OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 23, No. 3 • June 2001

Highlights

Appellate Cases—Land Use

Court of Appeals Confirms that Applicants Can Control Their Own Finality

In *K.B. Recycling, Inc. v. Clackamas County*, 171 Or. App. 46 (2000), the Court of Appeals reversed the trial court's denial of mandamus, holding that the purpose of the mandamus remedy is to assure prompt governmental action on land use applications. The Court refused to accept the County's argument that the applicant cannot use "gamesmanship" when exercising the mandamus right of action.

The petitioner filed an application for a permit in Clackamas County, but the County did not issue its decision for more than six months. When the decision was finally released, it was unfavorable to the petitioner. Under the County ordinance, permit decisions are "final" and appealable to LUBA, unless petitioner files a petition for rehearing within ten days. If a petition is filed, the decision does not become final until the rehearing is decided. In this case, nine days after the County's decision, petitioner filed a petition for rehearing and, only a few minutes later, filed a mandamus action.

At the mandamus hearing, the County argued—and the trial court agreed—that the hearings officer's decision was final and that petitioner's "arguably self-serving" maneuver in filing the petition for rehearing would not be allowed to divest the decision of its finality. The County suggested that the writ of mandamus should have been filed upon expiration of the 120-day period (several months earlier), instead of waiting to see the results of the County process. It was only after receiving a denial that the applicant complained about the process. According to the County, this allowed plaintiffs to obtain a "second bite at the apple" in circuit court. The Court of Appeals disagreed, noting that the purpose of the mandamus statute is to provide an alternative forum to applicants when the first forum, the local government, has "failed to deliver the goods" in the time and manner required by state law. The Court of Appeals reversed the trial court, relying on *State ex rel Compass Corp. v. Lake Oswego*, 319 Or. 537, 878 P.2d 403 (1994).

The County also argued that the Court should affirm the trial court on the alternative ground that mandamus was barred by laches. The Court of Appeals also rejected this argument, citing *State ex rel Coastal Management v. Washington County*, 159 Or. App. 533, 969 P.2d 300 (1999). The Court stated that governmental bodies "seem to have a fundamental misperception of the substance and purpose" of the mandamus statutes. They are designed to assure prompt governmental action on applications for the use of property, not to compel applicants, who have been denied that statutory right, to pursue a judicial remedy at the earliest possible opportunity.

This decision reiterates the Court of Appeals' understanding that the mandamus statutes are designed to assist applicants at the local level and not necessarily to ensure the correct decision, thus, giving applicants a little more weight in the balancing act between developers and governmental bodies.

William Kabeisman

K.B. Recycling, Inc. v. Clackamas County, 171 Or. App. 46 (2000).

Cell Towers Over 200 Feet Tall Not Subject to Necessity Test

In *Dierking v. Clackamas County*, 170 Or. App. 683 (2000), the Court of Appeals upheld the lower court's decision that cell towers taller than 200 feet are not required to satisfy the necessity test.

SBA Towers, Inc. applied for approval of a 199-foot cellular transmission tower in an EFU zone. A tower of 200 feet or less is a permitted use in an EFU zone under ORS 215.283(1)(d), provided that it is "necessary for public service." After a county planner pointed out that a tower over 200 feet would not be subject to this necessity test, SBA revised its application, requesting a 250-foot tower. The county approved the application. On appeal by Dierking, a neighbor, LUBA remanded the decision to the county, but denied a number of the assignments of error. Dierking sought review on those issues.

Dierking argued that the Court of Appeals should interpret the statutes to require that the necessity test, which applies to towers of 200 feet or less pursuant to ORS 215.283(1)(d), also applies to the taller towers allowed as conditional uses under ORS 215.283(2)(L). The Court declined to read this requirement into the latter statute, noting that towers of more than 200 feet are subject to additional *county* regulation, which ORS 215.283(1) uses are not. Dierking also asserted that the equipment cabinets required for the tower are independently subject to the necessity test. The Court agreed with LUBA that the cabinets are an essential part of the

tower facility, and need not be separately considered. The Court affirmed LUBA's decision.

Jane Kirkpatrick

Dierking v. Clackamas County, 170 Or. App. 683 (2000).

Appellate Cases—Real Estate

Court of Appeals Clarifies the "Hostile" Requirement for Common Law Adverse Possession

In *Mid-Valley Resources, Inc. v. Engelson*, 170 Or. App. 255 (2000), the Court of Appeals reversed the lower court, holding that the claimants had not established adverse possession. This adverse possession case was decided under common law, rather than under ORS 105.620, because the ten-year time period asserted as the basis for the claim did not extend beyond January 1, 1990.

The Court of Appeals decision in *Mid-Valley Resources* relied on the recent Oregon Supreme Court decision in *Hoffman v. Freeman Land and Timber, LLC*, 329 Or. 554, 994 P.2d 106 (1999). One of the five elements of a common law adverse possession claim is that the claimant's possession must be "hostile." In *Hoffman*, the Oregon Supreme Court reversed the lower court's decision, holding that open and continuous use does not create a presumption of hostility. In *Mid-Valley Resources*, the Court of Appeals explained that after *Hoffman* there are two ways that hostility may be established: (1) under the "pure mistake" doctrine, or (2) by proving a subjective intent to possess the property as its true owner.

The "pure mistake" doctrine applies when a party possesses land under the mistaken belief of ownership. That is, the claimant's deed correctly identifies the boundaries of the claimant's property, but the claimant actually occupies other property that the claimant mistakenly believes is covered by the deed. The mistake may not be based on "conscious doubt." Here, one of the claimants testified that, when she lived on the property as a child, she did not know the location of the property line, but believed that the property was "all ours." The Court of Appeals held that the claimants had "conscious doubt" about the location of the property line and, therefore, could not rely on the "pure mistake" doctrine to establish hostility.

The Court of Appeals also held that the claimants failed to prove hostility under the second method, which requires that they intended to possess the property as the true owners. The claimants argued that their predecessors had maintained a fence on one side of a fire road along one side of the disputed property. Oregon courts have held in adverse possession cases that fences, and fence maintenance, can vary in significance depending on the circumstances. Here, the Court held that the evidence suggested that the fence was intended merely to border the fire road, rather than to establish a property line and, therefore, did not evidence an intent to possess as true owner.

In sum, the claimants failed to prove their adverse possession claim because they failed to prove hostility in either of the two ways described above. The analysis of the hostility element is likely to differ somewhat in cases brought under ORS 105.620. The current version of the statute defines "hostile possession" as possession either under "claim of right" or with "color of title." In addition, "hostile possession" may be less of a deciding factor in statutory adverse possession claims because the current statute requires, in addition to the common law elements, that the claimant's possession be under an honest belief of actual ownership that is continuous throughout the vesting period, objectively-based, and reasonable under the circumstances.

Susan Glen

Mid-Valley Resources, Inc. v. Engelson, 170 Or. App. 255 (2000).

Utilization of Easement Limited to Minimum Use Reasonably Necessary

In *Clark v. Kuhn*, 171 Or. App. 29 (2000), the Court of Appeals determined that the reasonable use and enjoyment of defendant's easement did not require removal of several obstructions. The easement in question was created by deed and was "an easement for right of way purposes over a strip of land [twenty-five] feet in width lying adjacent to and on the southerly side of [plaintiff's property]." 177 Or. App. at 31. The Court assumed that for purposes of the appeal that all of the obstructions were within the twenty-five foot easement. The obstructions that defendant sought to remove were trees, large rocks, and a dirt berm placed near the road by plaintiff. The road, as currently utilized, varies in width between fourteen and twenty feet. Defendant wanted to widen and pave the road and place a gate across the road, which required removal of the obstructions. The plaintiff disagreed.

The Court determined that the appropriate legal test was whether or not the proposed changes were reasonably necessary for defendant's use and enjoyment of the easement: "The permissible uses or scope of an easement, as distinguished from its location, may vary depending on what land is necessary for the fulfillment of the easement's purpose" *Id.* at 33. On that basis, the Court concluded that the easement, in its current condition, was adequate to provide access to defendant's property and denied permission for any changes.

The Court did not discuss whether or not the defendant was entitled to utilize the entire twenty-five feet granted in the easement, so long as it was done in a reasonable manner. By failing to address this issue, the Court appears to be holding that an easement, notwithstanding the scope of the grant, can only be utilized to the minimum necessary to accomplish the stated purpose. In this case, even though the grant was for twenty-five feet, the defendant only needed fourteen to twenty feet of varying width and, therefore, that was all he was entitled to utilize.

The Court also implied, without directly stating, that "right of way purposes" are limited to the historical uses of the owners of the dominant estate, *Id.* at 34 ("Here, the purpose of defendant's easement is to provide ingress and egress from the county road to defendant's residence"), although other decisions by the Court have generally allowed uses more general in nature. *See, e.g.*, *Criterion Interests, Inc. v. Deschutes Club*, 136 Or. App. 239, 902 P.2d 110 (1995); *Cotsifas v. Conrad*, 137 Or. App. 468, 905 P.2d 851 (1995).

The decision also ignored the doctrine that allows easements to be utilized in a manner that recognizes changes in external circumstances, so long as the changes are reasonably contemplated by the original grant. *See, e.g.*, *Tipperman v. Tsiatsos*, 327 Or. 539, 964 P.2d 1015, 1021 (1988) (stating that "the use of an easement is subject to change over time, so long as that use is reasonable and not contrary to the intended scope of the easement."); *Bernards et ux v. Link and Haynes*, 199 Or. 579, 597, 248 P.2d 341 (1952) (stating "it is well settled that the grantee may avail himself of modern improvements which will enable him to enjoy more fully the rights which were granted").

Alan Brickley

Clark v. Kuhn, 171 Or. App. 29 (2000).

No Permit Required to Establish Prescriptive Easement

In *Foster Auto Parts, Inc. v. City of Portland*, 171 Or. App. 278 (2000), the Court of Appeals held that despite failing to secure the required permit, plaintiff, Foster Auto Parts, established a prescriptive easement in a private driveway. The driveway, which joined Foster Road, crossed the property of Portland Traction Company (PTC). Plaintiff started using the dirt and gravel driveway in 1962 as one of the points of access to its property. PTC owned the property until 1990,

when it conveyed the property to the City of Portland. When the City closed and removed the driveway as part of a recreational development, plaintiff sued for damages for loss of the prescriptive easement.

The property was governed by Multnomah County until 1976, when the City annexed the property. City and County ordinances and ORS 374.305 require a permit to access a state or county road. On appeal, the plaintiff limited its claim to the easement over PTC's land and made no claim to the "publicly-owned shoulder."

The City argued that, without a permit for the driveway, the plaintiff was precluded from claiming a prescriptive easement because such a use constitutes a public nuisance. A use that constitutes a public nuisance would bar the plaintiff from claiming an easement; however, the Court held that the lack of a permit did not necessarily establish that the driveway constituted a public nuisance. (The City presented evidence at trial that it would not have granted a permit for the driveway in 1996 because it would have been unsafe; however, the Court stated that the relevant time was 1972, when the prescriptive period was completed.)

The Court of Appeals held that the plaintiff established all the elements for a prescriptive easement by openly using the driveway for more than ten years. In fact, in 1972, plaintiff paved and striped the land. The court rejected the City's argument that the use was permissive because PTC made the entire area open to the public. Plaintiff's use was consistent with a private driveway, which satisfied plaintiff's burden.

Todd Northman

Foster Auto Parts, Inc. v. City of Portland, 171 Or. App. 278 (2000).

Stipulated Judgment Cannot Nullify Lease Requirements Under Public Housing Regulations.

In *Housing Authority of Portland v. Asana*, 165 Or. App. 531 (2000), the Oregon Court of Appeals held that the trial court erred in evicting defendant because the eviction order failed to comply with the requirements of federal law for public housing.The Court reversed the trial court's decision in this forcible entry and detainer (FED) action awarding possession of the subject residential real property to plaintiff. In rendering this decision, the Court of Appeals considered the impact of federal public housing regulations on a stipulated judgment involving a public housing tenancy.

This case involved a residential rental agreement in a federally subsidized housing. Plaintiff filed a forcible entry and detainer action against defendant for failure to pay rent. The parties entered into a stipulated judgment that, among other things, reinstated defendant's tenancy, established a future payment schedule, and required family and drug abuse counseling. The stipulated judgment provided for "immediate restitution" of the premises upon defendant's noncompliance. Several weeks later, plaintiff filed an affidavit of noncompliance with the Court averring that defendant had failed to begin the required counseling. Defendant had made all rent payments required by the stipulated judgment. After issuance of a notice of restitution by the court administrator, defendant requested a stay of the eviction pending a hearing, but did not seek to set aside the stipulated judgment.

At the hearing, defendant argued that he had complied with the stipulated judgment and that the eviction did not comply with federal law. The trial court found that the stipulated judgment did not violate federal law and that defendant had failed to comply with its terms. The trial court ordered defendant evicted and restitution of the premises to plaintiff.

The Oregon Court of Appeals began its analysis with defendant's argument that the automatic restitution provision of the stipulated

Oregon Real Estate and Land Use Digest

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

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

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judgment violates federal law regarding public housing. The Court noted that federal law requires leases, in which a public housing authority is the landlord, to contain certain clauses, or be read as if those clauses had been inserted in the lease. 42 U.S.C. § 1437d (1)(4) (1994). Federal regulations also prohibit lease clauses for public housing in which the tenant confesses judgment, or waives rights to legal notice or legal proceedings. 24 C.F.R. § 966.6 (1997). The rule provides that any lease clause that gives the landlord a right to an automatic eviction shall be deleted.

The Court then applied these rules to the stipulated judgment because it created "a new lease agreement between the parties that was subject to federal statutes and regulations by operation of law." 165 Or. App. at 535. The Court determined that the judgment's "restitution" clause, which allowed defendant to be evicted without an opportunity to defend, violated 24 C.F.R. § 966.6. "It necessarily follows that any order of eviction that depends on the legal efficacy of a prohibited clause also is without force." *Id.* at 535-36. Therefore, the trial court erred to the extent that it relied on the automatic restitution clause of the stipulated judgment. However, the fact that the automatic restitution clause was unenforceable did not invalidate the entire lease agreement. "Thus the question remains whether the trial court could lawfully order defendant evicted after hearing the evidence in the case." *Id.* at 536.

Federal law requires that a public housing tenancy not be terminated "except for serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 USC § 1437d (1994). The Court concluded that the language of the statute indicated that tenants could not be evicted based solely on proof of violation of lease terms because Congress included the additional requirement of "good cause." In reviewing the trial court's ruling, the Court found that this standard had not been applied.

The trial court had concluded that defendant had breached the terms of the stipulated judgment when he had failed to appear at two drug counseling appointments, which was sufficient justification for eviction. 165 Or. App. at 536 ("I don't care if he stipulated that he had to stand on his head, until his face turned blue, if he didn't do that then, he signed that agreement and he is out of the property."). The Court disagreed because the fact that lease terms were contained in a stipulated judgment did not nullify the requirements of federal law. However, the trial court did not rule on whether defendant's breaches were repeated or serious violations of the lease or whether defendant had good cause for missing the appointments. The Court held that trial court erred in finding defendant in violation of the lease based solely on two missed counseling appointments and remanded the matter back to the trial court.

In his dissent, Justice Kistler disagreed with the majority's contention that the legal effect of the stipulated judgment was to create a new lease, subject to the requirements of public housing law: "In my view, the federal law and regulations provide a standard against which leases may be tested, but their requirements are not automatically incorporated into a tenant's lease." *Id.* at 540. He concluded that any objections based on federal law merged into the stipulated judgment and no collateral attack was possible without the judgment being first set aside. Moreover, Justice Kistler would have affirmed the trial court determination because defendant's failure to attend the drug counseling sessions constituted "good cause" for eviction.

Although the dissent's argument does have some merit, I believe the prudent landlord of federally subsidized public housing should not rely on terms that are inconsistent with federal law, regardless of whether they are contained in a lease agreement or a stipulated judgment. Although a landlord may find that an automatic restitution provision provides the tenant with motivation to comply, the potential problems with its enforceability outweigh its apparent expediency. Additionally, any special conditions imposed upon a tenant as part of a stipulated FED judgment should be drafted with the goal of delineating clear objective standards that can be evaluated in a subsequent hearing. Even the dissent remarked that plaintiff "should not have proposed the agreement in the terms its did." *Id.* at 542, n.4. In this way, a public housing landlord could effectively condition tenancy on compliance with remedial actions by the tenant and still comply with the federal laws and regulations.

Raymond W. Grey Cloud

Housing Authority of Portland v. Asana, 165 Or. App. 521 (2000).

Undue Influence Established by Confidential Relationship and Suspicious Circumstances

In *Smith v. Ellison*, 171 Or. App. 289 (2000), the Oregon Court of Appeals set aside one of two real property deeds that the plaintiff had challenged as the product of undue influence. The Court reversed the decision of the trial court, which had refused to set aside either conveyance, concluding that defendant had failed to rebut the presumption established by plaintiff that the second deed was the product of undue influence.

In 1995, plaintiff and her husband, both advanced in years, decided to move from California to Oregon so that defendant, plaintiff's daughter, could help plaintiff care for her husband, who had serious medical problems. Defendant located a suitable property, which plaintiff instructed defendant to purchase in plaintiff's name without having seen the house. Plaintiff and her husband subsequently moved into the house with defendant and defendant's family in July 1995. After several months, plaintiff had her husband moved out of the house because of disagreements with defendant and her children. Shortly thereafter, plaintiff's husband suffered a stroke, which ultimately led to his placement in a convalescent home. Plaintiff also became seriously ill and asked defendant if she would take care of plaintiff's husband if plaintiff died. Defendant replied that she would take care of plaintiff's husband if defendant's name was placed on the deed to the house. Subsequently, plaintiff gave defendant a one-third interest in the property in January 1996.

In September 1996, plaintiff's husband died and shortly before traveling to California to attend a memorial service for him, plaintiff signed a deed conveying her remaining interest in the property to defendant. There is no dispute that defendant prepared the deed, but defendant claims she did so at plaintiff's direction while plaintiff claims that she did not know what she was signing. Plaintiff alleges that she did not learn that she had conveyed her entire interest in the property until the following summer when she returned to Oregon. Plaintiff then sought to have both conveyances set aside based on defendant's undue influence over plaintiff. Plaintiff argued that because she and defendant were in a confidential relationship and because plaintiff was particularly vulnerable at the time of the conveyances, defendant had the burden of proving that she had not exerted undue influence. The trial court held that plaintiff had not met her burden of proof and refused to set the deeds aside.

The Court began its review with a recitation of what constitutes undue influence. "Undue influence has been defined as unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare." 171 Or. App. at 293 (citing Restatement (Second) of Contracts § 177(1) (1981)). If the assent of one party to a contract is the result of undue influence by the other, the contract is voidable by the victim. Only slight evidence of undue influence is necessary if there is a confidential relationship between the parties. And if there are suspicious circumstances combined with a confidential relationship, then an inference arises that may be sufficient to establish undue influence.

The Court of Appeals set forth the following as "suspicious circum-

stances" that may indicate the existence of undue influence: (1) the donee participated in the arranging or preparing deeds; (2) the donor did not receive independent advice; (3) the conveyances were done in haste and in secret; (4) the donor's attitude towards others changed; (5) the conveyance deviated from the donor's previous plans for disposing of the property; (6) the gift is unnatural or unjust; and (7) the donor is susceptible to influence. *Id.* at 294 (internal citations omitted). The Court pointed out that "the emphasis in undue influence cases should be on the unfairness of the advantage which is reaped as the result of wrongful conduct." *Id.* at 294.

The Court defined a confidential relationship as a fiduciary relationship in which "one has gained the confidence of the other and purports to act or advise with the other's interests in mind." *Id.* at 294-95. The person in whom confidence is reposed has "superiority and influence over the other" resulting in a "position of dominance." *Id.* The Court noted that while the relationship between a parent and a child is often confidential, it is not per se confidential. As the facts in this case are in dispute the Court made its own findings in this *de novo* review.

The Court concluded that the evidence established the existence of a confidential—albeit sometimes "rocky"—relationship between the parties. The fact the parties shared a joint bank account indicated plaintiff's trust and confidence in defendant. The circumstances surrounding the purchase of the subject property also supported the finding that plaintiff had trust and confidence in defendant at the time of the disputed transactions.

The Court then addressed whether there were suspicious circumstances surrounding each of the disputed transactions sufficient to raise an inference of undue influence. In regards to the first deed, the Court did not find sufficient suspicious circumstances to meet plaintiff's burden of proof. Defendant did not prepare the deed and there was no secrecy or haste in the transaction. There was no evidence that plaintiff's attitude had changed, or that the conveyance deviated from her previous plans. The gift of a partial interest in real property by a parent to her daughter did not appear unnatural or unjust. Although there is no indication that plaintiff received independent advice, the Court noted that this factor is less important when the donee is a layperson who did not assist in the preparation of the deed. The question of the susceptibility of plaintiff to influence was a close one for the Court. While plaintiff's vulnerability was increased due to the illnesses of her husband and herself, plaintiff testified that she knew what she was doing. Additionally, there was no evidence that plaintiff was not of sound mind or was particularly susceptible at the time of the first conveyance. The Court concluded that any inference of undue influence arising from the circumstances had been rebutted and affirmed the trial court's decision regarding the first deed.

In evaluating the circumstances surrounding the second deed, the Court came to the opposite conclusion, holding that there was undue influence. The second deed was prepared by defendant, and plaintiff did not receive independent advice. Although the transaction was not secret, its completion within weeks of the death of plaintiff's husband, while plaintiff was still grieving, was evidence of haste. The evidence showed that the gift of the house to defendant was substantially larger than the gifts plaintiff had given her other two children and, therefore, somewhat unjust. The Court found that plaintiff was at least fairly susceptible to influence at the time of the second conveyance, due to the recent death of her husband. Plaintiff had testified that she was a "basket case" at that time. The Court concluded that the combination of the suspicious circumstances and the confidential relationship between the parties was sufficient to raise an inference that the second deed was the product of undue influence. The Court exercised its equitable powers and set the second deed aside.

Overall, this case emphasizes the importance of avoiding the appearance of undue influence. This means insisting on independent advice for the donor, conducting the transaction in the open without haste, and postponing major donative transactions during periods of time when the donor could be considered vulnerable or susceptible to influence. The decision of the Court in this case makes clear that once an inference of undue influence arises, it can be difficult to rebut. The better practice in these types of situations would be for the donee to take extra precautions before the transaction to avoid suspicious circumstances, thus precluding an inference from arising at all.

Raymond W. Grey Cloud

Smith v. Ellison, 171 Or. App. 289 (2000).

Cases From Other Jurisdictions

Connecticut Federal Court Denies Some, But Not All, Relief Regarding Cell Towers Under Federal Telecommunications Act of 1996

In *SBA Towers, Inc. v. Zoning Commission of Brookfield*, 96 F. Supp. 2d 139 (D. Conn. 2000), the District Court determined that the Federal Telecommunications Act of 1996 (FTA), 47 U.S.C. § 332(c)(7), did not foreclose section 1983 claims under the Civil Rights Act, 42 U.S.C. § 1983, and denied a motion to dismiss. Plaintiff, a wireless communications provider, challenged defendant's denial of a permit for its facility and sought declaratory judgment, mandamus relief, and a permanent injunction under section 1983 for violations of the FTA. Defendant brought a motion to dismiss the claims.

The Court dismissed the request for declaratory judgment and mandamus relief. Since the complaint dealt with alleged past misconduct under the FTA, but did not join the citizens who opposed the issuance of the requested permit, the Court determined that declaratory judgment was not an appropriate remedy. Although these citizens might have sued defendant if the town had granted the permit, the Court held that this potential controversy was too speculative. The Court also dismissed the mandamus claim because the Second Circuit had found that mandamus relief is inappropriate under the FTA. Rather, in these cases, an injunction is the appropriate form of relief.

The Court denied the motion to dismiss plaintiff's section 1983 claim under the Civil Rights Act, concluding that the FTA neither authorized nor foreclosed such relief. Noting that the federal courts are split on the availability of section 1983 claims for violation of the FTA, the District Court refused to dismiss the claim without further guidance form the Second Circuit. Thus, the injunctive and section 1983 claims remained for trial.

The question of the viability of a section 1983 claim is a recent consideration in the context of alleged violations of the FTA. However, the Civil Rights Act includes actions by defendants, under color of state law, that violate the Constitution or laws of the United States. Thus, it appears that there may be a cause of action for permit denials that do not conform with the FTA.

Edward J. Sullivan

SBA Towers, Inc. v. Zoning Comm'n of Brookfield, 96 F. Supp. 2d 139 (D. Conn. 2000).

Telecommunications Providers Lose Another One in California Federal Court

In *AirTouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158 (S.D. Cal. 2000), the District Court granted summary judgment to defendant on all claims. Plaintiff was denied, by the City of El Cajon, a permit for a wireless communications facility. The District Court considered both

plaintiff's motion for summary judgment on two causes of action, as well as defendant's motion for summary judgment on all causes.

Plaintiff sought a conditional use permit for a telecommunications facility on top of a water district tower in a suburban subdivision. The facility would have had thirty regular antennas, six omni-directional antennas, two satellite dishes, and a mechanical building. There were six antennas and a mechanical building of a competitor already located on the site. Although the staff report recommended approval, there was a great deal of opposition from the residential subdivision. Despite this opposition testimony, the Planning Commission approved the application, but the Mayor requested discretionary review before the City Council. After a further hearing, the Council rejected the application on seven grounds. Plaintiff then brought the federal court action, which resulted in the cross-motions for summary judgment.

The Court began with plaintiff's claims under the Telecommunications Act of 1996 (FTA), 47 U.S.C. § 332(c)(7). Plaintiff claimed that defendant unreasonably discriminated against it by granting a competitor a permit for its facilities, but denying plaintiff's permit. Plaintiff also claimed that the decision had the effect of prohibiting wireless communication service and finally, that the denial was not supported by evidence in the written record. The Court stated that there were few factual disputes in the case, determining that the City's evidence of aesthetic concerns and health and safety issues met the substantial evidence test. The Court then turned to whether the burden of proof of demonstrating substantial evidence was on plaintiff or defendant. The Ninth Circuit has not decided the issue and cases outside the Ninth Circuit are split. Because the parties stipulated that defendant bore that burden, the Court so assigned it. Plaintiff argued the neighbors' testimony was "unsubstantiated" and asserted that it was not sufficient. However, the Court disagreed, finding that the neighbors concerns were based upon experience with the competitor's facility and were supported by evidence from the City Council and the Planning Commission staff report.

Turning to the anti-discrimination provisions of the FTA, the Court did not find evidence of unreasonable discrimination. Although plaintiff's competitor had been granted a permit thirteen months earlier, the neighborhood had since changed. Many of the neighbors' concerns were based upon their experience of the effects of that first approval and the anticipated exacerbation of those effects by plaintiff's more intense proposal. The Court held that the City Council had merely come to a different conclusion based on different factors.

Plaintiff also alleged that the denial of the permit left it with a gap in service for the area, effectively prohibiting personal wireless service. The City argued that there cannot be a denial of service without a general ban on the service. The Court, noting a split among the other circuits, decided that sufficient gaps in service could be equivalent to a denial of service, even in the absence of a general ban. However, the Court stated that the "anti-gap" rule protects users, rather than carriers, and the area was already being served by a competitor. The Court also considered plaintiff's testimony that there was no reasonable alternatives because the gaps could be alleviated only if plaintiff built on the water tower site. However, the plaintiff had introduced contradictory evidence in the City hearings, which stated that the alternate sites were rejected for other reasons and that the water tower site was chosen because it had the best coverage for the least expense. The Court held that there was not a lack of alternative sites and that, in the realm of trade-offs, the choice belonged to the local government. Thus, the City prevailed on the claims under the FTA.

The Court then turned to plaintiff's claims under the Telecommunications of Act of 1934 (1934 Act). The plaintiff's first claim was based on an impermissible barrier to entry. However, noting that the 1934 Act gave local governments zoning power over telecommunications facilities, the Court found no attempt to erect a barrier to entry into the telecommunications field by the challenged action and granted defendant's motion for summary judgment.

Plaintiff also claimed that the overall regulatory scheme and the 1934 Act preempted the City's permit denial. Plaintiff alleged that defendant frustrated the establishment of a nationwide cellular service network and unreasonably interfered with the installation of a cellular communications facility. The Court concluded that the scheme did not preempt local authority to regulate the placement and construction of cellular towers, and further, it found no legislative intent to preempt local governments in this area.

Plaintiff also made three constitutional claims. Plaintiff first claimed that it was denied equal protection, based on the different treatment given to it, compared with its competitor on the adjacent site. The Court stated that the City's action would survive equal protection scrutiny if there were a reasonable basis for the differential treatment, a standard that the City satisfied. Similarly, the Court found no substantive due process violation based on an "arbitrary and capricious" decision. Plaintiff did not suggest or prove that anyone on the City Council acted with an improper motive, and the court found adequate grounds to uphold the city's decision. Plaintiff's third constitutional claim asserted that the City's permit denial amounted to a taking of its facility license. However, the Court stated that a regulation that adversely affects property values does not necessarily constitute a taking. Even if the FCC licenses constituted "property" (an issue on which the parties disagreed), a major portion of that interest was not destroyed. Thus, the Court granted the City's motion for summary judgment on all three of plaintiff's constitutional claims.

Because there were no violations of the federal Constitution or laws, the Court found no grounds on which to grant relief under the federal Civil Rights Act, 42 U.S.C. § 1983. Similarly, in light of its interpretation on the merits, the Court denied plaintiff's claims for declaratory and mandamus relief under state law. The City's motion for summary judgment was, therefore, granted in full.

This is an early case from a district court in the Ninth Circuit providing much-needed views on the effect of the Telecommunications Acts of 1934 and 1996 and providing guidance for telecommunication providers and local governments who deal with these issues on a regular basis.

Edward J. Sullivan

AirTouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158 (S.D. Cal. 2000).

Failure To Fulfill Traffic Improvement Condition Not Necessarily a Basis for Liability, Says California Supreme Court

In *Paz v. State*, 93 Cal. Rptr. 2d 703, 994 P.2d 975 (Cal. 2000), the California Supreme Court reversed the appellate court, ruling that defendants failure to install a traffic signal in a timely manner was not a basis of liability for harm to third parties. In 1981, plaintiff was injured in a motor vehicle accident in Los Angeles. The accident occurred at an intersection of a state road and city street, which at the time of the accident had only a single stop sign. In 1988, private-party defendants (defendants) were required to design and install a new traffic signal at this intersection as a condition of approval of a condominium development. The land use condition stated that, prior to recording the final plat, defendants would have to make "satisfactory arrangements" for the design and installation of the signal. In 1990, work was almost completed on the signal when CALTRANS stopped the project because it had not issued an encroachment permit on the state portion of the roadway. That permit was not issued until shortly after the accident in January 1991. Plaintiff asserted that the delay in installing the traffic signal constituted negligence because of the dangerous nature of the intersection. The appellate court held that defendants owed a duty to plaintiff to install the signals in a timely and reasonable manner and the fail-

ure to do so contributed to plaintiff's injuries.

The defendants moved for summary judgment, asserting that they owed no duty to plaintiff and the failure to get the state permit was not negligence. The trial court granted the motion, but the California Court of Appeals reversed as a matter of law. The Court of Appeals found that plaintiff was within the class that the condition was designed to protect and that injuries for failure to provide the signal in a timely and reasonable manner were foreseeable. Both the Court of Appeals and the Supreme Court relied upon section 324A, of the Restatement Second of Torts, often called the "Good Samaritan" law, which states that one who either gratuitously acts for compensation, or undertakes to render services for the protection of third persons, is subject to liability for the harm of third persons resulting from the failure to exercise reasonable care in that undertaking.

The California Supreme Court found nothing in the intersection work that increased the risk to plaintiff—at most, defendants failed to complete the work on time, so as to avoid the accident. Nothing changed here but the passage of time—a failure to alleviate a risk cannot be considered tantamount to increasing that risk. Moreover, in agreeing to design and install the signals, defendants did not undertake to perform a duty that the City was required to perform—California law assigns no liability to the failure to install traffic signals on the part of state or local government. Finally, plaintiff failed to prove injury on account of the failure to install the improvements earlier. Defendants could have abandoned the project for financial reasons and would not have been liable. The City did not impose any time limit to complete the installation and indeed, did not obtain an encroachment permit from the state until two months following the accident. The Court held there was no basis in the statute or common law, as set out in the Restatement Second of Torts, to affix liability on defendants.

Justice Mosk concurred, but distinguished situations where signals were required to be installed within a certain time period.

Chief Justice George dissented, finding a statutory and common law duty to install the signals in a timely and reasonable way. The dissent stated that the public using the intersection was the obvious beneficiary of the condition. A local government may be liable for negligence when it actively or constructively knows of a dangerous condition and has a reasonable opportunity to alleviate it. While a government entity may not be liable solely because the signal was not installed, it may be liable if there are other factors under its control. These other factors were, in the view of the dissent, present. Additionally, the dissent found that defendants owed a duty to the users of the intersection because the dangerous condition of the intersection was known for at least two years before the accident.

This case contains an interesting discussion on the liability to the public for installation of improvements, focusing on the duty, causation, and relationship between the two as part of traditional tort analysis. In most cases, a developer will not be liable for failure to complete improvements in time to avoid an accident, if there were no time limits set forth.

Edward J. Sullivan

Paz v. State, 93 Cal. Rptr. 2d 703, 994 P.2d 975 (Cal. 2000).

California Supreme Court Finds No Liability in Granting Permits to Develop in Landslide Hazard Area

In *Haggis v. City of Los Angeles*, 93 Cal. Rptr. 2d 327, 993 P.2d 983 (2000), the California Supreme Court affirmed the Court of Appeals, holding that the City was not liable for damage to a landowner's property for failure to record certificates relating to the property's unstable condition. Plaintiff landowner sued defendant City for failing to follow mandatory provisions of its own development code, regarding development within designated landslide areas. Plaintiff purchased the property already developed and claimed to have relied upon the City adhering to its own code. The trial court sustained a demurrer without leave to amend, which was affirmed by the California Court of Appeals.

In 1991, plaintiff purchased the subject property and occupied the residence, which was located on a coastal bluff in Pacific Palisades. In 1994, the City demolished the residence and other improvements because of a landslide caused by the Northridge earthquake. The City had been aware of the bluff's vulnerability to landslides as early as 1959, when the City sponsored a landslide study. In 1966, the City gave notice to a former owner to vacate the property and make stabilization improvements. However, the City failed to file the notice with the county recorder as required by its code, and it failed to record a similar notice in 1970. In late 1970, the City issued permits to the landowner to demolish and rebuild a portion of the property. However, the City failed to secure from the owners a written statement that the owners were aware of the unstable soil conditions, and it also did not require a geological report for the construction, both required by its code. The City issued similar building permits in 1971, without securing the same statements. In 1973, a new owner requested, and obtained, approval for the construction of a carport and swimming pool, with the pool located near the unstable bluff. That owner submitted geological reports, but did not demonstrate that the land mass would be stabilized, as required by the local ordinance, nor did the City obtain the required statements. The City staff were aware of the deficiencies, but took no steps to halt construction. A similar instance occurred in 1977, when the City approved a request to build an addition. CALTRANS, the state's transportation agency, requested a permit to remove slide debris in 1979, which the City granted without requiring a statement of how CALTRANS would stabilize the 1966 slide mass.

Plaintiff purchased the property in 1991, with no apparent indication of geological instability because the City had not required statements of awareness of slide conditions in 1970, 1971, 1973, and 1977. Plaintiff and his agents were unaware of the soil conditions because of the incomplete property records. In 1994, plaintiff lost his home in the Northridge earthquake and sought $3.5 million from the City, plus damages for emotional distress. The City demurred, asserting that the code sections did not create a basis for tort liability and that the statute of limitations for breach of these duties had passed.

The Court began its analysis with urban code section 815.6, which states that a public entity with a mandatory duty to act by ordinance is liable for an injury caused by a failure to perform that duty, if the harm suffered was of the type protected by the ordinance. The City, State, and *amicus curiae* argued that for a local ordinance to be used as a predicate to liability under section 815.6, not only must the ordinance create obligatory duties, but the ordinances' enacting body must also have manifested an intent to create a private right of action against the public entity. The Court found no such intent requirement in the relevant ordinance provisions; it held that it is the statute, rather than the predicate enactment, that creates liability. The Court then turned to the local codes to determine whether they created a "mandatory duty designed to protect against the kind of injury plaintiff allegedly suffered." 993 P.2d at 988.

The first code section was the duty to record the certificate of substandard conditions with the county recorder from 1966 on. Plaintiff alleges that he would not have purchased the property had he known of the problems. The Court took judicial notice of the full code sections in evaluating the demurrer and determined that the City had a mandatory duty to record the certificate once the building official determined that the property was unstable.

The larger issue before the Court was whether the code was designed to protect the plaintiff from his alleged injury. The City asserted that the purpose of the code section was to provide leverage for compliance orders to protect the general public against improper construction, rather than to protect against economic losses by purchasers.

The Court agreed with the City that the code section was enacted to encourage a landowner to undertake necessary stabilization work because if the work was not completed it would impair the value of the property for sale or security. The disclosure to prospective purchasers was, in the words of the court, "incidental." Moreover, a different code section was also applicable. That section stated that an entity is not liable for failure to make an adequate inspection for the purpose of determining whether a property complies with, or violates, an enactment that contains or constitutes a hazard to public health and safety. Thus, the City was not liable by statute for failure, after an inspection, to record the statement, nor did the City become an insurer by its failure to require that recordation. To impose liability, the Court stated, would frustrate the purpose of the immunity statute.

Plaintiff's second cause of action was based upon the City's failure to require the previous statement of awareness that the property was subject to landslides or instability, upon issuance of building permits. Plaintiff stated that he would not have purchased the property had such a statement been filed. The Court rejected plaintiff's contention that the building permit could not have issued without the statement. Rather, the ordinance section states that such a permit "shall issue" upon receipt of a statement, a very different duty. Moreover, the ordinance provision gives significant discretion to the building official in issuing the permit, following a determination of the parameters of the unstable area. This discretion negated the mandatory duty asserted by plaintiff.

Finally, plaintiff asserted that the City had a duty to issue grading or building permits in an active landslide area only upon a demonstration that the activity would not destabilize the land mass. The Court concluded that the ordinance provision did not require enforcement of an objective standard of stabilization by former owners. The stabilization must be satisfactory to the City staff, which involves discretion or judgment, rather than a mandatory duty. Since there was no mandatory duty, the Court held that there was no liability under this code section.

Justice Mosk concurred and dissented, finding that the first claim stated a cause of action because the ordinance provision was mandatory. Once the work is done, the ordinance requires the certificate to be recorded and that the owner receives notice of the problem. Justice Mosk believed that the purpose of the ordinance was to protect the plaintiff from the type of injury suffered in this case. Justice Mosk also found the connection between the inspection and the alleged negligence—failure to record the certificate—too attenuated to apply the immunity for lack of or negligent inspections. He found the city's failure to take the additional step of recording was not an integral part of the inspection process. Finally, Justice Mosk found no difficulty with the ten-year statute of limitations because the defect was latent and not visible. Moreover, the City did not "develop" the property, and thus, it does not qualify for immunity.

This is an interesting case for planners to note. The majority of the court interpreted the broadly worded statute narrowly to avoid municipal liability. The discretion inherent in various municipal determinations made recovery fall outside the scope of mandatory duty.

Edward J. Sullivan

Haggis v. City of Los Angeles, 93 Cal. Rptr. 2d 327, 993 P.2d 983 (2000).

United States Supreme Court Holds Corps of Engineers' Rules Exceed Its Jurisdiction

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), 121 S. Ct. 675 (2001), the United States Supreme Court reversed the Seventh Circuit, holding that the Migratory Bird Rule, as applied to SWANCC, exceeded the jurisdiction of the Army Corps of Engineer (Corps) under the Clean Water Act (CWA), Federal Water Pollution Control Act, 43 U.S.C. §§ 1251–1387 (1994 & Supp. III 1997). The Corps is charged with implementing section 404 of the CWA, which regulates the discharge of dredged or filled materials into the "waters of the United States." In this case, the Corps interpreted the CWA to require a permit for the dredge and fill of an abandoned sand and gravel pit in northern Illinois, which provided habitat for migratory birds.

SWANCC is a consortium of twenty-three local governments that was attempting to find a disposal site for nonhazardous solid waste. SWANCC made an arrangement with a gravel company to site the waste disposal in a 533-acre abandoned pit, which contained some shallow ponds, but had not been used commercially for about forty years. SWANCC asked the Corps whether a CWA permit was required before using the gravel pit. The CWA requires, under section 404, that all persons obtain a permit prior to dredging or filling in "waters of the United States." That term has always encompassed interstate and "navigable" waters, and in 1986, the Corps attempted to clarify its jurisdiction over intrastate waters by promulgating the "Migratory Bird Rule," which covers various intrastate waters, including wetlands, that may be used as habitat by birds protected under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (1994 & Supp. IV 1998). Initially, the Corps decided it had no jurisdiction over the gravel pit in the absence of a wetland, but changed its position when an environmental organization informed it of the presence of migratory bird species. SWANCC had received all the necessary permits, except for the CWA permit from the Corps, who determined that the project was not "the least damaging alternative" to the environment, nor the most practical alternative; thus it denied the permit. SWANCC appealed the permit denial, but eventually challenged only the jurisdiction of the Corps under the CWA and sought *certiorari* from the lower courts' adverse decisions.

The Court granted *certiorari* on the issue of whether the Corps exceeded its jurisdiction over the "waters of the United States," through application of the Migratory Bird Rule. Chief Justice Rehnquist wrote the 5-4 opinion for the Court. In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1974), the Court held that wetlands abutting a navigable waterway were subject to the Corps's jurisdiction because the wetland's water quality and aquatic ecosystems directly affected the water quality of the navigable waterways. However, the Court expressed no opinion on whether the Corps, under *Riverside Bayview Homes*, had jurisdiction over wetlands not adjacent to such waterways. The Corps contended, however, that it had adopted the current interpretation—nonadjacent wetlands are subject to the Corps's jurisdiction—by rulemaking and that Congress acquiesced to that interpretation through inaction when it enacted subsequent amendments to the CWA. Additionally, the Corps contended that an EPA program, under section 404(g), that allows states to administer the CWA permitting program over waters "other than" traditional "navigable waters," supported the Corps's interpretation. However, the Court stated that it views congressional inaction and the adoption of the section 404(g) program "with extreme care" because a bill may be rejected by Congress for any number of reasons and mere rejection is not very illuminating. Further, section 404(g) of the CWA refers to "other waters" of the United States in a very unclear manner. Therefore, the Court declined to hold that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [section] 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." 121 S. Ct. at 662. The Court stated that the CWA included the waterways at issue in *Riverside Bayview Homes*—non-navigable wetlands adjacent to navigable waterways—because the navigable waterways are traditionally subject to federal jurisdiction. In this case, however, the wetlands at issue were isolated—not adjacent to navigable waters—and the Court refused to extend the reach of the CWA over these waters because that would read the limiting term "navigable" entirely out of the statute.

The Court also refused to give deference to the Corps's adoption of the Migratory Bird Rule because it invoked the outer limits of Congress's constitutional power. As a prudential consideration, the Court avoids needlessly reaching constitutional questions and presumes that

"Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 683. Thus, the Court construes statutes to avoid constitutional issues, even if that requires voiding a rule. Similarly, the Court rejected the Corps's emphasis on SWANCC's activities as "commerce," which may be regulated under the Commerce Clause to protect recreational pursuits involving migratory birds. The phrase the Court considered was "navigable waters of the United States," and that phrase did not allow federal invasion into an area of the state's traditional and plenary power over water and land use. If Congress wished to alter the balance between the federal government and the states, it could have done so more clearly. Thus, the Court reversed the Seventh Circuit and concluded that section 404 of the CWA did not pertain to SWANCC's property.

There was an extensive dissent written by Justice Stevens and joined by Justice Souter, Justice Ginsburg, and Justice Breyer. He noted that, although the Corps's jurisdiction is generally over navigable waters, the scope of the CWA is over "waters of the United States," whether or not navigable. He added that, once the Court crossed the line to allow jurisdiction over wetlands adjacent to navigable waterways, there was no principled reason for not extending that jurisdiction to the present case. The dissent stated that the effect of the decision is to invalidate the Migratory Bird Rule, as well as the Corps's jurisdiction over non-navigable waters.

Justice Stevens traced the history of federal water regulation from an exclusive emphasis on commerce, to one involving water quality, beginning with the 1972 CWA, which, he argued, was meant to be comprehensive in its application. Justice Stevens attached great significance to the deletion of the word "navigable" in this process. Even the Corps initially considered using "navigable waters" as a limitation in drafting its regulations, but its later view was more consistent with the CWA, as amended. Justice Stevens said that the failed attempts to take away the Corps's jurisdiction over wetlands were significant, as was found in *Riverside Bayview Homes*. Further, he found that the 1977 amendments to the CWA showed a plain intent by Congress to extend the Corps's jurisdiction to "other waters." As a whole, the dissent believed that the CWA appeared to support the Corps's position.

Justice Stevens was also troubled by the Court's failure to extend *Chevron* deference to the Corps's construction of an act it was called upon to administer, and by the Court's determination that the CWA conflicted with traditional land use powers of state and local governments. He asserted that the commerce power in this case involved activities that "substantially affect" interstate commerce, and that it was the class of such activities in the aggregate, rather than the individual activity itself, that brought it under the jurisdiction of the Commerce Clause. The Corps had jurisdiction over the discharge of fill into waters used by migratory birds and such discharge, in the aggregate, will substantially harm migratory birds, whether or not one discrete point source will cause harm. It is in cases such as this, where the benefits (of the landfill) are local, but the incremental externalities are national, that there is a need for a federal system. Justice Stevens concluded that regulating commerce among the several states necessarily included the power to regulate the national resources that generated such commerce.

This is more than a case of statutory construction; it involves result-oriented jurisprudence, which is inconsistent with Congress's intent in the CWA, denies deference to an agency on a program it administers, and vulcanizes national interests for ideological purposes. Lawmaking in Congress is often not a pretty sight. Lawmaking in the Supreme Court is an even sorrier sight.

Edward J. Sullivan

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 121 S. Ct. 675 (2001).

LUBA

Property Subject to Notice Under ORS 197.763

In *Schrader v. Deschutes County*, LUBA held that under ORS 197.763(2)(a)(C) notice of a development proposal that includes improvement of an access road on an adjacent parcel must provide notice to persons within 500 feet of the subject property, as well as any persons within 500 feet of the proposed access road. *Schrader v. Deschutes County*, LUBA No. 2000-047 (1/11/01).

On July 2, 1999, Eagle Crest Inc. applied for a conditional use permit (CUP) for a master plan to expand an existing destination resort facility. The proposal included a 480-acre parcel of exclusive farm use land that is surrounded almost entirely by land owned by the federal Bureau of Land Management (BLM). Access to the proposed resort expansion includes development of a road across the BLM property. The County scheduled a hearing date and sent notice to property owners within 500 feet of the 480-acre parcel, but not to persons within 500 feet of the proposed access road. A hearing was held on September 14, 1999 and the application was approved on December 2, 1999. The applicant subsequently applied for a modification of the approval, and the hearings officer issued a decision that became final on January 18, 2000. After receiving the CUP approval, Eagle Crest Inc. obtained the necessary right-of-way on the BLM property, pursuant to federal requirements.

Under ORS 197.830(9) an appeal of a final land use decision must be filed within twenty-one days. If a local government fails to provide notice, a person adversely affected by the decision may appeal within twenty-one days after learning about the decision. ORS 197.830(3); *Leonard v. Union County*, 24 Or. LUBA 362, 374 (1992). Petitioners filed an appeal to LUBA after learning of the County's decision in March of 2000. Petitioners, who live within 500 feet of the access road, alleged that they were entitled to notice. Eagle Crest Inc. intervened on the side of the County.

Eagle Crest Inc. filed a motion to dismiss petitioner's appeal as untimely and argued that the access road across federal property is not part of the property that is the "subject of the notice" under ORS 197.763(a)(C). In support of that argument, Eagle Crest Inc. contended that the notice provisions under ORS 197.763(a)(C) did not apply because the county's land use regulations are pre-empted on federal land.

ORS 197.763(a)(C) provides:

"Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

(C) Within 500 feet of the property which is the *subject of the notice* where the subject property is within a farm or forest zone." [emphasis added]

LUBA found *Warrick v. Josephine County*, 36 Or. LUBA 81 (1999) dispositive on the issue of whether the right-of-way access is the "subject of the notice" under ORS 197.763(a)(C). In *Warrick*, LUBA held that "[i]f the application proposes development on more than one parcel of property, then all those parcels of property are, or should be, property which is the 'subject of the notice,' and property owners within the specified distances of such property are entitled to notice." 36 Or. LUBA at 86-87. Although federal preemption was not addressed in *Warrick*, LUBA rejected this argument. LUBA ruled that the notice provisions are triggered the location of the proposed development, not by the regulation of development on the BLM land. As a result, federal property that is included in an application for proposed development is property that is the "subject of notice" under ORS 197.763(a)(C). However, LUBA limited its holding in *Warrick* to require notice to owners within 500 feet of the proposed access road, rather than the entire BLM parcel.

Christopher Gilmore

Schrader v. Deschutes County, LUBA No. 2000-047 (1/11/2001).

Actual Notice of a Permit Decision Under ORS 197.830(4)

In another denial of a motion to dismiss, LUBA held that ORS 197.830(4) provides the applicable appeal deadline when a City fails to recognize a preliminary planned unit development approval is a decision on a permit that requires notice and a hearing. *Neighbors for Sensible Development, Inc. v. City of Sweet Home* (*Sensible Development*), LUBA No. 2000-154 (1/8/2001).

In the City of Sweet Home, an application for a planned unit development (PUD) follows an unusual three step process. The first step is an informal review of a preliminary development plan for consistency with the comprehensive plan and other regulations at a Planning Commission meeting, without notice or a hearing. Once the informal review and approval is granted, the second step requires approval of a general development plan in conformance with the preliminary approval. The final approval must be in accordance with step two, prior to recording the final development plan.

Linn County Affordable Housing, Inc. began the three-step process of applying for and receiving approval of a PUD on June 5, 2000. After receiving informal review and approval of the first step, the applicants proceeded to step two. The City provided notice and conducted a hearing before the Planning Commission. The staff report was available prior to the hearing, including a statement that an informal review of the preliminary PUD was approved. Petitioners were present during the hearing where the staff report was read aloud. The hearing was continued and the Planning Commission recommended approval of the PUD to the City Council. The City Council conducted a hearing on September 12, 2000, which was continued to October 10,2000, when the Council adopted a final decision approving the general development plan. Petitioners first learned of the preliminary approval after receiving a copy of the staff report for the City Council hearing for step two on August 25, 2000. Petitioners filed an appeal of the preliminary approval for the first step with LUBA on September 15, 2000. Linn County Affordable Housing intervened.

Intervenors argued that the first step is only an informal approval of a preliminary development plan and that an appeal may not be filed "unless the decision could lead to land use effects without further appealable land use decisions." *Sensible Development* at 5. LUBA found that a preliminary final decision in a multi-stage process is appealable, citing *Carlsen v. City of Portland*, 169 Or. App. 1, 8 P.3d 234 (2000).

Intervenors also argued that the appeal was untimely based on ORS 197.830(3)(b), which requires an appeal to be filed within twenty-one days after petitioners "knew or should have known" of the decision. Petitioners responded that the relevant deadline for an appeal is established by ORS 197.830(3)(a), which requires an appeal to be filed within twenty-one days after receiving "actual notice" of the decision. LUBA concluded that neither party was correct and relied on ORS 197.830(4)(a).

ORS 197.830(4)(a) provides:

"If a local government makes a land use decision *without a hearing* pursuant to ORS 215.416(11) or 227.175(10):

(a) A person who was provided mailed notice of the decision as required under ORS 215.416(11)(c) or 227.175(10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision." [emphasis added]

ORS 227.175(10) authorizes a local government to issue a decision on a land use permit without providing a hearing, so long as the City provides adequate notice and an opportunity for *de novo* appeal. ORS 215.416(11) is the mirror provisions for a decision made by a county.

Although ORS 197.830(4)(a) does not expressly address a situation where the local government fails, as in this case, to recognize that it is making a permit decision, LUBA held that "ORS 197.830(4) provides the applicable filing deadline when a city makes a permit decision without a hearing and without complying with the notice requirements under ORS 227.175(10)." *Sensible Development* at 9.

Intervenors argued that, even if ORS 197.830(4) applies, the availability of the staff report providing notice of the permit approval and the reading aloud of the staff report during the public hearing, at which the petitioners were in attendance, provides "actual notice" of the preliminary development plan decision. LUBA disagreed, concluding that the brief mention of the prior decision in a hearing is not a substitute for written notice. In addition, LUBA stated that burying notice of that decision within a staff report on a subsequent stage of approval does not meet the exacting standards of ORS 197.830(4)(a).

Christopher Gilmore

Neighbors for Sensible Development, Inc. v. City of Sweet Home, LUBA No. 2000-154 (1/8/2001).

LUBA Jurisdiction

In *Rest-Haven Memorial Park v. City of Eugene*, LUBA concluded that an open waterways ordinance adopted by the City of Eugene outside of the City's zoning ordinance was a land use regulation subject to the Board's review and remanded the City's decision to address Goal 5. *Rest-Haven Memorial Park v. City of Eugene* (*Rest-Haven*), LUBA No. 200-094/104 (1/11/2001). From November of 1999 to June of 2000, the City of Eugene engaged in a legislative process leading to adoption of a city ordinance prohibiting the placement of pipes or fill in the City's open waterways with limited exceptions.

The City moved to dismiss the appeal, arguing that the open waterways ordinance is not a part of the City's zoning ordinance, does not adopt standards implementing the City's comprehensive plan, and is not a land use regulation; thus, it is outside of LUBA's jurisdiction. The City relied on *Ramsey v. City of Portland*, 30 Or. LUBA 212 (1995). In *Ramsey*, LUBA concluded that adoption of a tree cutting ordinance was not a land use decision.

Although the ordinance is not part of the zoning code, LUBA concluded that the clear purpose of the ordinance is to implement the policies contained in the City's comprehensive plan. LUBA limited its holding in *Ramsey* to situations in which a local government makes it clear that the ordinance is not intended to be part of the local zoning ordinance, and there is no clear connection between the ordinance and the comprehensive plan, even though the regulation may advance some comprehensive plan policies in a "general or indirect way." *Rest-Haven* at 6. LUBA determined that, in this case, the connection between the open waterways ordinance and the comprehensive plan was "direct and clear." *Id.* at 6.

Turning to the merits of the case, Petitioner argued the City erred in failing to apply Goal 5 when adopting the open waterways ordinance. Under OAR 660-023-0250(3), a local government is required to apply Goal 5 to a post-acknowledgment amendment where the amendment will "affect a Goal 5 resource." An amendment "affects a Goal 5 resource" under subpart (a) only if "the [amendment] creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5." LUBA concluded that under this rule a local government adopting a new land use regulation to "protect a Goal 5 resource" must apply Goal 5. *Rest Haven* at 15. In applying Goal 5, the City must either complete the Goal 5 inventory and planning process, or meet the requirements under OAR 660-023-0030(7). OAR 660-023-0030(7) provides:

"Local governments may adopt limited interim protection measures for those sites that are determined to be significant, provided:

(a) The measures are determined to be necessary because exist-

ing development regulations are inadequate to prevent irrevocable harm to the resources on the site during the time necessary to complete the ESEE process and adopt a permanent program to achieve Goal 5; and

(b) The measures shall remain effective only for 120 days from the date they are adopted, or until adoption of a program to achieve Goal 5, whichever occurs first."

In this case, the City failed to do either, and LUBA remanded the decision.

Christopher Gilmore

Rest-Haven Memorial Park v. City of Eugene, LUBA No. 2000-094 (1/11/2001).

Exactions

LUBA's decision in *McClure v. City of Springfield*, LUBA No. 2000-115 (1/19/2001), appears to be the first case in Oregon to uphold a local government's findings to support an exaction post-*Dolan*. As a condition of partitioning a 25,700 square-foot parcel into three lots, the City required the following exactions: (1) the dedication of 20 feet of right-of-way along M street on the southern border of the property; (2) the dedication of a 10 foot by 10 foot area at the southeast corner of the property to ensure adequate sight visibility and turning radius at the M Street/8th Street intersection; and (3) the dedication of 5 feet of right-of-way along 8th Street to the east for the construction of a sidewalk and street lighting. LUBA concluded that the City's findings justifying the 20-foot exaction along M Street were sufficient to demonstrate the "rough proportionality" between the nature and extent of the impacts from the proposed partition and the exactions, as required by *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 304 (1994). However, LUBA determined the City failed to make the findings necessary to sustain the "clipped corner" and 5-foot sidewalk exactions and remanded the decision to the City.

This is the second time the *McClure* case has been before LUBA. In *McClure v. City of Springfield* (*McClure I*), 37 Or. LUBA 759 (2000), LUBA remanded the partition approval and exactions to the City because the City relied on exaction formulas in its zoning code and failed to make the particularized findings required to satisfy *Dolan*'s rough proportionality test. LUBA concluded the City's findings were too generalized and relied on considerations that were not relevant or appropriate under *Dolan*. On remand, the City Planning Commission again approved the partition and the exactions, adopting supplemental findings that attempted to quantify the nature and extent of the partition's impacts and the proposed exactions. Petitioners again appealed, challenging the City's exactions.

LUBA framed its task under *Dolan* as determining whether the exactions imposed as part of the partition approval were related in nature and extent to the impact of the proposed development. To satisfy this "rough proportionality" test, the relationship between the impacts and the exactions must be quantified, although no precise mathematic calculation is required. Citing the Oregon Court of Appeals' decision in *Art Piculell Group v. Clackamas County*, 142 Or. App. 327, 922 P.2d 1227 (1996), LUBA noted that findings used to support an exaction must show with particularity the relationship between the exaction and the impacts of development. The benefits that accrue to the development from an exaction may be considered as well.

Turning to the 20 foot right-of-way dedication along M Street, LUBA ruled that it was not necessary for the City to show that the impacts of the development would cause the street system to fail absent the exaction. LUBA concluded that "[t]o the extent a local government identifies an impact and demonstrates that the exaction is roughly proportional to that impact, incremental impacts attributable to a development may give rise to an exaction, even if the impacts will not cause a facility to fail or drop to a lower level of service."

The first step in the *Dolan* analysis is to determine whether the City has demonstrated a nexus between legitimate governmental interests and the right-of-way exaction. The City identified many legitimate interests addressed by this exaction, including traffic safety, connectivity, increased emergency response, and mitigating traffic congestion. LUBA held that this established the requisite essential nexus between these interests and the exaction.

LUBA also concluded the City's findings established a sufficient relationship between the nature of the development's impacts and the right-of-way dedication. The City found that additional vehicle conflicts would be created by cars backing out of a driveway on one of the parcels near the M Street/8th Street intersection, and that the exaction will help address or mitigate these conflicts.

In LUBA's view, the City's findings also adequately established the necessary relationship between the extent of the anticipated traffic impacts and the right-of-way dedication. The City determined that new residential development on the three parcels resulting from the partition would create nineteen additional trips per day. These nineteen trips represent 1.86 percent of the 1020 vehicle trips that directly and daily affect the surrounding streets. The required dedications totaled 4371 square feet, which is 1.59 percent of the total right-of-way affected by the proposed development. Thus, the City concluded that the required dedications are slightly less than the vehicle impacts generated by the development, and thus the dedications are "roughly proportional" to the impacts. LUBA agreed, although it dismissed as inadequate an additional finding by the City that the exactions required dedication of less land than the City would be entitled to require on a per lot or pro rata basis. LUBA characterized this finding as "exacting the amount of right-of-way the city needs to accomplish its general transportation goals, rather than determining the extent to which petitioners' development frustrates them."

Among the benefits derived from the dedications are development flexibility, safe and more varied access to the three parcels, and the ability to site utilities in a public right-of-way where the City can maintain them. While these benefits are not easily quantified, LUBA ruled there was sufficient evidence in the record to show that these benefits exist and should be weighed as part of the constitutional analysis.

Finally, LUBA examined whether the M Street right-of-way exaction takes too much, noting that reported cases offer little guidance on this issue. In *Schultz v. Grants Pass*, 131 Or. App. 220, 884 P.2d 569 (1994), the Court of Appeals held that an exaction of 20,000 square feet of right-of-way for eight new vehicle trips impermissible. Here, the ratio of new vehicle trips to the square footage of the exactions was more than ten times smaller than the ratio in *Schulz*. Describing it as "a very close question," LUBA concluded the required M Street dedication was roughly proportional to the impacts, safety concerns, and benefits of the proposed development.

The "clipped corner" and 8th Street exactions did not fare as well under LUBA's analysis. LUBA concluded the City established the necessary nexus between the exactions and legitimate governmental interests—separating different modes of transportation and providing additional sight distance for road users. However, the 8th Street sidewalk exaction did not withstand scrutiny because the City failed to establish a sufficient relationship between the number of non-vehicular trips from the development and the effect of these trips on the transportation system. The City could not rely on a general characterization of the exactions as transportation improvements without a more individualized and quantified determination. LUBA determined the City made no effort to explain why the "clipped corner" exaction was roughly proportional to the impacts of the proposed development. Accordingly, LUBA remanded the decision to give the City an opportunity to make the individualized determinations necessary for both exactions.

In a separate concurring opinion, Board Member Mike Holstun noted that "[t]he central problem under *Dolan*'s rough proportional-

ity test is that the things that must be shown to be roughly proportional in *extent* (exactions and impacts) are different kinds of things." This makes it difficult to make meaningful comparisons, unless they can be reduced to a common commodity or measurement, such as dollars. While it may take more effort or money to place an estimated value on land or improvements that a local government wishes to exact, Board Member Holstun commented that he "did not see any reason why, with appropriate study or documentation, a defensible estimate of the recoverable cost to the city for each additional auto trip, school child, park user, pedestrian, etc. could not be developed." In this case, the City successfully quantified the impacts of development and the M Street dedication and made a surrogate comparison that satisfied the rough proportionality test.

Kathryn S. Beaumont

McClure v. City of Springfield, LUBA No. 2000-115 (1/19/2001).

Historic Resources

The question before LUBA in *Demlow v. City of Hillsboro*, LUBA No. 2000-160 (1/12/2001), was whether the City's removal of the Old County Hospital from its cultural resources inventory was consistent with ORS 197.772(3). That statute authorizes a local government to allow a property owner to remove the owner's property from a historic property designation that "was imposed on the property by the local government." Friends of Historic Hillsboro nominated the hospital to the City's cultural resources inventory in 1992, and in 1993, the City added the hospital to the inventory. In August 2000, the county sent the City a written request to remove the hospital from the inventory, which the City Planning Commission and Council ultimately granted.

On appeal to LUBA, petitioner argued the City erred in removing the hospital from its inventory because ORS 197.772(3) only allows a historic designation to be removed if the designation was "imposed" on the property owner. Petitioner argued that the word "imposed" means the city must have designated the property over the owner's objection. Here, the City's ordinance allows an owner to request removal of a historic designation from the owner's property without any consideration of whether the property was designated against the owner's will.

After examining the text, context, and legislative history of ORS 197.772(3), LUBA upheld the petitioners' argument and ruled that the City's decision was contrary to the statute. LUBA reviewed various dictionary definitions of the word "imposed" and concluded that "the majority of the meanings support petitioner's argument that it involves doing something over the objection of another." LUBA also looked at other portions of ORS 197.772 and concluded the statutory context made it clear that the time to object to designation of property as an historic resource is during the designation process. An owner who fails to object during that time is precluded from later objecting to the historic designation. The legislative history also strongly suggests that an owner who voluntarily allows the owner's property to be designated as an historic resource cannot later have that designation removed under ORS 197.772(3). LUBA remanded the decision to the City because the City failed to determine whether the hospital was placed on the City's cultural resources inventory over the county's objection.

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Demlow v. City of Hillsboro, LUBA No. 2000-160 (1/12/2001).

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