OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

Appellate Cases—Land Use

Court of Appeals Avoids Difficult Ex Parte Contact Conundrum

In *Opp v. City of Portland*, 171 Or. App. 417 (2000), the Court of Appeals was presented with a difficult issue involving an *ex parte* contact, but avoided having to resolve it.

In 1996 the Portland City Council approved a conditional use permit for a community center, which was opposed by Opp. In her appeal to LUBA, Opp contended that during a recess, Commissioner Mike Lindberg talked to a person in the audience, Mr. Cooley, and this was an *ex parte* contact that should have been disclosed and an opportunity for rebuttal provided. LUBA remanded to the Council to determine whether Cooley had an interest in the proceeding and, if so, to provide an opportunity for rebuttal of his conversation with Lindberg.

In the subsequent proceeding, Lindberg stated on the record that he did not recall the nature of the discussion, but did not think it had influenced his vote. Other parties were given the opportunity for rebuttal, but declined on the grounds that nothing had been disclosed that could be rebutted. The City Council then decided it would not grant a rehearing or reconsider its prior decision. In her second appeal to LUBA, Opp argued that under the circumstances, the City erred by not conducting a "plenary rehearing," by which she meant a completely new proceeding on the application. LUBA declined to order a total new hearing, but again remanded with directions to the City "to adopt a new decision on the application that is based solely on publicly disclosed evidence and testimony that is, or was, subject to rebuttal or the opportunity for rebuttal." Opp sought review of that decision.

The Court of Appeals agreed with LUBA that usually "complete reiteration of the local proceedings" would not be required as a remedy for failure to disclose *ex parte* contacts: "[T]he remedy should be tailored to rectify the evil at which it is directed, in the light of the particular circumstances of the case." As a general rule, other interested parties must be informed of the substance of the communication and afforded an opportunity to respond, and the decision maker must then reevaluate its original decision, taking into account the new evidence and arguments, as well as the original record. The court recognized applying that general rule in this case would be difficult since Lindberg did not recall, and so obviously could not disclose, the substance of the conversation, thereby rendering rebuttal impossible. Therefore, "the past or present ability of the deciding body to base its disposition solely on the original evidence and argument, uninfluenced by the communication, cannot be categorically guaranteed." The court found it unnecessary, however, to "resolve that conundrum" in this case, because Lindberg had stated he definitely recalled not passing on his communication with Cooley to other Council members and three of them (a majority of the Council) had also voted to approve the permit. No harm—no foul, and LUBA's decision was affirmed.

Michael Judd

Opp v. City of Portland, 171 Or. App. 417 (2000).

UGB Amendment Based on Subregional Need Fails to Meet Evidentiary Burden

Residents of Rosemont v. Metro, 173 Or. App. 321 (2001), follows on the heels of the *Parklane* decisions, *D.S. Parklane Development, Inc. v. Metro*, 35 Or. LUBA 516 (1999), *aff'd*, 165 Or. App. 1, 994 P.2d 1205 (2000), in which LUBA remanded Metro's 1997 decision to designate 18,579 acres of land as urban reserves pursuant to OAR 660-21. LUBA's 152-page opinion in *Parklane* is too complex to summarize here, but the following includes highlights of that opinion.

Among its resolution of many issues in *Parklane*, LUBA held that Metro did not follow the priorities in OAR 660-21-330(3) for designating land in urban reserve areas, did not undertake an alternative sites study pursuant to OAR 660-004-0010 before including lower priority land in urban reserves and did not apply each of the Goal 14 locational factors or did so improperly. LUBA refused to affirm Metro's action with regard to any of the urban reserve areas and sent the whole matter back to Metro, because, among other reasons, it concluded that the analysis of potential urban reserve lands under OAR 660-21-330 must be conducted sequentially. Metro did not do so, thus its decision about the urban reserve areas is not properly supported. LUBA also held more detailed findings are required.

The Court of Appeals largely affirmed LUBA's decision in *Parklane*. Contrary to LUBA, the Court of Appeals concluded that the exceptions criteria in OAR 660-004-0010(1)(c)(B)(ii), (iii) and (iv) must be considered independently of the locational factors of Goal 14 in applying subsection (2) of OAR 660-021-0030, and that Metro cannot define thresholds for each of the Goal 14 factors and find lands unsuitable for designation if they fail to achieve at least one of the defined thresholds.

In 1998, while *Parklane* was on appeal to LUBA, Metro began to consider expanding the UGB to comply with ORS 197.296, which requires a twenty-year supply of residential land within the

UGB, half of which was to be added by December, 1998. In December 1998, Metro amended the UGB to include 830 acres of the 18,579 acres that was the subject of *Parklane*, including 762 acres zoned for exclusive farm use (EFU) and 68 acres for which exceptions to Statewide Planning Goal 3 (Agricultural Lands) were long-since approved (the "Rosemont area"). Metro also adopted a concept plan for the Rosemont area to show how its development can be undertaken in a way that will achieve certain public purposes.

Lake Oswego and West Linn, among others, appealed the ordinance amending the UGB to include the Rosemont area. LUBA resolved many of the cities' critical arguments in their favor, but upheld Metro's approach of basing the need for more urban land on the need within a particular subregion rather than within the entire Metro region. This was consistent with its holding in *1000 Friends of Oregon v. Metro*, 18 Or. LUBA 311, 324 (1989). The cities appealed that aspect of LUBA's holding, arguing that, even if a subregional analysis is allowed, Statewide Planning Goal 14 (Urbanization) requires Metro to consider whether the need could be accommodated elsewhere in the region.

The Court of Appeals accepted the concept that the need for more urban land under factors 1 and 2 of Goal 14, could be based on the need within a particular subregion. Nevertheless, the court held that, to sustain expansion of the UGB based on such a subregional need, the local government must explain the basis for the subregion and consider whether the need can be met within its regional context or explain why the needs of the subregion should be viewed in isolation. *See 1000 Friends of Oregon v. Metro*, 38 Or. LUBA 565 (2000) (a case in which Metro identified a subregional need for housing and considered the role that need plays in the context of the entire region).

The Court of Appeals held that, in its decision to include the Rosemont area, Metro acted based only on subregional considerations and did not sustain its methodology. It did not explain why the affordable housing need it identified must lie within a six-mile radius of a particular intersection, or why that intersection should be the center of a subregion that received virtually exclusive consideration.

Another issue in *Rosemont* was whether ORS 197.298(3)(a) provides independent authority for expanding a UGB based on a subregional need. LUBA construed the statute to confer such authority. The Court of Appeals found that subsection (3) of the statute merely provides exceptions to the priority requirements in subsection (1); it does not affect the obligation for a UGB expansion to comply with Statewide Planning Goal 14.

Next, the Court of Appeals agreed with LUBA and considered and rejected four arguments by petitioners who supported the UGB amendment. First, the court held Metro could not use population projections that were not part of its Urban Growth Management Functional Plan to determine the need for additional urban land. The court noted that, in subsequent oral arguments before LUBA in *1000 Friends of Oregon v. Metro*, *infra*, Metro testified that one of the population projections on which it relied in Rosemont, the 1997 Urban Growth Report, was part of the Regional Framework Plan. If that is correct, the court acknowledged that Metro could rely on that particular data. Second, the court held Goals 2 and 14 apply to a decision to amend Metro's regional UGB because it is a decision to amend a comprehensive plan.

Third, the court held it did not matter whether the UGB amendment would have fared better under OAR 660-004-0020, the general provisions regarding exceptions to Statewide Planning Goals, because, as a UGB amendment, it also is subject to and must comply with OAR 660-004-0010(1)(c)(B)(ii). Lastly, the court held the Rosemont area is not completely surrounded by exception lands because lands to the south are high-value resource lands. Therefore, the court remanded the case to LUBA for an order remanding the matter to Metro.

Larry Epstein

Residents of Rosemont v. Metro, 173 Or. App. 321 (2001).

Intensified Use Proposal Requires New Goal 3 Exception

Flying J. Inc. v. Marion County, 170 Or. App. 568, 13 P.3d 516 (2000), appears to be the final gasp of a long process through which the property owner attempted to increase development on lands previously rezoned from exclusive farm use to a more intense use of "Interchange District." *Leathers v. Marion County*, 144 Or. App. 123, 925 P.2d 148 (1996). In this case, the Court of Appeals affirmed the County and LUBA, holding the applicant's proposed use required a new Goal 3 exception.

After the initial rezoning to "Interchange District," the County adopted another ordinance which permitted more intense use of the property than existed when the land was previously rezoned. Under this new zoning approval, the applicants requested and were granted approval for uses including what LUBA and the court found to be an independent, new facility which could not be considered an expansion of earlier approved uses. This approval was appealed to LUBA, which held, among other things, that "the county's decision authorized uses that went beyond those that any of its previous Goal 3 exceptions contemplated and that revised goal 3 exceptions were required . . . ." *Leathers*, 144 Or. App. at 126. The Court of Appeals agreed and the matter was remanded to the County.

On remand, after reviewing the discussions and decisions of LUBA and the Court of Appeals, the county decided that the applicant's proposal was more than an expansion of an existing use and required a new Goal 3 exception. The application, which did not include a request for a new Goal 3 exception, was denied.

The applicant appealed the denial, which was affirmed by LUBA and the Court of Appeals. After discussing several non-dispositive issues, the court held that the use proposed by the applicant required a new exception to Statewide Planning Goal 3. The Court said: "In sum, there is no *material* difference between this case and *Leathers*." 170 Or. App. at 573 (emphasis in the original).

Ruth M. Spetter

Flying J. Inc. v. Marion County, 170 Or. App. 568, 13 P.3d 516 (2000).

Appellate Cases—Real Estate

Technical Requirements Not Imposed for Reinstatement of Time Essence Provision

In *Spiess v. White*, 172 Or. App. 36 (2001), the Oregon Court of Appeals affirmed the trial court's determination that, before commencing foreclosure of their trust deed, the plaintiffs properly reinstated defendants' obligation to timely pay real property taxes owing against the encumbered property.

Before 1996, defendants purchased several lots in a subdivision from plaintiffs. The sales were seller-financed, documented by notes and trust deeds against the lots. On January 1, 1996, defendants purchased another lot, known as Lot 4, in the same subdivision, from a third party, who had purchased it from plaintiffs. Defendants assumed the third parties' obligations under a note and trust deed in favor of plaintiffs against Lot 4. Defendants made some tax payments on Lot 4, but they failed to pay any taxes accruing after the 1996–1997 tax year. Defendants also fell behind on payments required under the notes and trust deeds for other lots purchased from plaintiffs.

On November 5, 1997, plaintiffs' attorney sent defendants a letter demanding that defendants cure the tax delinquencies against several lots specifically identified in the letter before a certain date. The letter did not identify Lot 4, but it did state that, unless taxes on all lots were brought current, plaintiffs would begin immediate foreclosure proceedings. Defendants paid the delinquencies on certain lots but not on Lot 4. On November 24, 1997, plaintiffs' attorney sent defendants another letter identifying two additional lots on which the taxes were delinquent.

Again, plaintiffs' attorney did not identify Lot 4, but the letter contained a general demand that all delinquencies be cured. The letter stated that there were several additional vacant lots that also were subject to taxes, that plaintiffs expected "full compliance with the terms of the promissory notes and trust deeds, which include payment of taxes on all lots," and that if "all taxes are not paid and paid receipts furnished" by December 10, 1997, action to foreclose the trust deeds would be commenced. Again, defendants failed to cure the tax-payment defaults on Lot 4. In August and September of 1998, plaintiffs filed actions to foreclose six trust deeds, not including the one on Lot 4. In December 1998, plaintiffs filed an action to foreclose the trust deed on Lot 4.

Plaintiffs agreed that they had waived the time essence provision of the Lot 4 trust deed before November 1997. To reinstate the time essence provision, plaintiffs were required to give defendants notice of their intention to insist on strict compliance with the terms of the trust deed in the future, and to allow a reasonable opportunity to cure past delinquencies. Defendant made three arguments that plaintiffs had failed to reinstate the time essence provision with respect to Lot 4 in November 1997 or later, all of which the trial court and the Court of Appeals rejected.

Defendants first argued that specific language was necessary to reinstate the time essence clause. The Court of Appeals held that no "magic words" are necessary and that the November 24 letter (which demanded "full compliance" with the transaction documents and demanded that all unpaid taxes relating to any of the various transactions be brought current by a specific date or foreclosure proceedings would be commenced) was sufficient.

Defendants' second argument was that plaintiffs' tolerance of late payments on various other transactions waived the time essence clause of the Lot 4 trust deed. The Court of Appeals held that defendants did not provide the court with any information necessary to establish that the lots involved in the other foreclosure actions were part of a "package deal" with the Lot 4 transaction (e.g., the lots were not purchased at the same time) and that the "package" waiver rule announced in *Walker v. Feiring*, 53 Or. App. 433, 438, 632 P.2d 1270 (1981), holding that five land sale contracts covering five adjacent residential units in a development lots was a "package deal") did not apply in this case.

Defendants' third argument was that, after November 1997, they missed several additional accruing tax payments on Lot 4 itself, and that plaintiffs waived the time essence provision by delaying foreclosure despite these new delinquencies. The court held that waiver of a time essence provision occurs when *late* payments are tolerated, not when *nonpayment* is tolerated.

In summary, the Court of Appeals did not impose excessively technical requirements on reinstatement of time essence provisions in transactions secured by real property. The court held that none of the following invalidated plaintiffs' reinstatement of the time essence provisions of the Lot 4 note and trust deed: (1) failure to name Lot 4 specifically in the demand letter, where the letter demanded payment of delinquent taxes with respect to all of the properties purchased by plaintiffs in order to avoid foreclosure; (2) tolerance of late payments under the notes and trust deeds for various other lots, because those lots and Lot 4 were not purchased at the same time and there was no other evidence the lots were part of a "package deal"; and (3) tolerance of *nonpayment* of taxes, as opposed to *late* payment of taxes, on Lot 4 for a period of time before commencing the foreclosure action.

Creditor's lawyers should be mindful of the need to reinstate time essence provisions when late performance has been tolerated in a particular transaction and, when there are multiple transactions between the parties, should consider whether tolerance of late performance or nonperformance in other transactions may require reinstatement of time essence provisions in a particular transaction.

Susan Glen

Spiess v. White, 172 Or. App. 36 (2001).

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Real Estate Agent Not Entitled to Additional Commissions

In *Miller v. Coldwell Banker Mountain West Real Estate, Inc.*, 172 Or. App. 494 (2001), the Oregon Court of Appeals affirmed the trial court, holding the plaintiff real estate agent was not entitled to additional commissions. This case dealt with the contractual relationship between real estate agents and brokers and the allocation of commissions. Plaintiff was an agent who was hired by the defendant, a real estate broker, in 1993. When plaintiff was hired, the parties entered into an independent contractor agreement that specified the parties' obligations and authority, how commissions were to be distributed, as well as what would occur upon termination of the agreement. In 1995, plaintiff assisted with the transfer of the real estate business of a particular client from another agency to defendant, and that new business became plaintiff's primary client. In October of 1995, defendant removed plaintiff from that account and later, in December, the parties terminated their agreement. Upon termination, plaintiff received commissions for all of her sales in escrow or that had pending negotiations.

Plaintiff then filed a complaint against defendant seeking additional "unpaid" and "future" commissions relating to the business account that she helped to transfer to the agency. Plaintiff asserted that she was entitled to those commissions because defendant only obtained that account as a result of her efforts, and in addition, she provided extensive services to that account. Defendant moved for summary judgment based on the explicit language of the parties' written agreement that governed what would occur upon termination. The trial court granted summary judgment, and plaintiff appealed.

On appeal, plaintiff made two arguments: first, that the language in the contract regarding commissions upon termination was ambiguous and, second, that there was an oral agreement between the parties about the particular account. The Court of Appeals examined the terms of the agreement and concluded that there was no ambiguity. As to the oral agreement, the court noted that the issue may not have been preserved below and that the record contained, "at best, scant evidence" of any oral agreement. The court, in rejecting plaintiff's arguments, noted that the oral modification of a contract requires clear and convincing evidence of the modification, and such a modification must have been supported by consideration.

Although this case turns on contract law, it is of interest to the real estate bar because it involves commissions for real estate deals, which are often contentious issues, and contract law will always be a part of real estate.

William Kabeiseman

Miller v. Coldwell Banker Mountain West Real Estate, Inc., 172 Or. App. 494 (2001).

Jurisdiction Exists for Damages Arising from Mexican Real Estate Contract

The issue of jurisdiction and forum relating to damages arising from a real estate contract was determined in *Novich v. McClean*, 172 Or. App. 241 (2001). Plaintiffs, purchasers of certain real estate in Mexico, were residents of Alaska vacationing in Mexico at the time the contract was executed. Defendant, one of the sellers of the property, was in Mexico at that time, however, beginning in 1991, payments and correspondence took place with him in Oregon.

The breach of contract occurred because of litigation in Mexico, which resulted in the property being returned to a third party, rendering the purchase contract between plaintiffs and defendant impossible. No further action in the Mexican court was available.

The trial court concluded it lacked jurisdiction and that Oregon was an inconvenient forum. The lower court based its holding on the Mexican Constitution, which contained a provision commonly known as a Calvo clause, as follows:

> "Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or waters. The State may grant the same right to foreigners provided they agree before the Ministry of Foreign Affairs (Secretaria de Relaciones Exteriores) to consider themselves as nationals with respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto."

Mexican Constitution, Article 27.

Following an extensive review of the literature, cases, and analysis of the apparent reading of the clause, the Court of Appeals determined that the quoted provision did not prohibit the Oregon court from accepting jurisdiction of the matter relating to damages. The essence of the holding is that the matter did not relate to title to real property, but damages based on the breach of the contract of sale.

In discussing the inconvenient forum argument, the court noted that the trial court applied the balancing test set out by the Supreme Court in *Piper Aircraft v. Reyno*, 454 U.S. 235, 257–61, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). The court further stated that, although the Oregon courts have not adopted the test, they did "not take issue with the trial court's use of the test." *Novich*, 172 Or. App. at 252. However, the court held that the trial court erred in failing to find that there was no "viable alternative forum." There was no such alternative forum because the statute of limitations had run on any claims that plaintiff could have brought in the Mexican courts.

Alan Brickley

Novich v. McClean, 172 Or. App. 241 (2001).

United States Supreme Court

United States Supreme Court Majority "Finds" New Takings Law

In *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), the United States Supreme Court considered whether state coastal wetlands regulations effected a "taking" under the Fifth and Fourteenth Amendments. The final result was a remand to the state court to determine whether a taking had occurred in light of another piece of newly minted regulatory takings doctrine and the "factors" contained in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The opinion was written by Justice Kennedy, but the court was split along now familiar lines.

The twenty-acre property at issue was purchased in 1959 by a corporation in which plaintiff was a shareholder. The property was divided into eighty lots, of which seventy-four remained. After three development attempts (all of which required significant amounts of fill to wetlands) were rejected in the 1960s, defendant passed coastal protection laws, making it more difficult to develop the wetlands area. In the 1970s, the corporation's charter was revoked for failure to pay state corporate income taxes and, as plaintiff had bought out the other shareholders, the land passed to plaintiff by operation of law in 1978. Plaintiff attempted to develop the land in 1983 and 1985, again unsuccessfully as the new state law required a "special exception" under which plaintiff must demonstrate a "compelling public purpose" for the development that would benefit public, as opposed to individual, or private interests.

Plaintiff appealed his 1985 denial, but was unsuccessful, and later filed an inverse condemnation action in state court, alleging that the state had deprived him of all beneficial economic use of the property. Plaintiff claimed $3,150,000, representing an appraiser's estimate of the value of the seventy-four lot subdivision on the site. The trial court rejected these claims, and the Rhode Island Supreme Court affirmed, finding that the claim was not ripe. The court held the plaintiff had no right to challenge wetlands regulations adopted before he became owner of the land in 1978, and further the plaintiff retained a viable economic use of the land,

as the record contained undisputed evidence that there was $200,000 in development value from one or more upland sites on which residential uses could be constructed. Moreover, the court also determined that plaintiff could not bring a *Penn Central* claim because he did not have a reasonable investment-backed expectation in the land calculated at the time of his acquisition of the property in 1978.

Justice Kennedy's majority opinion began by stating that the Fifth and Fourteen Amendments apply not only to physical invasions, but also to regulations that go "too far," thereby effecting a regulatory taking by depriving a property owner all viable, economically beneficial or productive use of the land. However, even if a regulation does not go that far, a taking may still be found under the three factors of the *Penn Central* test. Those three factors are: (1) the economic effect of the regulation on the landowner, (2) the extent to which that regulation interferes with reasonable investment-backed expectations, and (3) the character of the governmental act. The Court stated that these factors are "informed" by the "purpose" of the takings clause—to prevent the government from "forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 304 U.S. 40, 49 (1960).

As to the ripeness issue, the state claimed there was no final decision as to what development would be permitted on the site. While submission of a grandiose plan may leave open a question as to whether a lesser level of development would be allowed, the majority of the Court found that this was not the case here because the nature and the application of the regulations at issue—that development be justified by a "compelling public purpose"—was unrelated to the extent or intensity of development on the twenty wetland acres proposed to be developed. Here, it was clear that no fill would be allowed for any ordinary land use, such as a beach club or residential subdivision, both of which had been proposed earlier by plaintiff. In that event, there could be no development in any of the wetland areas. However, the "compelling public purpose" standard did not apply to the upland development two-hundred or more feet from the wetlands. While there was some doubt as to just how much land outside the wetlands could be developed, the majority found an adequate basis for a *Penn Central* claim to be litigated. The majority indicated it was aware that plaintiff may not be entitled to a seventy-four lot subdivision and that both state and local permits must be pursued; however, it found this contingency involved determining the fair market value of the land, rather than barring the filing of any claim. Even though the Rhode Island Supreme Court had relied on *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985) (as opposed to state ripeness or exhaustion principles), the Court held the matter to be ripe and no further application was required.

The Court then turned to the state's second defense that there were no reasonable investment-backed expectations in 1978 when plaintiff became owner because the current wetland development rules were already in place and plaintiff was deemed to have notice of them. In response, the majority said the state "may not put so potent a Hobbesian stick into the Lockean bundle," that is, the state may regulate the improvement of property through reasonable legislative exercises, however:

> "The Takings Clause . . . in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title."

The majority indicated its belief that future generations "ought" to be able to challenge "unreasonable limitations on the use and value of land." The state's proposed rule would, according to the majority, "work a crucial alteration to the nature of property," allowing the government to "secure a windfall for itself," and would be "capricious in effect" by allowing longer-term landowners to challenge regulations a more recent owner could not. Moreover, the majority stated that it would be illegal and unfair to bar a claim by a recent landowner because a predecessor-in-interest could not, or did not, ripen the claim. Further, the majority stated that it would not conflate background principles of property law with the issue of investment-backed expectations of landowners. The former are shared by all and do not depend upon when title is acquired.

Having rejected the first two grounds of the state court opinion, the Court turned to whether a *Penn Central* claim could be maintained. The majority agreed with the state court that plaintiff was not deprived of all economically beneficial use of the land and rejected plaintiff's contention, made for the first time before the federal Supreme Court, that the uplands parcel was a separate parcel. The Court noted that "some" of its cases use the "parcel as a whole" rule in evaluating takings claim, as in the *Penn Central* case, but also indicated some "discomfort" with the rule in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992). However, as the question was not presented below, the majority declined to reach the issue and remanded the case for review under the three *Penn Central* factors.

Justice O'Connor concurred, but emphasized that the rejection of the *per se* test under which a regulatory enactment would be measured as valid depending upon when plaintiff acquired the property did not mean that the temporal relationship was meaningless. Instead, Justice O'Connor believed that this question was relevant under the multi-factor *Penn Central* analysis. She agreed that the "purpose" of the takings clause was set forth by the majority's citation from *Armstrong v. United States*, but also noted that *Penn Central* used "essentially *ad hoc* factual inquiries," two of which were the extent to which the regulation interfered with distinct investment-backed expectations and the character of the governmental action. In a footnote, Justice O'Connor suggested that Justice Scalia would interpret *Penn Central* to remove any consideration of the temporal relationship in regulatory takings claims under his "government as thief" analogy and indicated this need to respond to Justice Scalia as her reason for writing separately. The dissenters joined in Justice O'Connor's opinion on investment-backed expectations as a viable part of a *Penn Central* analysis, so it effectively constitutes the decision of the Court.

Justice Scalia also concurred, but specifically indicated that he disagreed with Justice O'Connor's understanding of the use of the *Penn Central* test on remand. He stated he was not offended by the prospect of a sharp developer invalidating an excessive regulation (and presumably winning compensation) and then developing the property to its maximum potential with the offending regulation removed and making a larger profit. He analogized this activity to the stock market or antique auctions, where the knowledgeable or venturesome buyer prevails over the ignorant or risk-averse purchaser. He expressed his belief that the government that caused the unfairness should not benefit from its unconstitutional action and concluded that when a landowner takes title has no bearing on whether the regulation amounted to a taking.

Justice Stevens concurred in part and dissented in part, focusing on the relationship of the time of acquisition and the effect of the challenged regulation. Justice Stevens stated that a taking occurred at a particular moment in time, which is important in assessing the compensation that must be given to the person from whom the property is taken. Thus, he joined with that portion of the court's opinion, stating that the claim was ripe. However, plaintiff was not the owner of the land at the time the 1971 regulations caused a taking and the claim accrued. Plaintiff's standing was not dependent on notice of the regulations, but on whether he had the right to claim compensation for property taken from someone else. In this case, plaintiff may seek to enjoin the regulations, but may not claim damages. In any event, plaintiff's claim that the taking occurred in 1986 with the denial of the last application must be seen in light of what plaintiff acquired in 1978—only an expectancy that he could apply for a permit to fill the wetlands. Thus, he dissented from a rule that allows a right of compensation to one other than the victim of an illegal and unconstitutional taking. He noted that this right had no limiting principle or statute of limitations. He concluded:

> "Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous—and tremendously capricious—one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved."

Justice Stevens also concluded that whether there was a right to fill wetlands is a question of state law and again stated that a successor property owner had no right to claim a taking. Thus, he would affirm the state court decision.

Justice Ginsburg, joined by Justices Souter and Breyer, dissented. They found no final decision as to the use of the twenty-acre site under *Williamson County* and thus found the claim to be unripe. They pointed out that plaintiff never sought to develop any nonwetland use of the area, or any use, for that matter, that did not involve a substantial fill. The dissenters found the record ambiguous as to what uses could be made of the entire parcel and stated the majority's result was unfair to the state because plaintiff could pursue other concededly allowable upland development. Further, the dissenters suggested plaintiff had pursued only a *Lucas* claim—that there was no economically beneficial use of the land—and not a *Penn Central* claim below. The defeat of the *Lucas* claim and the failure to press the *Penn Central* claim should have resulted in a dismissal, noting that the *Penn Central* claim was asserted only after plaintiff secured new counsel.

The dissenters also observed that another new claim was added on review, *viz.*, that even if there were some use of the twenty acres (*i.e.*, one house) there could still be a taking presumably because the regulation had gone "too far." However, the dissenters found that claim was also defeated by showing that $200,000 worth of value remained and that this "floor" of value was sufficient to defeat any *Lucas* claim. In any event, these new claims were characterized by the dissenters as a "bait and switch" operation. They found the nature and extent of the permitted development on this site to be ambiguous and thus not supportive of a *Penn Central* claim because the case was not ripe.

Justice Breyer dissented separately, agreeing with Justice Ginsburg's opinion, but adding that he also agreed with the majority that the time of acquisition is not dispositive of any takings claim. However, he also agreed with Justice O'Connor that these factors may play a role under *Penn Central*. He also pointedly stated he could not see any basis for a takings claim, asserted on a remainder parcel created by manipulation of property boundaries, to be consistent with the stated purpose of the takings clause as "justice and fairness."

The Supreme Court is not final because it is right, but right only because it is final. As with *Dred Scott v. Sanford* and *Bush v. Gore*, the constitutional traditions of this country accept these final decisions, no matter how unpalatable or incorrect. So it is here.

On the ripeness issue, the Court found no *per se* taking, but stated that there was a sufficient understanding that no wetlands fill or development was allowed to obviate further need for applications, a result that may well breed more *Penn Central* trials, where the application of these factors has been notoriously unclear.

On the issue of the temporal relationship between the regulation and property acquisition, it is unclear in a future case whether the Court will agree with Justice O'Connor or Justice Scalia, since the other members of the majority did not address this issue. If the majority follows Justice O'Connor, as it now appears, then the investment-backed expectations factor of *Penn Central* may include consideration of what a reasonable person might consider paying for property or what the plaintiff did consider in so doing. If it follows Justice Scalia's vision of the government as a wrongdoer or thief, then there will be clever landowners who may profit from the Supreme Court's latest gloss on the takings clause, regardless of the justice and fairness of these positions.

As to the disposition of the case on remand, the Supreme Court gave little direction to state or lower federal courts. The Court seems more willing to save its discussion of the substance of the takings clause (except where here the time of acquisition and the effect of the regulation were discussed) from a "Monday morning quarterback" position.

There are some interesting observations to be made from this decision, however:

1. The majority of the court has adopted the "justice and fairness" *dicta* of *Armstrong v. United States* as the ostensible purpose of the takings clause over the text of the Fifth Amendment.
2. The *Agins*' tests are given less consideration because there was no challenge to the public purpose of the wetlands regulations, and it was obvious that there was some viable economic use of the land. Instead, the Court stated *Penn Central* is the appropriate vehicle for evaluating regulations that allegedly go "too far," but do not deprive all beneficial economical use.
3. The "parcel as a whole" rule of *Penn Central* is in some doubt, so that a landowner bringing a regulatory taking claim may involve lands that are the remainder parcel of a larger parcel, but which, because of wetland habitat or other considerations, may not be available for development.
4. The language used in the various opinions bring interesting analogies and expressions that convey deeper views of the members of the Court. Justice Scalia's fulminations regarding the government as a wrongdoer or thief that should not profit from its malefactions, Justice Ginsburg's "bait and switch" description of how counsel characterized the client's case before the Court, and Justice Stevens' noting that a taking occurs at a discrete point in time are all strong expressions that bespeak an intellectually divided Court. But the most interesting analogy is that of Justice Kennedy's majority opinion, stating that the state of Rhode Island attempted to place a "Hobbesian stick into a Lockean bundle." A little more talk like this could lead us to a better understanding of the political theory underlying our federal Constitution, which might be a productive discussion.

Edward J. Sullivan

Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001).

United States Supreme Court to Hear Lake Tahoe Case

On June 29, 2001, a day after its decision in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), the federal Supreme Court agreed to hear the Ninth Circuit's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000), *cert. granted* 121 S. Ct. 2589 (2001), which deals with whether a series of moratoria amounted to a taking. The Ninth Circuit decision, as well as the original federal district court case was previously summarized in the *Digest*. The case will be heard in the 2001–2002 term of the Supreme Court. The Supreme Court has previously indicated that normal development delays are not subject to the takings clause; however, the acceptance of this case, in conjunction with the current lineup of the Court, may portend a different view.

Further, on the same day as it decided *Palazzolo*, the Supreme Court also remanded the South Carolina Supreme Court's decision in *McQueen v. South Carolina Coastal Commission*, 340 S.C. 65, 530 S.E.2d 628 (2000), also previously reported in the *Digest*, for reconsideration in light of its *Palazzolo* decision.

Edward J. Sullivan

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000), cert. granted 121 S. Ct. 2589.

Cases From Other Jurisdictions

Washington Court of Appeals Strikes a Blow to Regional Planning

In *Skamania County v. Woodall*, 104 Wash. App. 525, 16 P.3d 701 (2001), the Washington Court of Appeals concluded that the Columbia River Gorge Commission, an interstate compact agency, must apply Washington state common law in interpreting undefined terms in the regional Management Plan governing land use in the Columbia River Gorge National Scenic Area.

The Scenic Area is a bi-state region including land in three counties in Oregon and three counties in Washington. It was created by the Columbia River Gorge National Scenic Area Act (the Act), 16 U.S.C. § 544 *et seq*. The Commission was created by the Columbia River Gorge Compact, ORS 196.150, 43.97.015, which was authorized by the Act. Pursuant to the Act, the Commission, in conjunction with the U.S. Forest Service, developed a Management Plan for the Scenic Area, which contains land use regulations. The regulations are implemented by county land use ordinances that the Gorge Commission has found consistent with the Management Plan.

In 1995, the Skamania County Planning Department, approved an application for a ten-site mobile home park in the Scenic Area, finding that the mobile home park had been operated prior to the Scenic Area regulations, and thus was a valid nonconforming use. Chris Woodall, an adjacent landowner appealed the decision to the County Board of Adjustment, claiming that the landowner had "discontinued" using the mobile home park and thus forfeited the nonconforming use. The Board of Adjustment agreed with the Planning Department that Washington law required Woodall to prove that the landowner *intended* to discontinue the use.

Woodall appealed to Commission, which hears appeals of county land use decisions in the Scenic Area. The Commission reversed the County's decision, finding that it applied the wrong legal standard; the term "discontinued" in the Scenic Area regulations did not require a showing of intent, but instead required only a showing of non-use for the prescribed period. The Skamania County Superior Court affirmed the Commission's decision. The Washington Court of Appeals reversed.

The Court of Appeals first determined that it must construe the Act using federal law, and then it gave six reasons why it believed the Gorge Commission must apply Washington state common law instead of federal law: (1) Congress did not make the Commission a federal agency; (2) Congress gave exclusive jurisdiction over appeals of Commission decisions to state courts; (3) the legislative history suggests that changes were made to the Act to address President Reagan's concerns that the Act amounted to federal zoning; (4) Congress approved the Compact knowing that it provided that "the provisions of [the Compact] hereby are declared to be the law of this state"; (5) Congress did not dictate that federal law applies; and (6) the language of the Management Plan suggests that the Commission believed it should apply state law.

The court's fifth and sixth reasons are worthy of some discussion here.

In its fifth reason, the court stated, "Nothing in the Compact or Act can be interpreted as a clearly expressed intention of the Legislature to give the Commission the authority to ignore Washington common law when interpreting a Washington State county ordinance." *Skamania County v. Woodall*, 104 Wash. App. at 535. In other words, the court began with the presumption that state law applies. This seems to contradict long-standing Washington Supreme Court and Ninth Circuit law, which provides that state law applies only when specifically reserved in the interstate compact. *Salmon for All v. Department of Fisheries*, 118 Wash. 2d 270 (1992); *Seattle Master Builders Ass'n v. Pac. N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986). The presumption in these cases is that state law does not apply.

In its sixth reason, the court identified a provision in the Management Plan concerning vested rights, which provides, "Except as otherwise provided, whether a use has a vested right to continue will be determined by the law on vested rights in the appropriate state." The court noted that in Washington, the right to continue a nonconforming use is sometimes referred to as a vested right, citing *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash. 2d 1, 6 (1998). The court also noted that in Washington, the term "vested right" refers to the applicant's right to have an application processed according to the laws in effect at the time of submission of the application. Based on these principles, the court determined that the Management Plan provision dealing with vested rights must also deal with nonconforming uses.

This sixth reason is curious because the court looked only to Washington law to interpret the Management Plan. The analysis is different if attempting to derive the meaning of the same provision vis-à-vis Oregon law. Under *Holmes v. Clackamas County*, 265 Or. 193 (1973), a vested right is obtained after demonstrating, *inter alia*, substantial financial commitment toward the use. While Washington law of vested rights does not deal with uses because vesting occurs at the time of the application, Oregon law looks to how far along the use has been developed in determining whether vesting has occurred.

Additionally, this decision could lead to the anomalous result of having Washington law apply in Washington, but having Scenic Area law apply in Oregon. Nonconforming uses and vesting are common law principles in Washington, but nonconforming uses and Washington's concept of vesting are statutory in Oregon. While not discussed by the court, this case demonstrates the difference between Washington's land use law, which begins with a Planning Enabling Act and is developed through the common law, and Oregon law, which is primarily statutory-based.

Woodall and the Columbia River Gorge Commission have appealed to the Washington Supreme Court. The court has not decided whether to review the case.

Jeff Litwak

Skamania County v. Woodall, 104 Wash. App. 525, 16 P.3d 701 (2001). Mr. Litwak serves as counsel for the Gorge Commission.

Divided California Supreme Court Upholds Religious Exemptions to Historic Landmark Regulations

In *East Bay Asian Local Development Corp. v. State*, 24 Cal. 4th 693, 13 P.3d 1122 (2000), the California Supreme Court upheld the validity of a statute granting religiously affiliated organizations the authority to exempt themselves from historic preservation laws. Plaintiffs—a secular non-profit organization that owns several landmark-eligible properties, several non-profit organizations interested in preserving the historic landmarks, and the City and County of San Francisco—challenged the statute under federal and state constitutional provisions that dealt with the relationship of religion and government. The plaintiffs sought declaratory and injunctive relief, which they received in the trial court. The California Court of Appeals reversed, concluding the statute suffered from no constitutional impediments. The court first determined that California constitutional provisions regarding religion are no broader than those of the federal Establishment Clause and, second, that a state may relieve part or all of the burdens faced by owners of non-commercial religious property. The Court of Appeals held that the relief provided by the statute did not constitute no governmental assistance to religious organizations or religious preference. The California Supreme Court affirmed.

In applying the federal Establishment Clause, the California Supreme Court used the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which established a regime of "benevolent neutrality" of government towards religion. The *Lemon* test requires that (1) the statute must have a secular purpose; (2) its principal effects must be neither to advance nor inhibit religion; and (3) it must not foster excessive entanglement with religion. The court decided that the *Lemon* test was ill-suited to deal with exemptions, so instead it applied a modified version from *Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In *Presiding Bishop*, the court, noting the asymmetric relationship between non-interference and accommo-

dation, modified the *Lemon* test. It allowed the secular purpose prong to be met by freeing religious organizations from certain secular burdens; and the second prong, neither advancing nor inhibiting religion, to be met by allowing religious activity to be unencumbered by government regulations. In this case, the statutory exemption from historic preservation laws also passed the third prong of no excessive entanglement of government and religion by avoiding entanglement entirely. Facially, at least, the statute passed constitutional muster, as did a different statute in the recent federal decision of *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000).

The court next turned to the California constitutional provisions regarding governmental relationships with religion. The court decided that the scope of the state constitutional provisions coincided with the scope of the Establishment Clause. The court noted that the state constitutional provision was adopted as part of a constitutional revision in 1974 and was meant to parallel the First Amendment. Under California case law, the court stated that it must follow United States Supreme Court First Amendment jurisprudence. A further provision of the state constitution, providing for religious freedom "without discrimination or preference," guarantees no favoritism or discrimination among religious views, a standard that the statute met, as demonstrated by the *Lemon* analysis. The court then turned to another provision of the California constitution that banned "aid of any religious sect," concluding it was not violated either because no public funds were involved. Thus, the decision of the Court of Appeals was affirmed.

Justice Mosk dissented, stating that the decision in this case should be based on state constitutional law, and that the court is not bound by federal constitutional law. He believed the different text and history of the state and federal provisions did not justify application of the *Lemon* test as a basis for interpreting state constitutional provisions on establishment. In Justice Mosk's view, the statute at issue violates both the Establishment and the "No Preference" Clauses of the California constitution. Even using the *Lemon* test, he found the statute failed each by singling out religious institutions for favored treatment to the detriment of otherwise applicable historic preservation programs. Such selection does not serve any secular purpose as there is no actual burden on religion. Instead, he found that the primary effect of promoting religion was undertaken by giving religious organizations a substantial economic advantage over other organizations holding historic property, and, by delegating power to religious organizations to decide whether they wish to be bound by law, excessively entangling the state with religion. Justice Mosk also read the constitutional ban on financial aid to religion more broadly than the majority and concluded that it prevents any law which resulted in aid to religion, even without a direct appropriation.

Justice Werdegar, joined by Chief Justice George, also dissented, stating that government may relieve religious organizations of tax burdens, but must remain neutral among religious groups and between religious and non-religious segments of society. Government may aid religious and non-religious groups alike, he stated, and thereby relieve religious groups of burdens caused by generally applicable laws. However, he concluded that the law in this case gives a benefit to religious organizations only and allows them the option to exempt themselves from generally applicable laws, while no similar exemptions are available to non-profit secular organizations. Further, the exemption applies without a showing that the law would harm religious purposes. Justice Werdegar found unconvincing the distinction made by the majority between advancing religion and removing barriers to allow religious groups to advance their message. He stated that only concrete interference with religious practices was sufficient to invoke the necessary principal of neutrality in government regulation involving religion. Justice Werdegar concluded the statute failed the federal Establishment Clause test of *Lemon*. He did not reach the California constitutional provisions, but indicated he would construe the Establishment and No Preference Clauses of the California constitution consistently with federal First Amendment jurisprudence. Indeed, he suggested that the test of *Employment Division v. Smith*, 494 U.S. 872 (1990), which presumed that generally applicable laws bound religious organizations, as well as secular organizations, is applicable. He also suggested that, after *Smith* there is little ground for removal of generally applicable burdens unless the exemption applies to counterpart secular organizations as well. The cost of compliance with historic regulations, he added, does not amount to a cognizable injury to the free exercise of religion sufficient to justify an accommodation of religion in most cases.

This is a lengthy case dealing with exemptions of religious (but not counterpart secular) non-commercial use of property from historic regulations. All of the opinions are well-reasoned and serve to illustrate the conflicted nature of judicial review under the Establishment Clause of the federal Constitution or similar provisions of state constitutions.

Edward J. Sullivan

East Bay Asian Local Development Corp. v. State, 24 Cal. 4th 693, 13 P.3d 1122 (2000).

No Claim from Unused Oil Lease Frustrated by Initiative Says California Appellate Court

In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 103 Cal. Rptr. 2d 447 (2001), plaintiffs, environmental organizations, appealed from a judgment favoring defendants, the City of Hermosa Beach and an oil lessee—the real party in interest. The trial court held that a 1992 oil lease between the City and the lessee was unconstitutionally frustrated as an impairment of contract by a 1995 initiative that banned the use of such a lease. The Court of Appeals reversed the judgment.

In 1985, the City Council adopted an oil lease permit system for all lands within the City. In 1986, the City requested offers from entrepreneurs for oil leases on City owned lands and granted a lease to the defendant oil lessee, which it renewed in 1992. In 1992, defendant City banned all new oil leases on City owned property. The lease at issue, and subsequent City land use approval, allowed for up to thirty wells to be drilled. Plaintiffs filed environmental challenges to the lease upon its issuance, but abandoned those challenges in 1996. In 1994, plaintiffs began the effort for an initiative to bar drilling on City owned lands, which was successful in the November 1995 election.

When the City continued to perform under the lease agreement, plaintiffs brought injunctive action. The City and the lessee contended that the initiative was not retroactive and, if it were, it would constitute an unconstitutional impairment of the contract. The trial court held that the scope of the initiative was retroactive, but also held that it constituted an unconstitutional impairment of the contract. During the trial, the City changed its position, claiming there were public health concerns, and terminated the lease; whereupon the lessee filed a cross-claim against the City. Plaintiffs appealed the adverse trial court decision, asserting that the initiative was a valid regulatory exercise that was authorized in the original lease, while defendant lessee claimed it had a vested right and the initiative was an unconstitutional impairment of contract.

The Court of Appeals stated the applicability of the initiative to the lease, and its constitutionality, were questions of law that could be determined *de novo*. The court determined the initiative applied to the lease, after reviewing the lease agreement and the valid arguments for and against the initiative. Moreover, the court also found the initiative did not disturb any vested rights, as no permits of any kind had been issued at the time of its adoption. The court said that, under California case law, all discretionary permits must be issued and the claimant must have incurred "hard costs" in good faith reliance on those permits. In this case, the lessee had expended only "soft costs" for engineers, consultants and lawyers. This was insufficient to form a vested right, since no building or other permit could issue before a number of additional permits were issued or conditions met.

In addition, the court found the initiative did not unconstitutionally impair the lease agreement, as the Contract Clause of the federal and state constitutions had been construed not to apply to subsequently adopted regulatory enactments. In this case, the enactment was held valid and applicable to the lease. Indeed, no party attacked the validity of the initiative, only its application to the lease. Further, the City reserved its reg-

ulatory rights under the terms of the lease, which also required defendant lessee to obtain all required permits. In light of these terms and circumstances and the prevailing climate of regulation over oil leases, the court found the regulation was not unreasonable. The lessee could have sought other terms of the agreement or pursued other strategies, but did not.

The court also held the trial court used the wrong standard to judge the regulation affecting the lease agreement—compelling state interest or strict scrutiny standard. This standard improperly discounted health and safety evidence. Instead, the trial court should have determined whether there was any set of facts under which the ordinance could have been upheld. The reserve regulatory power is to be given great deference when it is exercised by the people or their elected representatives. The court declined to speculate whether the lessee had any contractual remedies, as the issue was not before it.

The result of this case may appear harsh; however, one deals with the government at its own peril and a contract with a governmental body is subject to changing political perspectives and demands. Because the lessee never had a vested property right, it was not entitled to constitutional protection under the Contracts Clause of the state or federal constitutions.

Edward J. Sullivan

Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 103 Cal. Rptr. 2d 447 (2001).

California Appellate Court Upholds "View Restoration Permit" Requiring Tree Trimming

In *Echevarrieta v. City of Rancho Palos Verdes*, 86 Cal. App. 4th 472, 103 Cal. Rptr. 2d 165 (2001), plaintiff's neighbor petitioned defendant City for a "view restoration permit," which would require plaintiff to trim his trees. The City held a hearing and approved the permit. Plaintiff challenged the action unsuccessfully in the trial court and appealed from an adverse judgment.

The challenged ordinance was adopted via the initiative process and prohibits residents from significantly impairing a view by allowing foliage to grow in excess of certain heights. If the protected view property owner is unable to resolve the matter informally with the neighbor, she may petition for a "view restoration permit" from the View Restoration Commission. If the Commission orders the foliage trimmed or removed, or a replacement foliage to be planted, the costs are borne by the applicant. An appeal may be taken from the Commission to the City Council.

On appeal, the California Court of Appeals considered a previous similar case, *Kucera v. Lizza*, 59 Cal. App. 4th 1141 (1997), in which it remanded an unsuccessful challenge to a similar ordinance in the City of Tiburon. In *Kucera*, the court held the ordinance to be a legitimate use of the regulatory or "police" power, which could be applied to uphold esthetic values (i.e., preservation of views and sunlight). In the present case, the Court of Appeals found similar values at issue in reviewing the ballot title and supporting materials for the initiative adopting the challenged ordinance. The purposes of the initiative were incorporated into the purpose statement of the ordinance at issue. The court found protection of use to be within the scope of the City's regulatory or "police" powers and noted that the remand in *Kucera* was limited to a facial takings challenge that was not decided by the lower court and was not an issue in the instant litigation. The takings challenge in this case, rather, was "as applied."

Turning to the "as applied" takings challenge, the court noted that plaintiff bore a heavy burden to sustain such a challenge. The court rejected plaintiff's contention that the ordinance authorized a physical invasion, responding that such invasion may occur only after plaintiff fails to trim the vegetation following notice of an opportunity to do so. Similarly, there was no deprivation of significant economic beneficial use of plaintiff's land. The challenged action falls within the exercise of the regulatory power traditionally recognized as within the authority of state or local governments, and the court concluded that the denial of highest and best use does not, by itself, work a taking, nor did plaintiff have a vested right to grow vegetation to any height. In this case, there was no requirement to destroy the trees, but only to trim them. The court also remarked that the adoption and enforcement of ordinances such as these may actually enhance property values and concluded that there was no taking claim under either the federal or state constitution.

The court then turned to plaintiff's due process claim and held that the ordinance appropriately balanced the interests of neighboring property owners. It merely required the vegetation to be kept to the height it was when the ordinance was enacted. Only after a property owner applies for a view restoration permit is an inquiry made as to whether the vegetation must be trimmed. The court noted there was no showing of arbitrariness or irrationality in the application of the ordinance, as the ordinance established a date certain for most vegetation to be measured and also provided an adjudicative process to deal with disputes. The court found no uncertainty in the application of the ordinance.

This case involves the use of a public forum to deal with issues that are often left to covenants or litigation among private parties. View protection can be an asset to property values and an appropriate object of local regulation. The ordinances in this case demonstrate how these public purposes may be achieved.

Edward J. Sullivan

Echevarrieta v. City of Rancho Palos Verdes, 86 Cal. App. 4th 472, 103 Cal. Rptr. 2d 165 (2001).

LUBA

LUBA Update

In two recent opinions, the Court of Appeals affirmed LUBA decisions reported in the June 2001 issue of the *Digest*.

In *Rest-Haven Memorial Park v. City of Eugene*, 175 Or. App. 419 (2001), the Court of Appeals upheld LUBA's ruling that an ordinance prohibiting the placement of pipes or fill in the city's open waterways is a land use regulation to which the city should have applied Statewide Planning Goal 5. (*Digest*, Vol. 23, No. 3, at 10). The city argued it was not obliged to apply the goal because the ordinance was not adopted for the purpose of protecting significant Goal 5 resources. Like LUBA, the court disagreed. Because the ordinance provides additional protections to the city's open waterways, some of which are designated Goal 5 resources, the court concluded the city is required to demonstrate compliance with the goal. Additionally, the ordinance's purpose statement indicated it would apply until the city completed its Goal 5 process and adopted a comprehensive set of open waterway protection measures. The court reasoned that nothing in the Goal 5 administrative rules excuses compliance with the goal for local ordinances that have multiple purposes, including protecting significant Goal 5 resources: "So long as one of the purposes of the ordinance was to protect Goal 5 resources and no other provision of the law permits the city's action without compliance with OAR 660-023-0250(3), the rule is applicable."

In *McClure v. City of Springfield*, 175 Or. App.425 (2001), the Court of Appeals affirmed LUBA's ruling, which addressed three right of way exactions the City of Springfield imposed in approving the partition of a parcel of land into three lots. LUBA upheld a city condition requiring the applicant to dedicate a twenty-foot right-of-way along M Street, finding the city had successfully demonstrated an essential nexus between the dedication and a legitimate governmental interest and had justified the need for the exaction. LUBA concluded, however, that the city failed to make the necessary individualized determination under *Dolan* to justify the remaining exactions for a five-foot sidewalk along 8th Street and a ten-foot "clipped corner" at the intersection of M and 8th Streets. (*Digest,*Vol 23, No. 3, at 11). Both the petitioners and the city appealed LUBA's decision.

On appeal, the city argued that LUBA went too far in separately analyzing each of the required exactions and should have considered the combined exactions as an integrated response to the impacts of the proposed partition. The Court of Appeals disagreed, although it acknowledged that "a complete analysis properly includes consideration of all of the effects of

a particular development and that local governments may tailor their dedication requirements to ameliorate these effects." Nevertheless, the court concluded the city's findings on the 8th Street and clipped corner exactions were inadequate because they did not explain why the exactions were proportional to the impacts of the proposed development.

The petitioners, however, argued that LUBA did not go far enough and erred in upholding the M Street exaction. The court agreed with LUBA and rejected the petitioners' call for "a highly detailed and precise explanation of each effect produced by a proposed development and an equally detailed and precise correlation between those effects and the proposed exactions." This level of precision is not required under *Dolan*'s "rough proportionality" standard. The petitioners also argued that there is no evidence M Street will ever be improved and that any benefits from the exaction are illusory. The court rejected this argument, observing that under the petitioners' theory no improvement would ever be possible. Moreover, "the timing of the planned improvements to M Street does not render uncertain the determination of whether the city's proposed solution to the effects of the partition is roughly proportional under *Dolan*." Accordingly, the court affirmed LUBA's ruling on the M Street exaction.

Kathryn S. Beaumont

Farmworker Housing

In *Durig v. Washington County*, LUBA No. 2000-185 (5/01/01), LUBA addressed the relationship between ORS 215.213(1)(r), which allows seasonal farmworker housing in EFU zones, and ORS 197.685(2), which directs counties to consider rural centers and areas committed to nonresource uses in accommodating an identified need for seasonal farmworker housing. LUBA phrased the key issue as "whether ORS 197.685(2) requires consideration of rural centers and committed lands as alternative sites, *before* approving seasonal farmworker housing on EFU land."

The petitioners and the intervenor-applicant differed sharply in their interpretations of the applicable statutes. In the petitioners' view, ORS 197.685(2) requires the county to show that seasonal farmworker housing can't be accommodated in rural centers or rural areas already committed to nonresource use before approving it on EFU-zoned lands. Petitioners asserted the county erred by failing to perform this kind of alternative sites analysis before approving the applicant's quasi-judicial request to build seasonal farmworker housing on EFU-zoned land. The applicant argued ORS 197.685(2) requires counties to consider rural centers and areas committed to nonresource use in providing appropriately zoned land to meet any identified need for farmworker housing. It does not apply to quasi-judicial applications to use EFU-zoned lands for this kind of housing.

After reviewing the language of the applicable statutes and relevant legislative history, LUBA affirmed the county's decision and agreed with the applicant's interpretation of the relevant statutes. Like the county hearings officer, LUBA concluded the text and context of ORS 215.213(1)(r) and ORS 197.685(2) is unclear and turned to the legislative history for additional guidance. Although it was somewhat inconclusive, the legislative history was clear enough to show the legislature did not intend that ORS 197.685(2) would apply independently to quasi-judicial applications for seasonal farmworker housing in EFU zones. LUBA held:

> "[W]e agree with the hearings officer and intervenor that the legislative history shows that ORS 197.685(2) is intended to impose a *legislative* duty to consider non-EFU-zoned lands to provide land that would *supplement* seasonal farmworker housing allowed outright on EFU-zoned land under ORS 215.213(1)(r) and 215.283(1)(r), rather than a precondition of approving such housing on EFU-zoned land."

Slip Op. at 9-10 (emphasis in original). Consequently, the county was not required to apply the alternative sites analysis as petitioners advocated and LUBA affirmed the county's decision.

Kathryn S. Beaumont

Durig v. Washington County, LUBA No. 2000-185 (5/01/01).

LUBA Jurisdiction

In *Robinson v. City of Silverton*, LUBA No. 2000-114 (6/12/01), LUBA concluded that a city planning director's letter refusing petitioner's attempt to file a local appeal is a reviewable land use decision, but found no substantive error in the decision and affirmed the director's action. The chain of events underlying this jurisdictional dispute began on March 9, 2000 when the planning director approved the intervenor's application for site review for an assisted living facility. As the city's code required, the director sent notice of his decision to the applicant. Petitioner, an adjacent property owner, appealed the director's decision to LUBA and attempted to appeal the decision to the city planning commission. On June 2, 2000, the director sent petitioner a letter denying his local appeal because the city code allows only the applicant to appeal and, in any event, petitioner's appeal was not filed within the code's ten-day appeal period. Petitioner attempted to appeal the director's June 2nd letter to the planning commission and on July 5, 2000, the director refused to accept his appeal because the June 2nd letter was not an appealable decision. The July 5th letter was the subject of this appeal.

Responding to the parties' jurisdictional arguments, LUBA ruled the July 5th letter is a land use decision over which LUBA has jurisdiction, regardless of how it is characterized. If the letter is an attempt to exhaust an available local appeal under the city's code, it is a limited land use decision. LUBA noted that it previously decided the underlying site review decision is a limited land use decision in *Mountain West Investment v. City of Silverton*, 38 Or. LUBA 400 (2000). If it is an attempt to appeal a local decision for which there is no available local appeal under the code, it is a statutory land use decision because the director applied the city's code in deciding whether there is a local right to appeal the letter.

Turning to the merits of the city's decision, the city's code allows only "land use decisions" to be appealed to the next local level. The code defines the term "land use decision" to mean "a request, by an owner or agent thereof of a parcel of land, for permission of the city to use or develop the parcel for a specific purpose as required by the city's code or ordinances." Since the petitioner was not the applicant, LUBA agreed that he failed to demonstrate the June 2nd letter denying his appeal was a land use decision within the meaning of the code. Accordingly, petitioner did not have the right to appeal that decision to any local body and the director correctly rejected his attempt to do so in his July 5th letter to petitioner.

Kathryn S. Beaumont

Robinson v. City of Silverton, LUBA No. 2000-114 (6/12/01).

Utility Facilities

In two recent decisions, LUBA explored the meaning and application of the 1999 legislative amendments to ORS 215.275, which amended the standards for siting a utility facility in an exclusive farm use zone.

In *City of Albany v. Linn County and City of Millersburg*, LUBA No. 2001-011 (5/10/01), petitioner challenged the county's approval of a permit to site a water treatment facility and reservoir on land zoned Farm Forest (F/F). The proposed facilities would allow the City of Millersburg to obtain its own municipal water supply, rather than to continue buying water from the City of Albany as it had in the past.

One preliminary issue LUBA resolved was whether ORS 215.275 even applies to the approved facilities. Millersburg argued the statute was inapplicable because the affected property is not zoned EFU, does not contain agricultural soils, and is a reclaimed portion of a Goal 5 inventoried gravel pit. LUBA rejected this argument, noting that DLCD's administrative rules allow counties to adopt mixed farm/forest zones to satisfy the requirements of Goals 3 and 4. Where a county does so, uses authorized in EFU zones may be allowed in mixed farm/forest zones, subject to the restrictions in ORS Chapter 215 and the administrative rules implementing that chapter. Linn County's comprehensive plan treats the F/F zone the same as the EFU zone and allows the same permitted and conditional uses in both zones. Accordingly, LUBA con-

cluded the county was required to apply the standards in ORS 215.275 to siting a utility facility in an F/F zone.

Turning to the merits, LUBA considered Albany's argument that Millersburg and the county failed to show that reasonable alternatives, which do not require the use of EFU or F/F-zoned lands, are unavailable. The alternatives Albany identified as feasible included pursuing a joint venture with Albany or others to develop a Santiam River water source, using a Willamette River water source within Millersburg or using an elevated reservoir within Millersburg. Albany argued that under ORS 215.275 Millersburg may use EFU or F/F-zoned land for the reservoir and treatment facilities only if all other options are unavailable and infeasible. Millersburg contended that the phrase "necessary for public service" in the statute only requires the city to show that one of the siting factors in ORS 215.275(2) is present to be able to use EFU or F/F-zoned land for the proposed facilities. The statutory siting factors address technical and engineering feasibility, locational dependence, lack of available urban and nonresource lands, availability of existing rights of way, public health and safety, and other requirements of state and federal agencies.

LUBA examined the effect of the 1999 amendments to ORS 215.175, noting that the pre-1999 statutory standard for siting a utility facility in an EFU zone simply required a facility to be "necessary for public service." In *Clackamas County Serv. Dist. No. 1 v. Clackamas County*, 35 Or. LUBA 374 (1998), LUBA interpreted the pre-1999 standard to mean that an applicant who wanted to site a utility facility on EFU-zoned land must show there are no feasible alternatives for building the facility on non-EFU-zoned land. Although ORS 215.275 was amended after the decision in the *Clackamas County Serv. Dist. No. 1* case, LUBA concluded it essentially codified the standard in that case with minor differences. As LUBA pointed out, "[I]f in considering 'reasonable alternatives,' the applicant is unable to demonstrate that such non-EFU-zoned alternatives are 'infeasible,' it is difficult to see how the applicant could demonstrate that the proposed facility 'must be sited' on EFU-zoned land." In LUBA's view, when the legislature adopted the 1999 amendments it "elaborated on the infeasiblity standard without significantly altering that standard."

LUBA also examined the function the factors listed in ORS 215.275(2) play and concluded they act to disqualify potential alternative sites. A utility facility may be approved on EFU or F/F-zoned lands only if the county determines that the non-EFU sites cannot be used because one or more of the statutory factors is present and the EFU site must be used. LUBA made two additional observations about the statute. First, a "utility facility" may have multiple components, each of which must be separately analyzed and justified. Second, in performing the alternatives analysis under the statute, the county does not need to evaluate facilities or solutions to providing a public service that are different than the general type of solution selected by the service provider.

Turning to the alternatives Albany identified, LUBA concluded Millersburg and the county did not err in refusing to evaluate the feasibility of a joint venture between Millersburg and Albany or others to improve existing water capacity. These alternatives were essentially alternatives to the decision to obtain an independent water source, and not siting alternatives. Millersburg could appropriately limit its consideration to alternatives that provide an independent source of water for the city.

While the second alternative, a Willamette River water source, presents a closer question, LUBA affirmed Millersburg's decision to disqualify this option on the basis of water quality considerations. Admittedly, this alternative provides an independent water source and involves surface intake of water, like Millersburg's preferred option. Nevertheless, LUBA concluded Millersburg and the county did not err in rejecting this option without considering the ORS 215.275(2) factors because "there is no dispute in this case that the Willamette River is significantly polluted." Millersburg desired to replace its water supply with water of similar quality, which the Willamette River could not supply.

The third alternative, using water from the Santiam River, but siting a treatment facility and elevated reservoir within Millersburg's urban growth boundary, presented an even closer question for LUBA. Analyzing the components of the proposed utility facility separately, LUBA agreed that the water intake must be located near the river and pipes must cross F/F land. However, that does not necessarily mean that the treatment facility and reservoir also must be located in the F/F zone. LUBA concluded that Millersburg and the county erred in dismissing the possibility of siting the treatment facility and reservoir within Millersburg's UGB and in failing to analyze this possibility under the ORS 215.275(2) factors. In LUBA's view, this is a reasonable alternative that the county must consider under these factors.

LUBA's decision in *Jordan v. Douglas County*, LUBA No. 2001-045 (6/15/01) involved consideration of a different kind of utility facility, a proposed cellular tower on EFU-zoned land. Petitioner appealed the county's decision approving a ninety-foot, wooden cell tower on EFU land, arguing that the tower is not a "utility facility" within the meaning of ORS 215.283(d)(1) and the county code. LUBA disagreed, noting that the county's code defined "utility facility" to include cellular towers and that it had rejected a similar argument in *McCaw Communications, Inc. v. Polk County*, 20 Or. LUBA 456, 467 (1991). Petitioner also contended the tower was not "necessary" because there are other competitors providing cellular telephone service. Acknowledging that petitioner offered one plausible statutory interpretation (the facility must provide a necessary public service), LUBA nevertheless rejected it based on the Court of Appeals' decision in *McCaw Communications, Inc. v. Marion County*, 96 Or. App. 552, 773 P.2d 779 (1989). In that case, the court interpreted the "necessary for public service requirement" to mean that it is necessary to site a utility facility in an EFU zone for the service to be provided.

Finally, petitioner argued the applicant's desire to build the cellular tower in an EFU zone was based solely on cost and that the applicant and the county failed to consider all reasonable alternatives on non-EFU zoned land. One alternative petitioner identified was collocation on one of the existing nearby towers. In LUBA's view this was not a reasonable alternative that had to be considered. Although collocation would enable the applicant to provide telecommunication services, it would not serve another purpose of building a new tower—having space available to lease to other providers.

With respect to other reasonable alternatives, the applicant submitted evidence to the county that the selected site provided the best coverage to the target area of the five sites the applicant considered. The petitioner argued the applicant and the county were also required to consider alternative sites petitioner identified. The county disagreed, ruling that the applicant was not obligated to "produce technical and engineering documentation for any and all alternatives that may be described by opposing parties."

LUBA ruled the county misinterpreted the statute and implementing code provisions and concluded "once an opponent identifies an alternative site with reasonable specificity to suggest that it is a feasible alternative, the local government must consider that site." However, petitioner identified only one possible alternative site with any specificity during the local hearings, and later noted that the owner of the site would never allow a cellular tower to be built on it. In LUBA's view, a site that an owner refuses to lease or sell is not a reasonable alternative that has to be evaluated. Since petitioner failed to identify any feasible alternative with reasonable specificity, LUBA found no error in the county's decision. Substantial evidence supported the county's findings that it was necessary to site the tower on the EFU-zoned site based on engineering feasibility and locational dependence and LUBA affirmed the county's decision.

Kathryn S. Beaumont

City of Albany v. Linn County and City of Millersburg, LUBA No. 2001-011 (5/10/01); Jordan v. Douglas County, LUBA No. 2001-045 (6/15/01).

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