portland,* 169 Or App 599, 10 P3d 316 (2000), the Court of Appeals held that Goal 9 does not require local governments to make land available for specific types of industrial or commercial uses. Rather, Goal 9 requires planning and the provision of a variety of industrial and commercial uses.

The City of Portland amended its zoning code to prohibit retail uses that exceed 60,000 square feet in certain industrial districts and to make retail uses that exceed 60,000 square feet conditional uses in certain employment districts (the "amendments"). Before the amendments, retail uses that exceeded 60,000 square feet were permitted outright in the employment districts and as conditional uses in the industrial districts. The amendments did not rezone property, or remove property from the industrial or employment districts. In adopting the amendments, Portland did not consider the impacts the amendments would have on the supply of land that is available for large retail uses.

On appeal to LUBA, Home Depot claimed that the amendments were inconsistent with Goal 9. LUBA disagreed and affirmed Portland's decision. Home Depot sought the Court of Appeals review arguing LUBA's decision should be reversed. Home Depot claimed Portland's decision was inconsistent with Goal 9 and had to be reversed or remanded because Portland did not consider the impacts the amendments would have on the supply of lands available for large retail uses.

In affirming LUBA's decision, the Court of Appeals explained that Home Depot's arguments failed because the arguments were

premised on the presupposition "that the goal's general requirements pertaining to sites for 'a variety of industrial and commercial uses' embody a specific requirement for consideration or provision of sites for the particular kind of retail uses that the city's amendments restrict and that Petitioner [Home Depot] wants to conduct." The Court of Appeals rejected this premise.

In holding that Goal 9 and its implementing regulation does not require an analysis of available land for specific types of industrial or commercial uses, the Court distinguished its decision from prior decisions in *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995) and *Opus Development Corp v. City of Eugene*, 30 Or LUBA 360, *aff'd* 141 Or App 249, 918 P2d 116 (1996). According to the Court of Appeals, the decisions in these cases required an analysis of available commercial and industrial lands in order to establish compliance with Goal 9 because those cases involved city decisions that "actually redesignate[d] or divert[ed] existing industrially or commercially zoned lands from *all* industrial and commercial use."

In sum, amendments that restrict a particular use on industrial or commercial lands do not trigger Goal 9 analysis of available commercial or industrial lands for that particular use. However, amendments that rezone or convert industrial or commercial lands require the Goal 9 analysis.

Marnie Allen

Home Depot U.S.A., Inc. v. City of Portland, 169 Or App 599, 10 P3d 316 (2000).

Editors Note: On January 30, 2001, the Oregon Supreme Court denied Home Depot's petition for review of the Court of Appeals decision.

9th Circuit Cases

Ninth Circuit Finds No Constitutional Violations in Application of Washington Growth Management Act

In *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999), plaintiffs claimed violations of the federal and state takings clauses, as well as procedural and substantive due process clause rights by defendant county and the Washington Growth Management Hearings Board (the "Board"). Plaintiffs also contended that the members of the Board were not immune from damage claims. Plaintiffs owned a ten-acre tract, which had a house, guest house, and out-buildings. The property was zoned for rural residential use and adjacent to a salmon-bearing stream. Surrounding properties were used for commercial residential and industrial purposes.

Under the Washington Growth Management Act (the "Act"), the county gave notice of redesignation of the property in the vicinity, including that of plaintiffs, and noted that the property was likely to be zoned for large-lot residential use. Plaintiffs were initially successful at the last minute in having their property rezoned for commercial use; however, that amendment was remanded by the Board on the grounds that there was insufficient public participation. Plaintiffs were not parties to the Board proceedings. The plaintiffs participated in a second appeal to the Board that followed the designation of their property as rural residential. The appeal was rejected, and plaintiffs filed a civil rights suit in state superior court, alleging procedural and substantive due process violations. After the case was removed to federal court, plaintiff filed a takings claim. The federal district court found absolute immunity for the quasi-judicial functions of the Board and also dismissed the substantive due process claims. The court later granted summary judgment for defendants on the takings and procedural due process claims, and plaintiffs appealed further.

On appeal, the Ninth Circuit turned first to the immunity issues regarding the Board members. Plaintiffs sought to avoid an Eleventh Amendment issue by bringing suit against the members in their personal capacities. The court stated that immunity is granted to judges and those who act in a judge-like capacity where there are procedural safeguards in an adversary proceeding before a politically insulated body. Plaintiffs complained the proceedings were flawed because they were not able to participate in the initial stage. However, the court found that this did not change the nature of the proceedings or remove the immunity. All the Board did in this case was remand the matter to the county because there was insufficient public participation and uphold the county's decision for rural residential use on remand. Unlike the members of the Land Conservation and Development Commission in *Zamsky v. Hansell*, 933 F.2d 677 (9th Cir. 1991), the Board did not have the dual functions of being rulemakers and monitors of compliance, which, in that case, entitled them only to qualified immunity. Members of the Board were entitled to absolute quasi-judicial immunity because their sole function was as adjudicators.

The court concluded at 1136:

"In the end, the Buckles' argument on immunity is that it unfairly leaves them without a remedy against the Board. On this point, the Buckles attempt to sidestep their guaranteed right to appeal the Board's decision. The Buckles had a right to direct judicial review of the Board's decision that, after remand, King County complied with the Growth Management Act in designating the Buckles' property Rural Residential. But the Buckles did not appeal this decision. Instead, they filed this suit and therefore waived their right to a remedy for the Board's decision on the merits. We hold that the Board members are entitled to absolute immunity and, therefore, we do not address the Buckles' arguments regarding qualified immunity and their procedural due process claim against the Board."

Regarding the claims against King County, the court first addressed plaintiffs' procedural due process claims, as well as their contention that they had a "legitimate claim of entitlement" to commercial zoning under the first King County ordinance and under the GMA. Plaintiffs also claimed, without elaboration, that the Board of Commissioners was not an impartial tribunal. The court rejected this claim and affirmed summary judgment against plaintiffs on these issues, noting that plaintiffs made no attempt to defend their alleged legitimate claim of entitlement to commercial zoning when the Board invalidated the last-minute amendment to the county's zoning ordinance.

As to the substantive due process claim against the county, the court found this claim subsumed in the takings claim under *Macri v. King County*, 126 F.3d 1125-1128 (9th Cir. 1997) and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). There the Ninth Circuit held that when an explicit textural amendment to the Constitution (here, the Fifth Amendment) protects against challenged governmental action, that claim must be analyzed under the specific constitutional provision and not the more general provisions of substantive due process. The court also treated plaintiffs' spot-zoning claim in a similar manner. The court further rejected a substantive due process claim under the

Washington Constitution, indicating plaintiffs did not show that the state constitution's provisions are as wide a protection as those of the federal Constitution or show a violation of those provisions under Washington precedent.

As to the takings claim, plaintiffs claimed the rural residential designation failed to advance a legitimate state interest and was a "downzoning" that should cause the court to provide closer scrutiny of the county's action. The court reviewed the facts of the case (the long-standing rural residential zoning of the property before the GMA, the zoning in place when plaintiffs purchased the property, the use of the property over the years, and the tentative nature of the first GMA action (which was struck down because of a violation of public participation requirements) and concluded reliance on the commercial designation was "illusory."

Plaintiffs also claimed the zoning went "too far" and did not advance a legitimate state interest, arguing that the issue they claimed ought to be decided by a jury and was not subject to summary judgment. Under *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), this issue was not decided. Instead, the "predominantly factual question" of whether a landowner was deprived of all economically viable use of its property was allowed to proceed to a jury. However, there was no such contention here, and the court stated that the issue of whether the challenged zoning advanced a substantial public interest is a mixed question of fact and law, and the federal Supreme Court expressly disclaimed that these questions must necessarily be tried to a jury. In this case, the trial court ruled that these claims were properly resolved by summary judgment and were not subject to the unusual factual situation in *Del Monte Dunes*. The court found no grounds to require a jury trial on whether the challenged zoning advanced a legitimate public purpose and concluded the county could not "take" what plaintiffs did not have: a final designation of their property as commercial. The court ruled the GMA was a legitimate basis for land use regulation and the county's, concluded at 1142:

"Not every governmental attempt to restrict commercial development will be upheld as advancing the interest of protecting against urbanization, but the Buckles' claim that the government went "too far" in this case fails in light of the facts that the Buckles purchased the property when it was zoned for residential use, they actually used it for residential use for years, and it was zoned for commercial use for only a short period of time before that zoning was invalidated. If the Buckles were to prevail in their argument that the government lacks a legitimate interest in drawing a line at existing commercial use in non-urban areas, King County correctly points out that "the whole of rural King County would eventually be zoned commercial."

This is an early takings case following the *Del Monte Dunes*' decision, in which a plaintiff claimed a jury trial was necessary to decide the legitimacy of zoning plaintiff's property under a statewide planning program. The Ninth Circuit properly read the federal Supreme Court's *Del Monte Dunes* decision to find no jury issue as to whether a substantial state interest was advanced by the rural residential designation at issue. Unlike *Del Monte Dunes*, there was no pattern of abuse on which to decide whether all economically viable use of the property had been taken. Juries simply do not decide these public policy questions.

Edward J. Sullivan

Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999).

9th Circuit Invalidates Targeted Sensitive Use Veto in Adult Use Case

In *Young v. City of Simi Valley*, 216 F.3d 807(9th Cir. 2000), *cert. denied* 121 S.Ct. 844 (2001), defendant City appealed from a judgment declaring its adult business ordinance unconstitutional and enjoining its enforcement. Under the challenged ordinance, siting of a "sensitive use" prohibits location of an adult business within 500 or 1000 feet of such use, depending upon the particular use. A "sensitive use" includes a "youth oriented business," public or private school, park, playground, church, or house of worship.

Defendant City is 35 miles northwest of Los Angeles, consists of 34 square miles and has never had an adult business. After its 1978 adult business regulations were declared unconstitutional, the City began drafting new ones. Just before the current regulations were adopted in 1992, plaintiff put money down on a property and received a City license for an adult use. In early 1993, the City rescinded the approval and requested further information which plaintiff provided two weeks later. Just before the information was submitted, the city adopted an ordinance placing a moratorium on adult uses. The City's attorney testified that this was done in part as a reaction to plaintiff's application. In May 1993, the challenged ordinance was adopted and allocated 0.5 percent of the City's land for possible adult uses on four sites. Plaintiff abandoned its plans for the first site and brought the instant lawsuit.

Plaintiff then made inquiry about the current site and was told there were no approval impediments, but a final decision would have to await submission of plans. Plaintiff then leased the site, stayed the existing lawsuit, and made the application. On two occasions, plaintiff was told the information was insufficient (even though the additional information was not required with regard to the former site) and plaintiff spent $45,000 and many months on studies.

After the application was complete, the City denied it because of an incompatible "sensitive use" within the 1,000-foot buffer zone. It seems that, while the application was pending but the day before it was found to be complete, the City approved a Bible Study Institute that met once a week for one hour in the early morning. The Institute was founded by a local pastor who opposed plaintiff's application and who believed the location of the Institute would foreclose plaintiff's application.

The City also denied the permit because it was within 1,000 feet of a karate school, which the City now deemed to be a youth-oriented business. Finally, the City declared that the buffer regulations would be determined on the date of decision, rather than on the filing of the application. The planning commission and city council both denied the application.

Plaintiff then received federal court permission to reactivate its lawsuit and amended the complaint. The trial court granted judgment for plaintiff as a matter of law on two grounds: 1) the permit process was rendered more difficult because permitting of a sensitive use may veto the adult use at any time during the review process, and 2) there were only four sites available. Defendant appealed.

The Ninth Circuit affirmed, finding the potential veto at any time in the permit process by the issuance of a sensitive use permit deprived the adult use owner of a reasonable alternative avenue of communication under City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986), although the court expressly did not find that limiting the number of sites to four was unconstitutional. The court ruled the ordinance was facially unconstitutional on the alter-

native avenues ground. The court agreed with the plaintiff that the ordinance is over-broad because it tended to chill preferred free expression. Nevertheless, plaintiff must still demonstrate an injury in fact, which was done here in the two denials of adult use permits: the $45,000 expenditure for studies and the one-year wait for a determination on the application.

Turning first to the veto issue, the court noted that adult uses constitute protected free expression, but may be regulated as to their unwanted secondary effects under content-neutral time, place and matter requirements. Under *Renton*, so long as the regulations served a substantial governmental interest (which was found here) *and* leave open adequate alternative channels of communication, they are valid. The court found the dispositive question to be whether there was a reasonable opportunity for a prospective adult business owner to operate such a business within a city—a mixed question of fact and law and not limited to the number of available sites. The court said:

"We conclude that the Simi Valley ordinance, as interpreted by the City, denies an adult business owner-applicant a reasonable opportunity to open and operate an adult enterprise in Simi Valley. Significantly, the Simi Valley Planning Commission has ruled that the buffer zone requirement between adult businesses and sensitive uses must be satisfied as of the date of a project's approval, not just as of the application's filing date. It is this interpretation of the ordinance that gives rise to the sensitive use veto. It is, however, unconstitutional for a local government to impose a procedural requirement that delegates to certain favored private parties the unfettered power to veto, at any time prior to governmental approval and without any standards or reasons, another's right to engage in constitutionally protected freedom of expression. * * *"

The court added that, in a city of 100,000 with only four available sites and at least one active opponent, the sensitive use veto chills protected speech. Thus, the four available sites are not per se insufficient, but may be part of an analysis on reasonably available channels of communication.

The majority opinion said that the possibility of other denials by use of the veto was not speculative, especially as the institute applicant believed that its permit would thwart the adult use—a real, rather than a hypothetical event, even if the City used the karate school as an additional basis. The willingness of plaintiff to meet the City's criteria puts plaintiff within *Renton*'s protection, as plaintiff is not asking for preferential treatment, but rather to be on an equal footing with other prospective businesses. The sensitive use veto thus constitutes a prior restraint on free expression because it allows speech only if permitted by governmental officials without adequate procedural safeguards or prompt judicial review. These safeguards could be adequate but for the interpretation of the sensitive use veto by the City.

The court used *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), as authority. In *Larkin*, the federal Supreme Court struck down a liquor store licensing requirement that prohibited liquor stores within a certain distance of churches unless the church consented, under the establishment clause and found the analogy applied as well to the free speech clause. The court also used a line of cases in which private parties may exercise a veto over acts or uses without any standards under the due process clause, especially in a free speech context. The court concluded that the ordinance was fatally flawed for these reasons.

As to the number of sites, the court rejected the trial court's determination that four sites was insufficient as a matter of law under the reasonable alternative channels prong of *Renton*. Because there had never been an adult use in the City nor any current uses, it was premature to rule as a matter of law on the adequacy of the number of sites. It is possible that the deletion of the veto requirements may cause the number of sites to rise and, in the absence of a factual record otherwise, the question of the adequacy of the number of sites cannot be answered. The court concluded:

"We decline, however, to adopt a bright line rule that an ordinance is constitutional when the number of locations available for such businesses equals or exceeds the number of existing adult businesses. This "supply and demand" analysis is insufficient to account for the chilling effect that an adult use zoning ordinance may have on prospective business owners. This point is especially salient in the present case where another feature of the ordinance may deter business owners from applying for permits, thus artificially curtailing the demand. Rather, supply and demand should be only one of several factors that a court considers when determining whether an adult business has a "reasonable opportunity to open and operate" in a particular city * * * . A court should also look to a variety of other factors including, but not limited to, the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, "community needs, the incidence of [adult businesses] in other comparable communities, [and] the goals of the city plan." * * *

The court noted that plaintiff did not argue any of these other factors militated toward favorable consideration of this application to have an adult use open and operate. The court affirmed the trial court injunction, but modified it to strike only the sensitive use provisions.

Judge O'Scannlain concurred and dissented in part, and disagreed with both grounds used by the trial court to invalidate the city's ordinance. He faulted the majority for ruling on the basis of a "theoretical possibility" that a sensitive use may apply for a use permit and thus disqualify an adult use. In his view, the majority should not have invalidated the sensitive use veto on facial basis, particularly with the separate basis of the karate school. As to the veto issue, Judge O'Scannlain noted an absence of "reasonable alternative channels of communication by the theoretical possibility" of a veto, even if there was an adequate number of sites available. Judge O'Scannlain suggested the ordinance should be addressed on an "as applied" basis and that a jury should decide the matter.

Judge O'Scannlain agreed with the majority view that it was premature to decide whether the number of sites were adequate, but would go further to determine whether the demand for sites exceeded the supply as a *sine qua non* for a constitutional violation on the alternative channels of communication question. Finally, Judge O'Scannlain pointed to *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (March 30, 2000), to say that a content-neutral regulation can ban nude dancing entirely to combat deleterious secondary effects of sexually oriented businesses. Judge O'Scannlain suggested that a less than full ban, using stringent rules, may also be valid. Judge O'Scannlain thus declined to hold the ordinance facially invalid, but would uphold that portion of the majority opinion regarding overruling the trial court on the number of sites.

This is another splintered opinion on the question of adult uses. The majority does not explain why the karate school ground was not an adequate basis for denial. However, the dissent would authorize the banning of protected expression without more. Oregon must be thankful that it need not deal with this issue due to Article I, section 8, of the State Constitution.

Edward J. Sullivan

Young v. City of Simi Valley, 216 F.3d 807(9th Cir. 2000), cert. denied 121 S.Ct. 844 (2001).

Regulation of Oil Company Franchises Subject to "Advancement of Substantial State Interest" Test

In *Chevron USA, Inc. v. Caetano*, 224 F.3d 1030 (No. 99-15108, 9th Cir., September 13, 2000), defendant governor and attorney general appealed summary judgment for plaintiff oil company, which sought declaratory and injunctive relief, alleging that a 1997 legislative action was unconstitutional. The legislation set the maximum permissible regulated rent that plaintiff could charge to its oil company franchisees. Plaintiff contended the limitation amounted to a taking of its property. There were no factual disputes according to the parties.

The state legislature reacted to concerns over the highly concentrated gasoline market in the state by placing a cap on the maximum rent an oil company could charge to lessees of service stations. Plaintiff is one of two gasoline refiners and one of six gasoline wholesalers in the state and has leased 64 service station sites to franchisees. In 1994 and 1996, plaintiff relied on estimated gasoline sales to charge rent, but changed the calculation in 1997 to charge an escalating rent on actual sales (18 percent on sales up to $18,000, 32 percent between $18,000 and $28,000, etc.). The legislature set the maximum rent at 15 percent of gross margin.

While plaintiff admitted it had not recovered the expenses from rent in any state over the last 20 years, it also contended that its projected expenses now exceeded rent revenues. Plaintiff makes most of its revenues from contracts that require lessees to sell plaintiff's gas products. Plaintiff contended that the legislation did not advance a legitimate state interest, provide it with a just and reasonable return on its investment, or provide for individualized relief. The trial court resolved the first issue in favor of plaintiff and did not reach the other two issues.

A majority of the appellate court began its analysis by saying that states had authority to control rents and that the appropriate inquiry is not the efficacy of legislation, but whether the legislation substantially advances a legitimate state interest. The majority also rejected a suggestion in the concurring opinion that such regulations may only be judged under due process, rather than under taking standards, noting that in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the federal Supreme Court declined to reach, but did not reject, a taking claim in a rent-control case. The majority stated that it made more sense to judge the legislation under the takings, rather than the due process clause, because language in *Yee v. City of Escondido*, 503, U.S. 519 (1992), intimated that the substantial advancement of a legitimate state interest test might be applicable to rent-control cases and that a facial challenge may be ripe in an appropriate case. In sum, the majority stated that the "substantially advances" test should be used in rent-control cases as opposed to the "reasonableness" test advanced by the concurring opinion.

The majority found that the trial court erred in granting summary judgment as material issues of fact remained with respect to the facial challenge. In stipulated facts, the parties agreed that a franchisee may get a windfall under the Act from the increased value of the leasehold due to the reduced rent mandated under the Act. Plaintiff argued that the benefit accrued to the dealer, rather than the consumer, and that the Act therefore did not substantially advance a legitimate state interest. The state presented the testimony of an economist that adverse competitive effects of a concentrated gas market would occur in the state and thus the Act would benefit consumers and lower gas prices. The trial court attempted to resolve these matters of economic predictions as part of the summary judgment proceedings. Because the expert signing the affidavit relied upon unproven facts, the appellate court decided that more factual development is required in order to resolve the matter.

The majority suggested that a resolution of factual disputes may be necessary to show the Act is constitutional. In *Richardson v. City and County of Honolulu*, 124 F.3d 1115 (9th Cir. 1997), *cert. denied*, 119 S.Ct.168 (1998), a "rent cap" on land under condominiums was found to be a regulatory taking because the reduced rent was not necessarily passed on to the condominium owners after the first owner, who would then capture the benefit of the reduced rent and reflect that reduction in the sales price. The majority concluded that whether the rent cap is reasonably related to the objective of lowering fuel prices depends on whether it actually does so—a factual question that must be established on remand at trial, not summary judgment.

The majority also rejected two alternative bases for affirming the trial court judgment. First, it found the record did not support a claim that there was no viable economic use of the plaintiff's property, because the Act allowed plaintiff to charge $1.1 million more than it did under its existing program. Nor was there any requirement of individualized relief through a determination of the impacts of the Act, particularly if there were other sources of income such as the agreements requiring gas purchases by lessees exclusively from plaintiff. Under these circumstances, the court found no grounds for a facial takings claim. The trial court judgment was vacated and remanded.

Judge William Fletcher concurred in the judgment, disagreeing with the majority's analysis and suggesting use of a "reasonableness" test, instead of the "substantially advances" test. Judge Fletcher argued that the "substantially advances" test has only been used in cases involving severe zoning regulation of land or in cases of required dedications. There were no United States Supreme Court cases in which the rent-control applications of this test were considered, leaving to *Pennell* and *Yee*. Judge Fletcher read these cases as using the "reasonableness" test and, although he had admitted that a passage in the latter case refers to the "substantially advances" test. Finally, Judge Fletcher stated his fears that all rent-control regulations in the Ninth Circuit would be subject to the more rigorous "substantially advances" test, especially as most economists opine that, in the long run, rent-control regulations do not live up to their expectations. However, he stated the question as follows:

"The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide, in their political wisdom, whether to adopt rent and price controls. The Supreme Court's hints in Pennell and Yee may signal a willingness to rethink this long-ago retreat, but at this point the Court has not yet done so."

This is an important Ninth Circuit case for, although all three judges agree in the result, it is the test used ("substantially advances" or "reasonableness") that is important for further economic regulation cases. If this "substantially advances" test prevails, it may herald the re-emergence of substantive due process, albeit it in different garb.

Edward J Sullivan

Chevron USA, Inc. v. Caetano,
224 F.3d 1030 (No. 99-15108, 9th Cir., September 13, 2000).

Author's Note: The State of Hawaii recently filed a petition for certiorari in the U.S. Supreme Court in Chevron v. Cayetano, No. 00-1198. To summarize, the petition presents the questions: (1) whether the alleged failure of state legislation to substantially advance a legitimate governmental interest provides a basis for invalidating the law under the Takings Clause; and (2) whether the constitutional validity of state legislation can turn on a court's prediction about whether the law will actually achieve its objective. A copy of the petition is available on the Environmental Policy Project website, at www.envpoly.org.

Ninth Circuit Denies Rehearing En Banc in Lake Tahoe Takings Case

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 228 F.3d 998 (9th Cir. 2000), the Ninth Circuit denied rehearing in a case reported in the October 2000 issue of this Digest. The original panel decision in this case is found at 216 F.3d 764 (9th Cir. 2000). There was no opinion given on the denial; thus, the field was left open to the dissenters.

There was a vigorous dissent by Judge Kozinski (joined by four other judges, including Judge O'Scannlain from Oregon) beginning with the following:

"The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987), and adopts Justice Steven's First English dissent. Because we are not free to rewrite Supreme Court precedent, I urged our court to take this case en banc. By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority."

The facts of the case are set forth in the previous summary in this Digest; however, the dissent focused upon the temporary moratorium for two years and eight months that prevented construction on the various properties owned by individual plaintiffs in the Lake Tahoe Basin. The dissent stressed some occasionally used "sound bites" from previous cases to the effect that the Fifth Amendment ensures that the few are not forced to bear the burden of uses that benefit the many," and equated denial of use with physical invasion, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The dissent distinguished *Lucas*, only on the basis that the instant case involved a regulation of finite duration.

The dissent also pointed to Justice Stevens' dissent in *First English* which objected to the notion that an ordinance effecting a taking may not be so if it remains in existence for only a limited duration, because property is valued because the regulation may be removed. The Kozinski dissent found "an uncanny resemblance" between the wording of the Stevens' dissent and that of the panel opinion in this case and asserted that the panel opinion was in conflict with that of the federal circuit in *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993) (stating that "a taking even for a day, without compensation is prohibited by the Constitution."). The Kozinski dissent further asserted that it is not property value which is the touchstone of taking, but rather the deprivation of use, however brief, which it again equated to a physical occupation of the land. To some extent, all regulations are temporary said the dissent, adding "while land is timeless." Even land for which there no use is allowed has some value, and state or local governments could evade constitutional review on takings matters by calling it temporary. In such cases, the property owner may have problems with waiver and laches defenses. By asserting the temporary deprivation equivalent to physical occupation, the dissent was able to use an example of a single family home being used by the government as a government warehouse without compensation.

The dissent further characterized the panel holding as equivalent to the *First English* dissent of Justice Stevens, which it claims was adopted in this case. The dissent rejects reliance on *Agins v. Tiberon*, 447 U.S. 255 (1980), because it involved a "taking that never occurred."

The Kozinski dissent also rejects the panel's observation that *First English* did not delineate the nature of a taking, and said that these perimeters were established in *Lucas*. Finally, the Kozinski dissent discounted the language in *First English* to the effect that normal delays in building permits, zone changes, variances and the like were not takings by stating that any denial of all beneficial use constitutes a taking and that the desire to ease "local governance" does not excuse a violation of the takings clause.

This strongly worded dissent of selective indignation is hardly surprising for those who know Judge Kozinski as he signals to the Scalia cabal a desire to advance a property rights agenda in the Court's takings jurisprudence. It is also typical that the selective use of precedent is an old and typical trick of those who value property rights over all. From the use of Justice Holmes' "out of the blue" opinion in *Pennsylvania Coal*, to the invention of the three factors of *Penn Central*, and the two tests from the dicta of *Agins* (both ex nihilo) to the erasing of 100 years of nuisance exceptions to takings in *Lucas*, to the resurrection of substantive due process in *Nollan* and *Dolan*, the Federal Supreme Court's rewriting of legal history shows breathtaking chutzpah. It shouldn't be surprising that Judge Kozinski learned so well from his mentor Justice Scalia just how to bend, ignore, massage, and make precedent from previous dicta. Their respect for judicial restraint also appears to be equivalent as well.

Edward J. Sullivan

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 228 F.3d 998 (9th Cir. 2000).

Cases from Other Jurisdictions

Washington Supreme Court Finds Facial Taking in Mobile Home Tenancy Act

In *Manufactured Housing Communities of Washington v. State*, 142 Wa2d 347, 13 P3d 183 (2000), plaintiff association challenged the constitutionality of the Mobile Home Parks Resident Ownership Act, which gives tenants a qualified right of first refusal to purchase the mobile home park in which they live. The trial court granted the State's motion for summary judgment and the Court of Appeals affirmed. The Act was codified as RCW Ch. 59.23 and was passed in 1993. The law requires the mobile home park owner to offer a qualified tenant organization a right of first refusal under certain circumstances.

Plaintiff contended the statute interferes with certain basic ownership rights including free disposition of property, exclusion of others, and immediate closing of a transaction. The State claimed that a right of first refusal is not a "property right" and therefore total taking or physical invasion had occurred. In the alternative, the State claimed that if a taking had occurred it should be remedied through just compensation under the Act, not invalidation. The Court said a facial regulatory taking would occur if the regulation destroys all viable economic use of the property, results in a physical invasion, destroys one or more "fundamental attributes of ownership," or the regulations were used to enhance the value of publicly owned property. The court noted that the Washington courts also employ sub-

stantive due process to evaluate regulations.

The court first examined the regulations under a federal and state constitutional analysis to determine whether the state constitution provided more protection to property owners than did the federal constitution. The court concluded that the state constitution was more solicitous of property rights, based on the analysis in *State v. Gunwill*, 106 Wa2d 54, 61, 720 P2d 808 (1986). In particular, the court pointed to the peculiar Washington definitions of the terms "public" and "private" use and concluded that the challenged statute authorized the tenants to acquire the owner's property for a private use in violation of a specific provision of the state constitution. Moreover, the court said that a public benefit (i.e., having ownerships in tenants) was not equivalent to a "public use" as the public will not own the land. Under the Washington Constitution, private property may not be taken for private use regardless of the compensation involved. The court also said that a public purpose was not equivalent to a public use.

The court decided to use a more exacting analysis for regulations, which it found impinged on a fundamental attribute of ownership, i.e., the right to posses, exclude others, and dispose of property. The court found the statutory right of first refusal impinged on an owner's right to dispose of property. While such a right may be subject to bargaining away among parties, it may not be exacted by state regulation. The question is not the characterization of the right gained by the tenant, but whether the mobile home park owner loses thereunder. If the property interest is taken from an individual for public use, compensation is required; when taken for private use, the legitimacy of the regulation is open to question regardless of compensation, particularly in view of the state constitutional requirement that private property may not be taken for private use. That provision stands regardless of the public benefit found as a result of the legislation in homeownership. The court concluded:

"Chapter 59.23 RCW authorizes the State to take from the park owner the right to sell to anyone of choice, at any time, and gives tenants a right to preempt the owner's sale to another and to substitute themselves as buyers. Then, after a mobile home park has been forcibly sold to a "qualified tenant organization," no member of the public can use the park. In fact, only the park tenants can freely use it. Although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a "public benefit," this public benefit does not constitute a public use."

The court thus invalidated the statute on facial takings grounds.

This is a case distinguishable from urban renewal or other "public use" cases in which the Washington Supreme Court interpreted its own state constitutional provisions on takings to preclude a forest transaction among private parties through regulation, even with compensation. The result was required, particularly in view of a state constitutional provision prohibiting the taking of private property for private use.

Edward J. Sullivan

Manufactured Housing Communities of Washington v. State, 142 Wa2d 347, 13 P3d 183 (2000).

San Francisco "Mitigation Fee" May Be A Taking, Says California Appellate Court

In *San Remo Hotel L.P. v. City and County of San Francisco*, 82 Cal. App.4th 1105, 98 Cal. Rptr.2d 792 (Cal. App. 1st Dist., August 8, 2000), plaintiff claimed that the application of defendant's hotel conversion ordinance ("HCO") to plaintiff's hotel was a compensable taking. Plaintiff originally filed suit in federal court, but the Ninth Circuit ruled that such claims must be pursued in state court. The city forbade plaintiff to operate a tourist hotel unless it paid a "conversion fee" of $567,000. The trial court sustained the city's demurrer to the takings claim and overruled plaintiff's additional claim that it had a lawful nonconforming use. The city cross-appealed the trial court's imposition of a $190 penalty against the plaintiff for operating a tourist hotel for 190 days. However, the court upheld the trial court's position as plaintiff spent the 190 days attempting to navigate the ordinances and regulations in this area without intending to violate them.

The San Remo Hotel was built in 1906. It had been renovated at substantial cost in the 1970s and had a mix of short-stay and long-term guests. In 1979, the city placed a moratorium on the conversion of long-term stay hotels to tourist hotels and made that moratorium permanent in 1981 by the HCO. However, the city allowed such conversion upon the payment of the mitigation fee. In 1990, the HCO was amended to double the mitigation fee and forbade occupancy of residential hotels by tourists during the tourist season. The City determined whether the hotel had tourist or residential rooms by the hotel's response to a survey on occupancy as of September 23, 1979. The city construed the survet response to be that all 62 rooms in plaintiff's hotel were for long-term residential stays. Plaintiff claimed the figure was the result of a false declaration by a former lessee and that the total number of residential rooms was really between ten and twenty. In 1990, plaintiff paid the fee of $9,000 per room under protest before the fee doubled.

The court noted that despite much state and federal litigation, there had been no definitive ruling as to whether the ordinance effected a taking of property. In this case, plaintiff's takings claim was both facial (for alleged failure to advance a substantial state interest) and "as applied" (for forcing plaintiff to bear a disproportionate burden of meeting housing needs). Plaintiff had attempted to replead, alleging that the attempt to collect the fee for all 62 units constituted a taking, as well as a failure to advance legitimate state interests. However, the trial court again sustained a demurrer, this time without leave to amend. Plaintiff also sought a writ of mandate to secure recognition of its claim to a nonconforming use so that it would be exempt from the ordinance.

In regard to the demurrer, the Court of Appeals stated that it assumed the truth of all well-plead allegations and looked at legal claims *de novo* to determine whether the facts entitled plaintiff to any relief. The court followed *Ehrlich v. City of Culver City*, 50 Cal Rptr.2d 242, 911 P2d 429, *cert. denied*. 519 U.S. 929 (1996), to the effect that the *Dolan* burden and test of "rough proportionality" applied to fees set in a discretionary proceeding. The *Erhlich* court applied heightened scrutiny to such fees because of the opportunity to use the fee structure for unrelated matters. Plaintiff pled that in accordance with this standard the demurrer should have been overruled because of the individualized discretionary decision and the fee was in lieu of condemnation of the site for public use. The court empha-

sized that the HCO was not a generalized zoning ordinance that regulated uses, but a highly individualized ordinance that affected only a small class of landowners. The court refused to consider plaintiff's facial claims as plaintiff had not sought leave to replead them, and the record from the trial court was incomplete for purposes of review.

In regard to the as-applied takings claim, under the federal and California Constitutions the court stated that these provisions were meant "to prevent governments from taking private property for public goals without payment of just compensation." Plaintiff must, therefore, show lack of both an "essential nexus" between the fee and the impacts of the proposal, as well as a "rough proportionality" between the two. The court further found that plaintiff had a claim based on the defendant's mistaken view that all 62 units were residential, instead of short-stay units. Moreover, plaintiff alleged it was required to offer lifetime leases to its residential dwellers, none of whom were adversely affected by the conversion. These claims, stated the court, were sufficient to raise a takings issue under *Nollan* and *Dolan*, especially as there have been no residents displaced or relocated by the HCO.

The court noted that a similar scheme in New York was found to violate the takings clause. *See Seawall Associates v. City of New York,* 542 N.E.2d 1059, *cert. denied,* 493 U.S. 976 (1989), in which landowners are forced to bear the burdens which should, "in justice and fairness," be borne by the public as a whole. This standard caused the New York Court of Appeals to find the ordinance allocating that burden facially unconstitutional because the hotels were required to stay in business, creating a physical invasion. The court found no such physical occupation in the fee exaction in *Erhlich*. Even if physical occupation was required, however, the ordinance's requirement to offer lifetime leases to residential occupants would meet that standard, because it would prevent the hotel from closing down. The court also rejected plaintiff's claim that, by paying the fee, plaintiff would waive its right to challenge the ordinance. The court found that there was a knowing and voluntary relinquishment of a right, and that there was a right with no remedy. The case was remanded for further proceedings.

The remainder of the opinion was unpublished. In the first portion of the unpublished opinion, the court reviewed plaintiff's nonconforming use claim as a pure question of law on *de novo* review. The lack of nonconforming use was asserted by the city based on the survey report filed by the former lessee and the failure to appeal the report within ten days. However, plaintiff claimed it had no notice of the survey. The court resolved the nonconforming use issue under the zoning regulations that existed before the city enacted a more restrictive ordinance in 1987. Those regulations did not distinguish between residential and tourist rooms, but merely allowed "hotels" as outright uses. The survey was not meant to be a zoning regulation and cannot bind plaintiff. The city attorney stated that the ordinance would not have the effect of rendering an existing use nonconforming. Because the trial court upheld the city's view that the response to the survey estopped it from denying there was a nonconforming use, the matter was remanded for a determination on that factual issue.

The final issue in the unpublished portion of the opinion related to the city's contention on cross-appeal that the $190 fine was insufficient. The Court of Appeals found the trial court's assessment of nominal damages sufficient and rejected the city's view that "disgorgement" of the hotel's profits was appropriate under the circumstances.

This is a most unusual case from a state that has usually upheld local government regulatory powers of a most sweeping nature. The city may have overplayed its hand in asserting that plaintiff was not able to contradict a survey response of a lessee without considering other information on the former use of the hotel. The appellate court also applied the *Erhlich* decision to fees under *Dolan* principles, a position not universally accepted and perhaps now incorrect in view of *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998). The California Supreme Court accepted certiari in November, 2000.

Edward J. Sullivan

San Remo Hotel L.P. v. City and County of San Francisco, 82 Cal. App.4th 1105, 98 Cal. Rptr.2d 792 (Cal. App. 1st Dist., August 8, 2000)

LUBA

Farm Uses

In *Barge v. Clackamas County*, LUBA No. 20005-85 (12/06/01), LUBA considered the extent to which a farm and feed store may sell non-farm items under the county's code. The code allows as a conditional use in an exclusive farm use zone "commercial or processing activities that are in conjunction with timber and farm uses." The applicant sought and received conditional use approval for a farm and feed store to be located on a half-acre parcel zoned Rural Residential Farm/Forest-5 acres. Based on the applicant's estimate that 10 to 20 percent of the store's sales would be nonfarm-related items, the hearings approved the store with a condition limiting non-farm related sales to ten percent of gross sales.

Petitioner appealed to LUBA and argued that commercial activities in conjunction with farm uses must sell farm-related items exclusively to be permitted under the county's code. LUBA disagreed, relying on its decision in *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994) in which LUBA concluded the incidental sale of nonfarm items is permissible as part of a commercial activity that is primarily in conjunction with farm use. In this case, the hearings officer found that the sale of nonfarm-related items would be in "incidental quantities" and limited the sale of these items to ten percent of gross sales. LUBA concluded the hearings officer properly interpreted the county code and that the feed store is permissible because it is primarily a supplier of farm uses. Accordingly, LUBA affirmed the county's decision.

Kathryn Beaumont

LUBA Jurisdiction

The question before LUBA in Bes*seling v. Douglas County,* LUBA No. 2000-136 (12/04/00) was "whether a local government may separate an otherwise unitary land use decision into different components, remand some components for further proceedings, and designate some components as immediately appealable to LUBA." LUBA concluded the answer is "no."

At issue was the county's decision on an application for a comprehensive plan amendment and zone change from agricultural to industrial and a reasons exception to statewide plan-

ning goals 3 and 14, all to allow a 3.77 acre site to be used for heavy equipment repair, storage and sales. The planning commission approved the entire application. On appeal, the county board concluded that the alternative sites analysis required to support the Goal 14 exception was inadequate. The board issued an order remanding the Goal 14 issue to the planning commission, but purporting to make a final, appealable decision upholding the commission's decision on all other aspects of the application.

In the subsequent appeal to LUBA, the applicant-intervenor moved to dismiss the appeal on the ground that the county's decision is not a final, appealable land use decision. Relying on its decision in *Tylka v. Clackamas County,* 20 Or LUBA 296 (1990), LUBA concluded that the county must make a final determination on all aspects of the application before there is a final decision that can be appealed to LUBA. Recognizing that "this appeal was precipitated solely by the board of commissioners' erroneous attempt to finalize portions of the decision," LUBA nevertheless granted the motion to dismiss and dismissed the appeal for lack of jurisdiction.

Decision to condemn land

In E *&* R *Farm Partnership v. City of Gervais,* LUBA No. 2000-069 (12/15/00), LUBA concluded it lacked jurisdiction to review a city decision to condemn 15 acres of EFU-zoned property. The City sought to acquire the property for a poplar tree farm that would be irrigated with wastewater from the City's sewage treatment plant. LUBA previously had dismissed an earlier appeal involving the same project, E *&* R *Farm Partnership v. City of Gervais,* 37 Or LUBA 702 (2000), which challenged the City's decision to authorize appraisals of the property. LUBA's dismissal was based in part on the City's representation that after it received the appraisals it would address the land use issues of concern to petitioner at the time it decided to purchase the property.

Despite the earlier representation, the City also moved to dismiss the second appeal for lack of jurisdiction, arguing that it had decided to complete the purchase of the property before seeking any land necessary land use approvals for the proposed poplar tree farm and wastewater irrigation operation. LUBA expressed some puzzlement over why the City represented in the first appeal that it would address petitioner's land use issues at this second stage of the process. Nevertheless, LUBA agreed with the City that it did not and was not legally required to apply any land use standards to the condemnation decision. Accordingly, LUBA dismissed the appeal.

Ordinance amendments resulting from mediated settlement agreement

LUBA's ruling in *Waibel v. Crook County,* LUBA Nos.2000-126 through 2000-132 (Order on Motion to Dismiss, 12/21/2000) illustrates the difficulty of insulating a mediated settlement from further challenge, particularly if the settlement requires additional land use decision making by the affected local government. The ordinances challenged in this appeal were the result of a mediated settlement of two sets of consolidated appeals that were earlier filed against the County. Under the settlement agreement, the parties filed a stipulated motion asking LUBA to: (1) dismiss one of the appeals challenging a nonresource land ordinance, (2) remand other nonresource land ordinances for adoption of amended ordinances, and (3) remand several exception ordinances also for the adoption of amended ordinances. The parties attached the amended ordinances the County proposed to adopt to the stipulated motion.

LUBA granted the first two requests in Bu*rke I, Burke v. Crook County,* LUBA Nos. 99-037 through 99-041 (6/20/2000) and the third request in Bu*rke II, Burke v. Crook County,* LUBA Nos. 98-220 through 98-225 (6/20/2000). On remand, the County held two public hearings on the proposed ordinance amendments and adopted them at the conclusion of the second hearing. Seven separate appeals were filed with LUBA and were consolidated for review.

The County and numerous intervenor-respondents moved to dismiss the appeals on the ground that the County exercised no judgment in adopting the ordinances and that therefore the ordinances are not land use decisions reviewable by LUBA. They argued that the County did precisely what LUBA ordered it to do in Bu*rke I a*nd Bu*rke II a*nd that the new appeals are an impermissible collateral attack on LUBA's decision in the earlier appeals. Further, they contended dismissal is necessary to ensure that goal of allowing for mediated settlements pursuant to ORS 197.860 is not frustrated. The County argued that the mediation statute, ORS 197.860, does not limit the possible outcomes of mediation nor does it limit LUBA's authority to give local governments specific instructions for final decisions on remand pursuant to mediated settlements.

LUBA rejected the County's arguments, noting first that the ordinances adopted pursuant to the mediated settlement amended the county's comprehensive plan and land use regulations and, therefore, are statutory land use decisions pursuant to ORS 197.015(10)(b)(A). Additionally, LUBA observed that the motion to dismiss seriously overstates the authority given to the parties under the mediation statute and the effect of LUBA's decisions in Bu*rke I a*nd Bu*rke II*. Parties to the earlier cases could foresee that affirmance, reversal or remand of the challenged County decisions could be obtained either through decisions from LUBA or a mediated settlement. In LUBA's view, however, the parties could not reasonably foresee that LUBA would order the County to adopt the amended ordinances resulting from the settlement without observing otherwise applicable procedural requirements. And LUBA noted that its decisions in Bu*rke I a*nd Bu*rke II d*o not authorize the County dispense with these procedural requirements.

Even if the mediated settlement required the County to adopt the amended ordinances without change, LUBA ruled that this would not preclude persons who appeared in the local proceedings on the amended ordinances from raising issues of concern to them on appeal to LUBA. Expressing some sympathy for the County's position, LUBA reasoned that the legislature simply had not given parties to mediation under ORS 197.860 the extraordinary powers envisioned by the County, stating:

"Respondents are certainly correct that allowing persons who were not parties in Bu*rke I a*nd Bu*rke II t*o participate in the proceedings on remand introduces the possibility that the mediated settlement will be upset. That possibility introduces an element of uncertainty that would not be present under respondent's view of ORS 197.860. However, the certainty that is achieved under respondents' view of OS 197.860 comes at the expense of the persons who will be affected by the new ordinances in ways they would not have been affected by the initial ordinances. Under respondents' view of ORS 197.860, the only way such persons could be sure to protect their rights would be to join in every LUBA appeal of a county land use decision. Otherwise, the parties might mediate and stipulate to county adoption of a quite different decision that pleases them. If the legislature intended to extend such extraordinary power to private litigants to agree to enactment of land use decisions with-

out first observing any relevant statutory notice and hearing requirements, we do not see that intent expressed in the words of ORS 197.860. (Slip Op. at 6)"

LUBA concluded that in Bu*rke I a*nd Bu*rke II it* directed the county to adopt the amended ordinances the parties agreed to during mediation, but did not review the merits of either the original challenged ordinances or the amended ordinances. Moreover, petitioners who did not intervene in Bu*rke I a*nd Bu*rke II m*ay have waived their right to raise issues that could have been raised in the earlier appeals, but they have not waived the right to raise new issues that could not have been raised earlier. For all of these reasons, LUBA denied the motion to dismiss.

Kathryn Beaumont

Vested Rights and Nonconforming Uses

In *Fountain Village Dev. Co. v. Multnomah County, LUBA No. 2000-051 (12/13/00)* the Land Use Board of Appeals addressed the issue of whether Multnomah County was correct in applying the principles of abandonment or interruption of a nonconforming use to a vested right. The case is one of first impression in this state.

In 1985 the owner of a 38 acre parcel of property in Multnomah County constructed a concrete bunker for the purpose of growing marijuana plants. After completing the bunker the owner began constructing a log cabin on top of the bunker without first obtaining a scenic waterway or building permit from the County. The zoning for the property at the time of construction was Multiple Use Forest with a minimum lot size of 10 acres. In 1986 the owner illegally sold a 2 acre portion of the site to an associate. The County issued a stop work order on any further construction on the cabin which remained in effect until an application for a building permit was reviewed and approved on March 10, 1987. No application for a scenic waterway permit was ever filed with the County. Although construction continued throughout the year, the cabin was never completed and after 1987 no further construction or expenditures towards construction took place. The total amount of expenditures on construction was $70,000, approximately one-third the cost of completing the entire project. In 1992 federal agents found marijuana plants on the property and seized the entire parcel including the cabin. The County then acquired the property and rezoned the same to a Commercial Forest Use which requires a conditional use permit for a dwelling.

Petitioner acquired the entire 38 acres from the County paying approximately $25,000 for the 2 acre site and cabin in a series of transactions between 1993 and 1994. In 1994 the County approved a lot line adjustment resulting in a 2.96 acre site for the cabin. The remaining parcel was sold. In 1995 petitioner paid $3,000 to clear soil off of the bunker, construct a road leading to the cabin and to assess the integrity of the structure. No efforts were made to continue construction on the cabin for occupancy due to high interest rates for second home loans between 1995 and 1998. During that time period petitioner's efforts were limited to clearing, replacing broken windows and maintaining the roof. After interest rates fell, petitioner applied for a loan in 1998 to complete the cabin.

On September 24, 1999, the petitioner applied to the County for a determination of the legal status of the unfinished cabin. The County issued an administrative decision finding no vested right to complete the cabin or in the alternative that any vested right had been abandoned or discontinued under the County code. The County's decision was appealed to a hearing officer and the Board of Commissioners. The decision was affirmed in both proceedings and additional findings were adopted by the Board. Petitioner then appealed to LUBA.

The seminal decision on vested rights in Oregon is *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973). In *Holmes* Clifford and Dorothy purchased a piece of rural unzoned property for the purposes of constructing a chicken processing plant in 1965. Approximately $33,000 of the total project cost of $400,000 to $500,000 was spent on drilling a well, purchasing an irrigation system, installing electrical power and planting grass. The County then zoned the property prohibiting the establishment of the plant. Applications were filed to rezone the property in 1966 and 1967 but were denied. Thereafter the property was used for cattle grazing until new construction started on the plant in 1970. The county issued a stop work order and filed in the circuit court seeking to enjoin construction of the plant.

In *Holmes* the Supreme Court set forth the basic test for determining a vested right which is restated by the Court of Appeals in *Eklund v. Clackamas County*, 36 Or App 73, 81, 583 P2d 567 (1978) as follows:

"The Supreme Court in *Holmes* identified four essential factors to be considered in assessing the evidence of a nonconforming use; (1) the ratio of prior expenditures to the total cost of the project, (2) the good faith of the landowner in making the prior expenditures, (3) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost."

The Supreme Court held that Clifford and Dorothy had acquired a vested right to complete construction given the substantial expenditures directly related to developing the chicken processing plant. *Holmes* 265 at 193.

The County's findings denying the existence of a vested right in *Fountain Village* relied mostly on whether petitioner's expenditures were made in good faith to lawfully develop the property. In particular, the County found that: (1) the expenditures were made for the unlawful purpose of growing marijuana, (2) the conveyance of only 2.96 acres in 1994 rendered the use of the cabin unlawful because the vested right was for a dwelling on a minimum lot size of 10 acres under the Multiple Use Forest District, and (3) petitioner never attempted to acquire a scenic waterway permit as required by state law.

In lieu of the more traditional vested rights analysis in resolving the issues presented, LUBA assumed a vested right was established prior to 1993 and affirmed the County's decision based on findings that the vested right extinguished under the relevant provisions governing nonconforming uses. The County's findings and LUBA's decision are original in this state.

Statutory law governing nonconforming uses can be found under ORS 215.130. In particular ORS 215.130(10) authorizes a local government to establish standards for determining whether a nonconforming use is interrupted or abandoned. Section 11.15.8805 of the Multnomah County Code (MCC) provides consistent with this statutory authority the following standards for Multnomah County:

"(A) Restoration or replacement of a non-conforming use shall be permitted when the restoration or replacement is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the

date of occurrence of the fire, casualty, or natural disaster.

(B) If a non-conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption.

(C) A non-conforming structure or use may be maintained with ordinary care."

The County found that petitioner abandoned the right to continue completion of the cabin between 1995 and 1998 when petitioner chose to forego a second home mortgage due to unfavorable interest rates. Even if the County's approval of the lot line adjustment in 1994 establishes that the cabin is an existing lawful use of the property, the County decided that lawfully established use is still a nonconforming use subject to abandonment.

Petitioner argued that a vested right is an equitable right subject only to equitable restrictions and as such the principles of abandonment or interruption do not apply. Petitioner further argued that nonconforming use law by its terms applies to a use whereas here no use as yet has been established only an inchoate structure. Citing to *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981), petitioner contends that establishing a vested right is a separate and distinct inquiry from determining whether a nonconforming use exists. The County argued that a vested right is a right to complete a nonconforming use that is subject to the standards provided under ORS 215.130 and MCC 11.15.8805. Because no substantial steps were taken to complete the nonconforming use the County concluded that the right to do so was lost pursuant to 11.15.8805(B).

LUBA agreed with the County that vested rights are not a separate and distinct entitlement from a nonconforming use but are rather treated as an inchoate nonconforming use. LUBA cited to *Holmes* 265 Or at 197 ["The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted"], and Rathkopf's The Law of Zoning and Planning, §50.03, 50-22 ["Although this Oregon line of cases speaks of protecting partially completed land development projects as nonconforming uses, the factual and policy analysis employed therein makes it clear that these situations would be treated as vested rights cases in other jurisdictions. The fact that they are treated under the rubric of nonconforming uses is because Oregon, alone among the states, does not insist that a use have been in 'actual existence' as a definitional prerequisite to a nonconforming use status."] in support. LUBA went on to note that the Supreme Court in *Holmes*, 265 Or at 201, did address an abandonment argument during an equitable proceeding to determine the existence of a vested right. LUBA found that "a vested right is simply the right to complete development of a nonconforming use" and that the holder of that right must "diligently exercise those rights" consistent with the applicable state and local provisions governing nonconforming uses.

Petitioner argued that even if the nonconforming use provisions apply, the property was kept in ordinary care consistent with 11.15.8805(C) and that a decision to forego a second home mortgage based on unfavorable financing is a reasonable basis for delaying completion of the cabin. The County's findings interpreting Section 11.15.8805(B) state that a nonconforming use may be discontinued "for any reason" and that to avoid a 2 year interruption in completing the cabin the owner must make a "substantial effort to finish the development."

LUBA found that because petitioner did nothing over the 1995 to 1998 period to finish the development the existing right was lost. Furthermore because the discontinuance may occur for "any reason" the Board found that whether that discontinuance was reasonable because of an unfavorable financial market is irrelevant in determining whether a use is discontinued.

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Past Practices

Local jurisdictions should be cautious in relying on past practices as a basis for reviewing land use decisions as is evident in LUBA's consolidated decision in *Halvorson Mason Corp. v. City of Depoe Bay, LUBA No. 2000-060* and *Vista Land Corporation v. City of Depoe Bay, LUBA No. 2000-060 (12/08/00)*. In that case LUBA reversed an interpretation by the City of Depoe to apply a time-limit provision for approval of a tentative subdivision plan to a planned development approval because the City's past practices were not consistent with that interpretation.

In this case Halvorson Mason Corporation and Vista Land Corporation both applied for and received approval for the a planned development. Halvorson first applied for the Little Whale Cove Planned Development in 1976. The application was reviewed and approved under the Lincoln County Zoning Code (LCZC). Two months later the City adopted the Depoe Bay Zoning Ordinance (DBZO) and in 1984 the Depoe Bay Subdivision Ordinance (DPSO). The first five phases of development received final planned development approval in 1976, 1978, and 1993. In 1996, Halvorson applied for permission to modify phase six. Review and approval of phase six was based on the substantive provisions of the existing Depoe Bay Zoning Ordinance. In 1994, Vista also obtained a planned development approval for Seapointe. Although both Little Whale Cove and Seapointe involved residential subdivisions the City applied only the substantive criteria for approving a planned development, DBZO 3.410, and not the substantive provisions governing the subdivision of land, DBSO 2.040. No part of the planned development provisions address or cross-reference the subdivision regulations.

In the past the City reviewed and approved final planned developments including residential subdivisions, allowed those final plans to be recorded and lots sold without also requiring approval of a tentative and final subdivision plan. On January 11, 2000, after considering several legal opinions on the issue, the City Council voted to send notice to any party with a tentative plan for subdividing property under the planned development provisions that such plan expired under the two-year time limitation for submitting a final subdivision approval under DBSO 2.040(3)(e). On February 4, 2000, consistent with the Council's decision, the Planning Commission requested the city planner send a letter to Halvorson and Vista stating that the tentative approvals for the planned developments are subject to the two-year time limitation. Petitioners appealed to the City Council who affirmed the Planning Commission's decision adding that both petitioners have 60 days to seek a one-year extension under DBSO 2.040(4). Petitioner's subsequently appealed.

Halvorson argued that the Little Whale Cove development received final approval for the entire project under the LCZC in

1976 and that all subsequent approvals over the past 24 years have been approved without applying the time limits under DBSO 2.040. Vista similarly argued that the Seapointe project received approval from the Planning Commission without application of the time limit provision and that the City Council may not retroactively apply that provision.

The City contended that both projects are subdivisions subject to the applicable time limitations. The conceptual approval of the planned development, as argued by the City, does not actually subdivide the land until a final subdivision plat is recorded. Finally, even if the City failed to apply a time-limit at the time of the final planned development approval, the time-limit provision is not an approval criterion that must be addressed in order to determine whether the application is in compliance with the local code. Therefore the City is free to interpret the application of the time-limit provision at any time subsequent to that approval and consistent with the City's obligation to implement the terms of its code.

LUBA found that neither of the City's decisions made any reference to or provided any interpretation of the time limit provisions in issue. As a result the City's subsequent decision effectively applies a new standard to the original approval inconsistent with ORS 227.178(3) ["Approval or denial of [an] application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."]. Both the staff report and final decision state that the planned development may be "completed within a reasonable period of time" consistent with petitioner's position that the City did not believe at that time that the time-limit provision under DBSO 2.040(3)(e) was applicable. Because of the City's past practices, LUBA concluded that DBSO 2.040(3)(e) was not in effect at the time the planned development applications were approved.

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