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Highlights

Appellate Cases — Real Estate

Redemption Rights of Judgement Debtor Unaffected by Prior Redemption by Junior Lein Creditor

In a recent decision, the Oregon Court of Appeals clarified the statutory rights of judgment debtors to redeem property sold to satisfy the judgment. The issue in *Duree v. Blair*, 179 Or App 534 (2002), was whether the redemption rights of a judgment debtor are affected by a prior redemption of the property by a junior lien creditor. Defendant's real property had been sold to satisfy a money judgment pursuant to a levy of execution and redeemed from the purchaser by a junior lien creditor. When Defendant attempted to redeem the property, the trial court rejected Defendant's tender because he did not satisfy the junior lien creditor's own judgment. On appeal, the Court reversed the trial court decision, holding that a judgment debtor may redeem from any person holding after the purchaser for 180 days after the date of the sale.

The facts in this case were not in dispute. Defendant owned several parcels of real property in Harney County. A money judgment was entered against him in Harney County Circuit Court (Judgment No. 1) in 1995. This judgment was partially satisfied by the sale of some of Defendant's real estate by a levy of execution. In 1996, another money judgment was entered against Defendant in Multnomah County District Court (Judgment No. 2). Eventually, both money judgments were assigned to Plaintiff, who in turn assigned Judgment No. 2 to a third party, Freedom Cattle Ranch. Freedom subsequently redeemed the real property sold on the levy of execution of Judgment No. 1.

Less than 180 days after the execution sale, Defendant attempted to redeem the property by tendering the redemption price paid by Freedom plus 9% interest. Freedom objected to the redemption, arguing that Defendant had no remaining redemption rights, and if he did, he was required to satisfy Judgment No. 2 in order to redeem the property. The trial court agreed that Defendant was required to satisfy Judgment No. 2 and rejected the tender offer. Defendant appealed, arguing that the trial court erred and applied the wrong statute to determine the amount required for redemption of the property.

After analyzing the provisions of ORS 23.550, which governs the rights of lien creditor redemptioners, and ORS 23.560, which governs the redemption rights of mortgagors and judgment debtors, the Court rejected Freedom's argument that only lien creditors can redeem from redemptioners. The Court found that ORS 23.560 does not restrict from whom the debtor may redeem the property. Although the statute may contemplate a debtor redeeming from the purchaser of the property at the sheriff's sale, the definition of "purchaser" under ORS 23.560(5) includes persons holding after the purchaser. The Court reasoned that this definition encompasses a redeeming judgment lien creditor because such a creditor holds after the purchaser at the sheriff's sale. The Court noted that this is consistent with the established principle that redemption statutes are remedial and therefore must be liberally construed. The Court concluded that ORS 23.560 permits a judgment debtor, for 180 days after the date of the sale, to redeem from any person holding after the purchaser, including a judgment lien creditor redemptioner.

Freedom argued that if Defendant did have a redemption right, he was required to satisfy Judgment No. 2 in order to redeem the property. Freedom maintained that in the absence of unambiguous statutory provision specifying the amount that the redeeming debtor must tender, sound and equitable policy dictated that the debtor should pay the lien creditor's own judgment in addition to the amount paid by the lien creditor on redemption. Otherwise, wasteful and redundant litigation would be required to execute on the subordinate lien. The Court rejected this conclusion, finding that the payments that a judgment debtor must make in order to redeem are clearly specified by statute. ORS 23.560(2) requires the debtor to pay the amount of the purchase money, plus interest from date of sale, and any other sums paid by the purchaser for taxes, waste prevention or prior liens. The Court noted that "[t]he amount of any unsatisfied junior judgment lien

is not enumerated in that list." *Id.* at 541. The Court concluded that the trial court erred because Defendant had properly tendered all sums required to redeem the property. Freedom could not compel Defendant to satisfy Judgment No. 2 in order to redeem the property from the execution of Judgment No. 1.

The Court summarily rejected Freedom's policy argument, observing that "this court may not reconstruct an unambiguous legislative enactment to subserve the court's view of sound public policy." *Id.* at 542. (Citing *State v. Vasquez-Rubio*, 323 Or 275, 283 (1996)). The Court commented that Freedom had never attempted to levy execution on Judgment No. 2 and that nothing in this decision prevents Freedom from doing so in the future.

Raymond Greycloud

Duree v. Blair, 179 Or App 534 (2002)

Court of Appeals Analyzes Promissory Note under UCC Rather than Law of Contracts

A promissory note that does not contain a condition on its face is a negotiable instrument, and therefore is to be analyzed under the UCC rather than the common law of contracts, ruled the Court of Appeals in *Hildebrandt v. Anderson*, 180 Or App 192 (2002). That analysis applies even where the note was issued in connection with a real property transaction.

Plaintiff, a real estate broker, represented landlord-defendants in finding a tenant. Plaintiff and defendants' agreement provided that defendants would pay plaintiff a commission if plaintiff found a tenant "ready and willing" to enter into a lease. Plaintiff did so, and tenant executed a three-year lease and performed for a period of less than a year. In lieu of full payment of his commission when the lease was signed – as required by the brokerage agreement – plaintiff accepted a promissory note and a partial assignment of rents from defendants. The partial assignment of rents was for the same amount as the monthly payments due under the note.

After tenant breached the lease, defendants stopped paying on the note. Defendants argued that, following tenant's breach, there was no consideration for the note. The court disagreed, citing an example in the commentary to UCC in rejecting defendants' argument. Defendants also argued that tenant's failure to perform cancels landlord's duty to pay the balance of the commission. The court rejected defendants' reading of case law pertaining to a real estate sale – where a default by purchaser can cancel the obligation to pay an outstanding balance due on a commission – insisting that the pertinent question is whether the transaction has closed. Here, the lease "closed" when the parties executed the lease.

Finally, the court rejected defendants' argument that there was no meeting of the minds, finding clear and objective evidence of assent: defendants' signatures on the note.

Tod Northman

Hildebrandt v. Anderson, 180 Or App 192, 42 P.3d 355 (2002).

State Appeals Court again Weighs ODOT's Authority over Access

The Oregon Court of Appeals recently decided another case regarding ODOT's authority to close private "approach roads" to state highways, *Deupree v. ODOT*, 180 Or App 395 (2002). Although no one is disputing the breadth of that authority, at least one appellate judge believes that it is limited for permits issued before 1967.

Recall that the Court of Appeals in *ODOT v. Hanson*, 162 Or App 38 (1999), ruled that a location-specific reservation of access (commonly described as "deeded access") is effectively an easement. Under that ruling, if ODOT denies or revokes a permit to operate an approach road at such a location, then it "takes" the easement and must compensate the owner.

Deupree asked the court to overturn ODOT decisions to cancel two approach road permits relating to his property situated next to Hwy 62 in Eagle Point. ODOT canceled the permits, which had been issued to Deupree's predecessors-in-interest in 1962 and 1965, in order to facilitate highway widening.

ODOT found that the first permit "was granted for access to a grocery store," but that the approach road now serves a trailer sales operation on the property. Based upon these findings, ODOT concluded that the 1962 permit was out of compliance with its terms and, thus, revocable. All three members of the appellate panel upheld ODOT's conclusion.

As to the permit issued in 1965, however, the panel split. The majority concluded that then-existing legislation authorized ODOT to issue permits subject to conditions for their cancellation. A condition of the 1965 permit referred to removal of the approach road "in the event of reconstruction or widening of any highway." The majority concluded that this condition is "the functional equivalent of authority to cancel the permit for the approach road."

Judge Rex Armstrong dissented from this conclusion. He asserted that the mere reference to approach road removal could not be construed as a basis for permit revocation. Furthermore, he noted that the legislature explicitly granted ODOT authority to revoke approach road permits in 1967. He deduced that, had such authority existed prior to that time, the legislature would not have felt compelled to explicitly grant ODOT revocation authority. His reading of the law seems to be that ODOT may cancel a permit issued before 1967 only where its conditions expressly authorize it to do so.

This case is particularly important to commercial property owners and operators that depend on access to a state highway. Though those owners and operators may not realize it, many of their approach roads were permitted before 1967. If Judge Armstrong is correct, then ODOT's ability to revoke such permits has some limits. Deupree has asked the state Supreme Court to review the Court of Appeals' decision. The Supreme Court has yet to decide whether it will hear the case.

Ty K. Wyman

Deupree v. ODOT, 180 Or App 395 (2002)

Clear and Convincing Evidence is Necessary to Establish Abandonment of Easement

The standard of proof required to support a claim of abandonment of an easement was the critical holding of the court in *Shields v. Villareal* 177 Or App 687, 33 P.3d 1032 (2001). The Plaintiffs own property immediately north of that of the Defendant. In addition, Plaintiffs have an express easement across the north 15 feet of Defendant's property.

In 1987 Plaintiffs developed their property as an automotive machine shop and parking. They graded their property, put in a curb and planted bushes between the respective properties. The grading created a "berm" which was a few feet to six feet high. In 1998 or 1999 Defendant developed his property into a steel yard. As part of the development he placed large amounts of fill dirt on the easement blocking Plaintiffs' ability to traverse its length. Plaintiffs initiated this action when Defendant refused to remove the dirt deposited on the easement.

At trial the court held that the Defendant had carried his burden of proof of Plaintiffs' abandonment of their easement. The court specifically held that he had, by a preponderance of the evidence, established that Plaintiffs had "manifested an intent to relinquish possession… by performing acts inconsistent with the continued use of the easement and subsequently relinquished possession of the easement by non-use." *Shields, supra* at 690.

The Court of Appeals reversed, holding that the proper standard of proof was "clear and convincing".

> "Clear and convincing evidence is evidence that is "free from confusion, fully intelligible, distinct" and which establishes that the truth of the asserted fact is 'highly probable" (citations omitted) In this case that means the dispositive question is: Does unambiguous evidence lead with a high degree of probability to the conclusion that the curb, bushes and berm plaintiffs installed rendered access to the easement impossible (or so impractical as to be virtually impossible), thereby demonstrating an intention to abandon it?
>
> Even deferring to the trial court's determination that defendant's testimony was "more accurate" we conclude that it establishes at most that the curb, bushes and berm made vehicular access to the easement difficult and potentially unsafe" *Id.* at 694-695.

In discussing the standard of proof required, the opinion further noted that "clear and convincing evidence" was also the standard for establishing extinguishment by adverse possession and consent. *Id.* at 691-692.

Alan K. Brickley

Shields v. Villareal, 177 Or App 687, 33 P.3d 1032 (2001).

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Appellate Cases — Land Use

Metro Prevails in Challenges to UGB Amendment and Regional Transportation Plan

Two cases with the same name and same year — *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12 (2002) *(Citizens I)*, and *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 468 (2002) *(Citizens II)* — stick together mentally despite addressing quite different land use topics.

In *Citizens I*, petitioners challenged Metro's amendment of the Portland metropolitan area UGB to add 306 acres south of Hillsboro. The amendment converted the 306 acres to urbanizable land. Conversion to actual urban use was conditioned on the City of Hillsboro amending its comprehensive plan to address transportation issues related to the Tualatin Valley Highway.

Procedurally, petitioners lost on all of their assignments of error at LUBA and the Court of Appeals affirmed. Along the way, the Court of Appeals made several interesting points.

One set of issues related to compliance with the Goal 14 factors. Petitioners claimed that the seven Goal 14 factors were threshold approval standards. For example, petitioners argued that under factor 3, it must be shown that needed public facilities and services can and will be provided in an orderly fashion to the UGB expansion area before the amendment can be approved. The Court rejected that premise, holding that no single factor is so important as to be determinative in a UGB amendment proceeding. The individual Goal 14 factors are not necessarily thresholds – they must only be "considered" by the local government.

Another set of issues related to timing of the conversion to urban uses. The appealed decision only allowed conversion from rural to urbanizable land, not to urban land. Because including the 306 acres within the UGB only set the stage for later, more specific planning decisions, Goal 14 did not require Metro to show the adequacy of urban services at this point in the process.

Finally, and segueing to the issues of *Citizens II*, the two-step process of converting rural land first to urbanizable land and then to urban land delayed consideration of transportation issues. Petitioners claimed the UGB amendment significantly affected a transportation facility. LUBA held that the amendment did not alter the types or intensities of allowed land uses, reduce the performance standards of transportation facilities, or otherwise significantly affect any transportation facility. In effect, the two-step process postponed the transportation issues until the time the land is actually converted to urban use. The Court rejected petitioners' argument that "that is a poor way to conduct land use planning" and that DLCD's transportation planning rules, OAR 660-012-0005 *et seq.*, should be revised.

In *Citizens II*, petitioners were back again. This time they challenged Metro's adoption of a regional transportation plan (RTP). Petitioners claimed the RTP failed to comply with Metro's regional framework plan and with Goal 12. Metro argued these issues were within the exclusive jurisdiction of LCDC, and LUBA agreed. The Court affirmed and noted that review authority of an RTP for compliance with Goal 12 and the transportation planning rules is vested in LCDC under ORS 197.251. LUBA lacked jurisdiction and the case was properly dismissed.

The common thread to the two cases appears to be a dedicated effort to oppose expansion of the Metro UGB. The cases are somewhat amusing because of the petitioners' dedication, but add little to the conceptual development of urban planning.

Stephen Mountainspring

Citizens Against Irresponsible Growth v. Metro, 179 Or App 12 (2002).
Citizens Against Irresponsible Growth v. Metro, 179 Or App 468 (2002)

Vested Rights and Nonconforming Use Rights are "Inextricably Related"

Fountain Village Development Co. v. Multnomah County, 176 Or.App. 213, 31 P.3d 458 (2001) is a vested rights case with an interesting discussion about whether vested rights and nonconforming uses may be regulated in the same way. Petitioner appealed LUBA's determination that Petitioner had lost its alleged vested right to complete construction of a residence on property where such development was no longer permitted as of right.

The facts are that the prior property owner constructed a bunker on the property to grow marijuana. Two years later, in 1987, the property owner began to construct a log cabin over the bunker, but did not complete the work. Building permits were issued to permit the construction in 1987 and 1991, although the legality of the latter is questionable. However, no further construction took place. At the time of the initial construction effort the applicable zoning permitted one dwelling on the property. In 1992, federal agents found marijuana on the property and seized it. The County then acquired title. In January of 1993, the County rezoned the property. Under the new zoning, a single-family dwelling was no longer an outright permitted use; it was a conditional use.

The original owner reacquired the property and petitioner bought the property in 1993 and 1994. Between 1995 and 1998 petitioner spent a few thousand dollars to clear off the top of the bunker, bring a road to the site, and to have an engineer determine the stability of the partially built cabin. Petitioner made no effort to complete the cabin.

In 1999, at the petitioner's request, the County reviewed the facts. The County determined that the petitioner had no vested right to continue construction based on the County code and its definition of abandonment of a nonconforming use.

Petitioner appealed and objected to the County's consideration of its regulations for non-conforming uses. Petitioner argued that "a vested right to complete a use is not a nonconforming use and could not be treated as such." Petitioner also alleged that, based upon a finding in the County's final decision, the County applied criteria not in its code.

The Court of Appeals first considered petitioner's argument that "statutes and local laws governing nonconforming uses do not apply to vested rights generally [and] if the legislature had wanted to include vested rights within the scope of the laws governing

nonconforming uses, it could have and would have, said so explicitly." To support its arguments petitioner said there were special "vesting statutes" that "give property owners the right to develop their property under the regulations existing when the right vested." Petitioner argued there was a difference, under state law, between the right to build and the right to use. Petitioner argued that only properties in use are subject to the county's nonconforming use regulations. The court rejected this argument stating, "[n]othing in Oregon's case law or statute precludes subjecting vested rights to develop property to the same limitations that apply to nonconforming uses generally." Vested rights are, according to the court, "in effect, inchoate nonconforming uses."

Looking at the County's statutory land use regulation obligations, the court determined that the County's application of its nonconforming use criteria, to address the vested rights issue, was within the County's authority. The court determined that "LUBA was correct in concluding that vested rights may be lost by abandonment or discontinuance" just as nonconforming rights may be so lost and that there is "no reason why a vested right should be treated more favorably than a nonconforming use with respect to the duration of that right or the requirement for diligent exercise."

The Court said, "In sum, while not equating vested rights with nonconforming use rights, we [have] treated the two as inextricably related." The Court cited the prior cases of *Polk County v. Martin*, 292 Or. 69, 636 P.2d 952 (1981), *Clackamas County v. Holmes*, 11 Or. App. ____, 501 P.2d 333 (1972), *rev'd on other grounds*, 265 Or. 193, 508 P.2d 190 (1973), *Eklund v. Clackamas County*, 36 Or.App. 73, 583 P.2d 567 (1978), and *Milcrest Corp. v. Clackamas County*, 59 Or.App. 177, 650 P.2d 963 (1982), to support its position.

Although agreeing with LUBA's position regarding the law of vested rights and nonconforming uses, the court remanded the matter to LUBA because LUBA did not address petitioner's argument that the County made its determination of discontinuance based on a standard not in the applicable regulation.

Petitioner appealed the Court of Appeals' decision to the Oregon Supreme Court where the matter was, as of May 1, 2002, still pending in terms of whether or not it will be accepted for appeal. As a consequence, LUBA has taken no action on the remand.

Ruth Spetter

Fountain Village Development Co. v. Multnomah County, 176 Or. App. 213, 31 P.3d 458 (2001).

Legal Status of Lot is a Relevant Consideration in Reviewing Rezoning Request

In *Maxwell v. Lane County*, 179 Or App 409, 40 P.3d 532 (2002) *(Maxwell II)*, Lane County and Intervenor Gorham petitioned the Court of Appeals to reconsider its decision in *Maxwell v. Lane County*, 178 Or App 210, 35 P.3d 1128 (2001) *(Maxwell I)*. The court in *Maxwell I* ruled that LUBA erred in holding the county need not consider the legal status of Gorham's lots relative to his application for rezoning. It remanded the decision to LUBA with instructions to remand the decision to the county for further proceedings on Gorham's rezoning application, with specific attention to be paid to the legal status of the relevant parcels. LUBA had affirmed the county's decision approving Gorham's application for rezoning 32 acres of property from Rural Residential 10-acre (RR-10) to Rural Residential 5-acre (RR-5) minimum lot size.

As the *Maxwell I* court rightly stated, the facts material to the dispute are "complex and, frankly, arcane." *Id.* at 212. The subject property is part of a Goal 3 and 4 exception area, taken by the county in 1990. At that time, the area consisted of 11 parcels, totaling roughly 105 acres. The dispute focuses on a portion of the exception area, which in 1990 contained three tax lots. "Whether that area now includes three or four parcels is the central dispute in this case." *Id.* The property's history involved a complicated series of property line adjustments, a minor partition and legal lot verifications that yielded two parcels and a third parcel bisected by a right of way. Pursuant to an informal policy, the County treated the bisected parcel as two lots, referred to as the north lot and the south lot.

In November 1999, the county approved the siting of a mobile home on the north lot. Gorham submitted his application to rezone the north and south parcels, now totaling 31.68 acres. After initially denying the application on the ground that the lots were not properly categorized as distinct parcels, resulting in an average parcel density too high to justify a zone change, the hearing's officer reconsidered his decision, approved the rezone, and on appeal the county board affirmed.

Petitioner Maxwell unsuccessfully argued to LUBA that the county erroneously calculated the average lot size within the exception area. LUBA upheld the county's decision, relying on *McKay Creek Valley Assn. v. Washington County*, 118 Or App 543, 848 P.2d 624 (1993) for the proposition that where a county's rezoning ordinance does not expressly require an inquiry into the legal status of lots, the county need not consider the issue relative to a request for a zone change.

The petitioner reiterated this argument to the Court of Appeals in *Maxwell I*. After reviewing cases in addition to McKay Creek that dealt with the "legal lot" issue, the Court noted that the cases stood for the slightly broader proposition that:

> a local government entity must determine the legal status of a unit of land in connection with a current proceeding involving that unit of land if required to do so by applicable legislation. Applicable legislation includes not only the local enactment governing the particular proceeding at issue, but also other related enactments. In addition, the requirement that the local government determine the legal status of a unit of land in connection with a particular proceeding need not be expressly stated in the relevant enactment, but may be derived from its text in context or by consideration of its purpose or policy.

The Court of Appeals in *Maxwell I* reviewed the county's code and pertinent sections related to the term "parcel." It concluded that those sections were applicable to the rezoning decision and determined that consideration of the legal status of the parcels was

appropriate. On reconsideration, and in response to the county's and Gorham's assertion that the court's analysis in *Maxwell I* foreclosed the county's consideration of other parts of the county's code relevant to the "legal lot" inquiry, the Court clarified its decision in *Maxwell I*.

The Court in *Maxwell II* held in pertinent part that it did not intend its review of "applicable" county provisions to be "exhaustive," stating that "the parties are free, on remand, to identify other legislation that may be relevant and applicable to the meaning of the term 'parcels." *Id.* at 413. The Court also held that it did not intend for its review of "applicable" legislation "to predict the result of the county's consideration of the legal status of the parcels at issue." *Id.* In so holding, the Court adhered to its *Maxwell I* opinion as modified, and remanded the case for further proceedings.

David F. Doughman. *Mr. Doughman is an attorney with Hutchison, Hammond and Walsh, P.C.*

Maxwell v. Lane County, 179 Or App 409, 40P.3d 532 (2002).

Cases From Other Jurisdictions

Split United States Supreme Court Remands Adult Zoning Case

In *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728 (May 13, 2002), a majority of the United States Supreme Court remanded a Ninth Circuit decision on adult use zoning. The plurality opinion was written by Justice O'Connor, in which the Chief Justice and Justices Scalia and Thomas joined. The City's code originally prohibited more than one adult business from locating within a specified distance of another adult business. Plaintiff owned two such businesses within the same structure and brought suit after the City amended its code to proscribe that combination, alleging violation of the First Amendment and seeking declaratory and injunctive relief. On cross motions for summary judgment the federal district court found the regulations to be content–based and ruled they did not survive analysis under a strict scrutiny standard. The Ninth Circuit reversed, holding that even if the regulations were content neutral, they did not serve a substantial governmental interest as the city did not show the relationship between multiple-use adult establishments on the same property and negative secondary effects, especially because the study the City relied upon was insufficiently related to the challenged regulations.

The City relied on a 1977 study of adult businesses undertaken by City staff that examined crimes around these establishments and any resulting effects on property values. The property value study was inconclusive but the crime study was the basis of the original 1978 ordinance dispersing such uses and prohibiting their location within a certain radius of each other or of "sensitive" uses such as religious institutions, schools and parks. However, that ordinance contained a potential loophole because it did not prevent more than one adult use to be located within the exterior walls of the same structure. In 1983, the City amended the ordinance to prohibit more than one adult use per structure. The Ninth Circuit opinion analyzed the regulations in terms of the United States Supreme Court's opinion in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The plurality opinion also found *Renton* applicable but described that case as having a three-step approach:

1. If the regulation did not ban adult uses altogether, but required that they be located at certain distances from each other or from sensitive uses, the regulation could be analyzed as a time, place and manner regulation.

2. The court would then examine whether the ordinance was content neutral or content based – if the latter, it would be examined under a strict scrutiny standard; however, if it was not content based, it could be permissible to deal with the secondary effects of the use; and

3. Finally, the court would examine whether the regulation served a substantial governmental interest and left open adequate channels of communication.

The district court invalidated the ordinance on the second step, but the Ninth Circuit passed over that step and used the third step to invalidate the ordinance because it found the 1977 study did not support a reasonable belief that a combination of adult businesses at the same site would produce the alleged harmful secondary effects from those uses. The Ninth Circuit also rejected as inadequate a report on health problems inside adult video arcades.

The 1977 report dealt with crime rates in areas of high adult use concentrations, compared to other areas, and found crime rates grew faster in the former category. The Ninth Circuit faulted that report because it dealt with concentration of establishments in a neighborhood, but not within the same structure. The Supreme Court's plurality opinion found, however, that concentrating adult uses in the same structure also involved concentration of such uses in the same area and that the findings of the 1977 study could apply. That plurality found the burden imposed on the City by *Renton* did not require the City study to mitigate every possible contrary theory concerning the deleterious effects of adult businesses and noted that there was no contrary theory presented in the case before the court. The fact that other interpretations of the 1977 study are possible did not render invalid the City's reliance on it, if the study's conclusions are otherwise plausible. As to the sufficiency of the evidence, the plurality found the report fairly supports the rationale for the City's regulations.

The plurality also rejected the position expressed in Justice Souter's dissent that the challenged regulation must be founded on empirical data. Such a position, said the plurality, would constrain the ability of municipalities to experiment with solutions to deal with secondary effects of protected speech and would overturn the court's "settled position" on that point. The plurality noted that there were no adult video arcades in Los Angeles operating independently of adult book stores, so the only alternative under the dissent's view would be to invalidate the ordinance for lack of empirical data.

The plurality concluded:

> "Our deference to the evidence presented by the City of Los Angeles is the product of a careful balance between competing interests. One [sic] the one hand, we have an obligation to exercise independent judgment when First Amendment rights are implicated. *** On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. *** We are also guided by the fact that Renton requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. *** There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech. ***"

The plurality also rejected the Souter position of "rethinking *Renton*" because none of the parties asked the court to depart from the analytical framework of that case. Nor, noted the plurality, was that issue within the scope of the question presented to the court. The Souter dissent, according to the plurality, would determine the content neutrality question before the Ninth Circuit dealt with it, which it felt was "inappropriate" under the circumstances.

Finally, the plurality described the additional basis for the ordinance, which was a report on health conditions in adult video arcades. It did not examine that question because it found the 1977 Los Angeles study to be a sufficient basis for the challenged ordinance. The plurality then remanded the matter for further proceedings to determine whether the challenged regulation was a time, place and manner regulation and not a ban on speech. The plurality noted, however, that the Ninth Circuit did not find the City's regulation was such a ban and respondent did not petition for review of that determination.

Justice Scalia concurred because he said the plurality opinion represented a correct application of the court's views regarding "regulation of the secondary effects of pornographic speech." However, he did not think that the First Amendment prevents communities from "regulating, or even entirely suppressing, the business of pandering sex."

Justice Kennedy concurred in the judgment, but did not join in the plurality opinion because he was concerned whether the *Renton* decision may have been improperly expanded and might have approved a "content based" regulation. Justice Kennedy believed *Renton* allowed a city to deal with secondary effects of adult uses ("the sordidness outside") while leaving speech alone. A regulation of speech cannot have the effect of suppressing the disfavored speech itself, according to Justice Kennedy. Because the ordinance in question takes that approach, the challenged regulation is a time, place and manner restriction not subject to strict scrutiny, as if it were content based; however, it is subject to an intermediate level of scrutiny. Nevertheless, Justice Kennedy had concerns over whether the regulation at issue was indeed content neutral, stating:

> "The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in Renton treat[ed] theaters that specialize in adult film differently from other kinds of theaters. *** The fiction that this sort of ordinance is content neutralor [sic] content neutralis perhaps is more confusing than helpful, as Justice Souter demonstrates, see post, at 4 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. *** These ordinances are content based and we should call them so."

Justice Kennedy found the basic holding of *Renton* sound, *i.e.*, that an ordinance seeking to reduce secondary effects of speech should be subject to intermediate, rather than strict, scrutiny. This kind of evidence did not raise the specter of impermissible content discrimination, so long as there is a *prima facie* legitimate purpose for the regulation, e.g., to limit negative externalities, which he termed a "built-in legislative rationale" that rebuts the presumption that content-based regulations are unconstitutional.

In this case, the plurality, in Justice Kennedy's view, focused on the quantum of evidence necessary to sustain a secondary effects restriction, but did not ask the more important question of what rationale the city must advance to enact such a regulation without suppressing the speech itself. Again, according to Justice Kennedy, the plurality opinion did not deal with how speech is treated. If two adult businesses under the same roof are prohibited, one must either relocate or close. If the result is the latter, then free speech suffers. The ordinance in this case is supported by a single study and the experience of the legislators. The city must, in order to uphold the ordinance, show that two businesses under the same roof are no better than two next door to each other. Now that the summary judgment was reversed, this is what the city must show at trial.

Justice Souter dissented, joined by Justices Breyer (in part), Stevens and Ginsburg. The dissenters, less Justice Breyer, found the 1977 study did not provide a basis for the ordinance at issue and the video arcade health study was not on point. These dissenters would use an intermediate level of scrutiny applicable to content–based regulations of expression. They noted that the regulation of expression was triggered by its content, though not justified by it, and was limited to time, place and manner restrictions. While restrictions on loud speakers may have no necessary relationship to what is said over the loudspeaker, adult use regulations are triggered because of their content. Justice Souter continued:

> "It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove."

Justice Souter said that the safeguard in such circumstances is to require proof of the deleterious secondary effects of the restricted use to justify the restriction, *i.e.*, to show the regulation works, instead of relying on "casual relationships" between deleterious effects and disfavored speech. Justice Souter said that this task is not Herculean and can be shown by police reports, crime statistics and studies of property market values. However, it is evidence and not an uncritical "common sense" that must support this kind of regulation.

In the final portion of Justice Souter's dissent, joined in by all the dissenters, he noted the study based on property values was inconclusive, but the crime study did show a relationship between the concentration of adult businesses and higher rates of crime. However, the study did not show, according to the dissenters, that putting two adult businesses under one roof will result in higher crime rates so as to require dispersion of different adult uses. The dissenters simply found no study of the effect of a combination of adult bookstores and video arcades on crime rates. A casual relationship may justify dispersal of adult businesses generally, but does not justify separation of adult uses found originally in a single establishment. The dissenters found no basis in *Renton* for allowing cities to experiment in dealing with secondary effects, as the ordinance in the *Renton* case only dealt with adult use locations, rather than subcategories of adult uses. In the dissenters' view, the city must show that a proliferation of adult uses is not an end of the ordinance but neither is raising of cost of doing business in order to suppress speech.

This is an interesting First Amendment case. The plurality viewed the Los Angeles ordinance as similar to one that the court had upheld in *Renton* by finding some justification for regulation of adult uses, if not necessarily the adult uses before the court, because of a study that shows concentration of adult uses lead to higher crime rates. Justice Scalia would allow suppression of free speech without further thought. The most interesting decision in the case was that of Justice Kennedy, calling a spade a spade – it is the content of adult uses that triggers their specific regulations. However, Justice Kennedy retreats from the consequences of his statement by allowing content based regulations to restrict speech if there is some level of empirical justification for that restriction, even if it be casual. The dissenters appear to have it right – the justification must be related to the kind of speech regulated. This case may be the harbinger of change in the court's First Amendment jurisprudence. One can only hope that the court speaks from more than a plurality of positions.

Edward J. Sullivan

City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728 (May 13, 2002).

Colorado Supreme Court Implements Palazzolo and Defines "Relevant Parcel"

In *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of La Plata County*, 38 P.3rd 59 (Colo. 2002), plaintiff landowner initiated an inverse condemnation action against defendant, alleging its regulations amounted to a taking. Plaintiff bought 46.57 acres in 1961, when there were no mining or land use regulations in place. In 1979, plaintiff sold 4.65 acres to its president, leaving only the 41.92-acre site at issue. In 1993, defendant adopted its land use plan. At that time, plaintiff had a permit to mine eight acres of the site. The plan allowed this mining to continue, but designated the remaining 33.92 acres of the site as a "river corridor district" under which agricultural, residential, professional office and tourist uses were allowed, but not mining. Plaintiff applied to rezone the unmined portion of the site, but that request was denied, and plaintiff did not seek further review from an adverse decision of the state trial court. Plaintiff then filed this inverse condemnation action, claiming the county's plan constituted a regulatory taking of the 33.92-acre portion of its property, the area in which mining was not allowed. The trial court found for defendant Board of County Commissioners (Board), determining that the relevant parcel for purposes of a takings analysis was the 33.92 acres on which mining was not allowed. The court ruled that the Board's plan did not render this parcel valueless and denied the takings claim on that basis.

The State Court of Appeals reversed. The Court of Appeals agreed with the trial court that the 33.92 acre parcel was the "relevant parcel" for takings analysis and that the appropriate test for a regulatory taking was whether the plan deprived plaintiff of all reasonably beneficial use of its property. However, the Court of Appeals ruled that the trial court may have placed an improper burden of proof on plaintiff as it used cases applying both a "beyond a reasonable doubt" and a "clear and convincing evidencing" standard. Both parties applied for certiorari to the Colorado Supreme Court. Plaintiff contended that the Court of Appeals erred in using only the economic use test (*i.e.*, no reasonable beneficial economic use) and in refusing to analyze mineral rights separately from the 33.92-acre parcel. The Board argued that the whole 41.92 acre parcel must be examined.

The state supreme court noted that the inverse condemnation claim was brought only under the Colorado Constitution, but looked at the federal constitution "for guidance." The state constitution prohibited either taking "or damaging" property. However, the court found the damage language was not at issue in this case.

The first question addressed by the state supreme court was whether there could be a takings claim if there were viable economic use of the subject site. The court answered that question in the affirmative, using *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), in which a *per se* claim was found not to be sustainable in the absence of a physical invasion of the property or deprivation of all viable economic use. Nevertheless, the court in *Palazzolo* determined the property owner could still maintain a claim for a regulatory taking under the three-factor analysis of *Penn Central Trans. Co. v. New York City,* 438 U.S. 104 (1978). The state supreme court

determined that a regulatory takings analysis requires a two-step analysis, i.e., whether a per se taking exists and, if not, whether a regulatory taking exists under the "ad hoc, factual inquiries" of the *Penn Central* analysis. The court concluded that the level of government interference must be "very high" to amount to a regulatory taking under *Penn Central*, concluding,

> "Thus, the court's current formulation of the fact-specific inquiry seems to contemplate a situation in which the property in question retains more than a de minimis value but, when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner. It provides a safety valve to protect the landowner in the truly unusual case."

The state supreme court noted that the trial court had limited itself to the first *Penn Central* factor (the impact of the regulation on the plaintiff) and added that the character of the regulation appeared to weigh in the Board's favor (*i.e.*, the regulation did not result in an invasion of plaintiff's property, it was the result of a carefully drafted plan adopted after public hearings, and it had a legitimate governmental purpose). However, the economic impact of the regulation on plaintiff's land was unclear, according to the court, as it did not affect existing mining on the eight-acre parcel, nor did the trial court consider whether there were other mining regulations that might have an effect on value. On remand, the court said the trial court must quantify the net loss in a fair market value to the property.

Assuming plaintiff could prove a substantial diminution of fair market value attributable to the Board's plan, plaintiff must also show the plan interfered with its reasonable investment-backed expectations. The court noted that the parties differed on those expectations. The plaintiff claimed expansive mining plans while the Board called the site a "one - retiree operation." The state supreme court concluded that to prevail, plaintiff must show that it is in the "rare category of landowner" whose land has a greater than *de minimus* value but, nonetheless, under the totality of circumstances, has had its lands taken.

The court then turned to the "relevant parcel" issue. The court agreed with both the trial court and the Court of Appeals that the mineral rights could not be viewed in isolation, noting the United States Supreme Court has consistently analyzed regulatory taking claims by examining the parcel as a whole. Moreover, the court found all contiguous property under the same ownership must be a part of the calculus. The court noted that plaintiff's proffered analysis would allow a takings claim on any site if it were small enough (*e.g.*, setback requirements), a result that "would defeat the balance of interests reached in takings jurisprudence." The case was thus remanded for retrial under the *Penn Central* factors.

Justice Kourlis, joined by Justice Coats, specially concurred, agreeing with the court's remand under the *Penn Central* factors, but disagreeing with the majority's analysis of the relevant parcel. The dissent suggested a different analysis under the Colorado Constitution and also suggesting that the federal analysis used by the majority was incorrect.

The dissent said that the words "or damaged" in the Colorado Constitution made governments more liable for the their actions affecting real property than under the federal constitution. Moreover, the dissent posited that the *Palazzolo* court had not resolved the relevant parcel issue and disagreed with the majority's characterization of the *Penn Central* test as providing relief only in rare circumstances where there is some value but still a taking under the totality of circumstances. The dissent pointed to two post–*Palazzolo* state court cases to demonstrate that, if anything, the range of issues involved in applying *Penn Central* is greater than before *Palazzolo*. The dissent would define the relevant parcel as the lands plaintiff sought to mine. Moreover, the dissent would revisit the binding nature of the county plan vis-a-vis mining, as opposed to reviewing any zoning or land use regulations as a part of the takings calculus.

Given the *Palazzolo* decision and the recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 2002 WL 654431, (Apr. 23, 2002), it appears that the *Penn Central* test will be used in non-per se takings cases (except perhaps those brought under the "substantially advances a legitimate governmental interest" prong of *Agins*), which will tend to require more trials and provide less clarity in takings jurisprudence. Both sides of this case accepted the use of *Penn Central*. The dissent would segregate out the tract in which mining is not allowed for a separate takings analysis and would also allow a takings analysis of the mineral rights that were foreclosed by local regulation. Perhaps such an interpretation of the Colorado Constitution might be made; however, such an analysis is inconsistent with the Fifth Amendment, as applied to the Fourteenth Amendment, after *Palazzolo*.

Edward J. Sullivan

Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of La Plata County, 38 P.3rd 59 (Colo. 2002).

Split California Supreme Court Decides Major Takings Case

In *San Remo Hotel L.P. v. City and County of San Francisco*, 117 Cal. Rptr.2d 269 (Mar. 4, 2002), plaintiff hotel sought to convert its rooms from long-term residential occupancy to short-term tourist occupancy. Under the city's ordinance, plaintiff was required to comply both with its land use regulations relating to the conversion, as well as its Residential Hotel Unit Conversion and Demolition Ordinance (HCO). To meet the latter requirements, plaintiff paid an "in lieu of" fee to fund construction of low- and moderate-income housing. Plaintiff also filed an action challenging the constitutionality of the ordinance, the amount of the fee, and the city's use of land use regulations to require the fee as a taking under the federal and California constitutions. The trial court denied relief, the California Court of Appeals reversed the trial court's decision in part, and the California Supreme Court granted review.

The court first examined the HCO, which addressed the short-term residential market deficit in housing by requiring a permit to undertake conversion of long-term to short-term occupancy in hotels and required a one-to-one replacement of units. The plaintiff

contended that a previous lessee incorrectly reported to the City that there were no short-term rooms in the hotel. The City rejected plaintiff's later efforts to reclassify the facility as a mixed-residential use of both long- and short-term occupancies and applied the HCO as a condition of approval of the conversion.

Before turning to the merits, the court looked at the state's constitutional provisions regarding takings, noting that plaintiff had alleged the "in lieu of" fee of $567,000 failed to substantially advance a legitimate state interest (*i.e.*, the first prong of the *Agins* tests) and was not "roughly proportionate" to the impacts of the conversion on the public and, thus, amounted to a taking without just compensation. Under *Nollan* and *Dolan*, plaintiff sued for a refund of the fee, but the trial court ruled that plaintiff's compliance with the conditions of approval, including payment of the fee, precluded a subsequent damage claim and that the "heightened scrutiny" of *Nollan* and *Dolan* was not applicable. The trial court also found plaintiff bound by its original declaration that it was a long-term residential hotel. The Court of Appeals reversed on that point, finding *Nollan* and *Dolan* to require heightened scrutiny of fees in this case and remanded the matter to the trial court for a determination of whether plaintiff had a nonconforming use for some of the rooms.

On appeal, the California Supreme Court first determined whether the City correctly required plaintiff to obtain a conditional use permit. The question under the City's code was whether the use "lawfully existed" as a tourist hotel in 1987. The record showed that there were both long-term and tourist occupancies of the hotel. The court found that any conversion from long-term to tourist rooms in 1987 or thereafter required a conditional use permit as there was a change in use. In reaching this conclusion, the court rejected a number of plaintiff's contentions, instead focusing upon whether the change of use in a "multi-use structure" had occurred. The majority opinion rejected the call by the dissenters for a remand to determine the exact mix of uses by a number of rooms in 1987 and thereafter. Moreover, the majority rejected plaintiff's contention it should be entitled to use the "Ellis Act," which allowed a withdrawal of units from long-term residential use, because plaintiff never sought to comply with the terms of that Act. Finally, the court noted that the planning commission did not assess the $567,000 fee under the HCO as part of its land use proceeding, but merely incorporated the representation by plaintiff that it would pay that fee into a permit condition. The court thus determined the Court of Appeals erred in finding the trial court improperly denied relief to plaintiff.

The court then turned to whether the $567,000 fee was subject to "heightened scrutiny" under *Nollan* and *Dolan*, noting that it had construed the California constitution's takings clause similarly to the Fifth Amendment of the federal Constitution, as interpreted by the United States Supreme Court. The Court observed that in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), the court applied *Dolan* to monetary exactions and used a heightened scrutiny when reviewing discretionary fee impositions. The court noted that it had applied different levels of scrutiny to different kinds of governmental actions regarding fees and exactions in which the state constitutional provisions on takings were applicable. The court determined that the heightened scrutiny applicable to fee exactions was not the appropriate level of scrutiny to be applied to generally applicable land use regulations. In this case, the fee schedule is generally applicable, and the HCO is met upon the payment of that fee. The land use conversion process through the conditional use permit is a separate discretionary process in which the payment of the fee is not an element of approval. This kind of legislatively set fee is subject to a different calculus of a "reasonable relationship in both intended use and amount to the deleterious impact of the development." The court thus concluded that heightened scrutiny of *Nollan* and *Dolan* is applicable only to discretionary land use fees.

The court then turned to the plaintiff's contention that the fee is a taking because it bears no relationship to the housing lost by the hotel conversion. The court found the goal of replacement housing a legitimate government interest and the self-reporting of tourist and long-term units by a date certain, when combined with city staff review, to be an accurate measuring device. Moreover, the fact that the City raised the fee, due to loss of federal housing funding, did not convert the fee into a general revenue-raising device—especially because a hotel owner may avoid the fee by constructing replacement units. The fee is also placed in a separate housing account and not available for general city purposes. The majority also rejected the dissent's test of an average reciprocity of advantage before a regulation (or a regulatory fee) may be imposed. The Court found no support for such a test in these circumstances. In a pointed swipe at the dissent, the majority stated:

> If, as Justice Holmes warned, the Constitution "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. New York (1905), 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937* (dis. opn. of Holmes, J.)), it just as surely does not enact the late Robert Nozick's Minimal State. (See Nozick, Anarchy, State and Utopia (1974) pp. ix, 171-172, 272-274.) However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties, nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state.

The Court also rejected plaintiff's as-applied challenge, because it expressed only a general complaint that the HCO lacked a rational basis. In the Court's view, a mitigation fee measured by the loss of residential units was determined to be reasonably related to the impacts of plaintiff's change in use. The trial court opinion was thus affirmed, and the Court of Appeals' opinion inconsistent therewith reversed.

Justice Baxter, joined by Justice Chin, concurred in part (regarding the reversal of the use of a heightened scrutiny standard in as-applied takings challenges of the replacement housing fee), but dissented on other aspects of the majority opinion. As to the requirement for the conditional use permit, this dissent would not have an "all-or-nothing" analysis. Both the majority opinion and this dissent agreed that the trial court erred in construing the HCO as a zoning

regulation, which would make use of any tourist room of the hotel unlawful. The dissent, however, would not have used any conversion from residential to tourist as the basis for requiring a conditional use permit for the entire structure. The dissent would have remanded the case to determine how many tourist rooms were "grandfathered" in 1987 and, therefore, not subject to the HCO.

While the Baxter/Chin dissent agreed with the majority view that a *Nollan/Dolan* analysis was inapplicable to a legislatively imposed fee schedule, the dissent also believed that an "arbitrary and capricious" standard, normally applicable in substantive due process cases, was not appropriate. Instead, this dissent would use the *Nollan/Dolan* "substantially advances a legitimate state interest" standard as its test, though it would not require a showing of rough proportionality. Rather, the dissent would use a standard requiring a "cause and effect" relationship between the proposed use and the social evil the regulations sought to remedy, and that the fee be related "in both intent and amount" to that social evil. This approach comes from Justice Scalia's concurring opinion in *Pennell v. City of San Jose*, 485 U.S. 1, 15-24 (1988).

Finally, the Baxter/Chin dissent would not terminate the litigation at this point, but would remand the matter to the California Court of Appeals to apply the correct takings standard, relating to fees, and would do so according to the number of units converted only, rather than to the whole hotel.

Justice Brown also dissented, finding the HCO facially unconstitutional, the $567,000 fee a product of a discretionary decision, and the hotel owners constitute a "discrete and insular minority" under *United States v. Carolene Products*, 304 U.S. 144, 152, n. 4 (1938). He suggested that democracy was converted into a "kleptocracy" and equated property use with the freedoms of speech and religion.

This is an interesting case on several fronts. The issue of whether a conversion of less than all rooms from residential to tourist use is a matter of interpretation of state law, as is the refusal to apply a nonconforming use standard to each room. However, the use of the heightened scrutiny, a reasonable relationship, or a cause-and-effect standard to the imposition of fees are matters of national constitutional importance, and the discussion of the law on this point by most of the opinions in this case is a contribution to that dialogue.

Edward J. Sullivan

San Remo Hotel L.P. v. City and County of San Francisco, 117 Cal. Rptr.2d 269 (Mar. 4, 2002).

■ Community Living Arrangements for Youths not Required by Fair Housing Act says Wisconsin Court

In *State ex rel. Bruskewitz v. City of Madison*, 248 Wis.2d 297, 635 N.W.2d 797 (2001), plaintiff appealed from a trial court decision affirming the City's conditional use permit approval for a Community Living Arrangement ("CLA") for 15 to 18 adolescent boys in the juvenile justice system. The City contended it was required to approve the conditional use permit under the Fair Housing Act Amendments ("FHAA") and the American with Disabilities Act ("ADA") because some of the boys have disabilities. The site at issue has been a group home use since 1981. The Wisconsin Department of Health and Family Services required a neighborhood setting before it would authorize the facility. Plaintiff appealed the grant of the conditional use permit approving the facility as a matter of a "reasonable accommodation" under the two acts.

The record showed that 80% of the boys in these facilities were serving time for juvenile delinquency, while the remainder were referred by social service agencies. The applicant contended below that some of the prior and present participants of the program suffered from learning disabilities, sexual abuse, psychological disabilities and past drug and alcohol addictions and that, not only did the conditional use permit meet the local standards, but must be granted under the FHAA and ADA. The city attorney advised the planning commission that these acts were applicable and that the permit could be denied only if the residents presented a "direct threat" to the neighborhood.

Nevertheless, the planning commission denied the application and the applicant appealed to the city council, which referred the matter for further investigation. The planning department retained a physician who reviewed the case files and found that some of the proposed residents had disabilities within the meaning of the two federal acts. The city attorney opined that, under the circumstances, the City must provide a "reasonable accommodation" to the applicant. The council then granted the application with conditions and plaintiff appealed from the trial court decision affirming the city council's conditional use approval.

Plaintiff contended that the council acted arbitrarily and unreasonably in its interpretation of the FHAA and ADA, which the Court found applicable to land use regulations, practices or decisions that discriminate against persons with disabilities. Discrimination against disabled persons can take three different forms: (1) intentional discrimination, (2) discriminatory impact, or (3) refusal to make reasonable accommodations. Plaintiff contended that the disabled residents were not living in the applicant's facilities because they were disabled, but because they needed training in social skills and personal and social responsibility.

The Court found the conditional use process did not discriminate against the facility's residents because it was not triggered by any disabled status of the proposed residents. The conditional use permit in this case was required because this facility was within 2500 feet of another group home. The Court noted that the residents of the CLA were placed in the facility based on their need for independent living skills, and not on the basis of any disability. The Court read prior cases to say that "the obligation to make a reasonable accommodation to the [2500 foot] distance requirement arises only when the proposed residents need to live in a CLA because of their disabilities." Teaching social skills does not equate to dealing with disabilities. The Court concluded at page 807:

> "We conclude that because the proposed residents are not living in a CLA because of their disabilities, the City is not obligated to make a reasonable accommodation to [the applicants]

in the application of the 2,500 foot requirement. That is, the City has no obligation to do anything other than apply the standards for a conditional use permit in the same way it would if none of the proposed residents had a disability. Bruskewitz argues that had the Common Council done this, it could only have concluded that the standards for the permit were not met, and he asks us to reverse for that reason. However, we cannot say as a matter of law that this is the case. Neither can we say, based on our reading of the transcript, that the Common Council would have made the same decision—to grant the conditional use permit—had it not been advised that the FHAA and the ADA required a reasonable accommodation. The question whether the proposed residents had disabilities within the meaning of the statutes, and, if so, what effect that had on the standards the Common Council was to apply, was the focus of a significant portion of the discussion.

"Therefore, we cannot agree with the City's implicit suggestion that we review the record to determine whether the evidence supports granting the permit without regard to the FHAA and the ADA. We are persuaded that the proper course is to reverse and remand to the circuit court with directions that it reverse and remand to the Common Council. The circuit court shall instruct the Common Council to consider [the] application for a conditional use permit by applying the standards for a conditional use permit under [the Madison Zoning Code] without regard to a reasonable accommodation based on handicap or disability."

This case involves application of the FHAA and ADA to a group facility in which not all residents were "handicapped." The Court takes a strict view that both acts apply only when there is a connection between the disability of the proposed residents and the 2500 foot separation requirement. In this case, the Court found that connection missing. Time will tell whether this view will overcome the more prevalent view that the presence of a disability in some of the residents is a ground to involve application of the two acts.

Edward J. Sullivan

State ex rel. Bruskewitz v. City of Madison, 248 Wis.2d 297, 635 N.W.2d 797 (2001).

Federal Supreme Court Finds No Taking in Thirty-Two Month Moratorium

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 122 S.Ct. 1465 (Apr. 23, 2002), a majority of the United States Supreme Court upheld a moratorium on development in the Lake Tahoe Basin against a *per se* takings challenge. Defendant, Tahoe Regional Planning Agency (TRPA), authorized two moratoria while it studied environmental means of preserving the clarity of the lake's waters. That clarity was threatened by development in the lake basin and the consequent increase in impervious surfaces, which created runoff into the lake. TRPA, an agency created by an interstate compact approved by Congress in 1968 and amended in 1980, began work on development restrictions on steeper slopes and "Stream Environmental Zones" (SEZs). As a result of the two moratoria, a 32-month delay in development occurred. A further three-year delay occurred when an injunction was granted against the plan that was developed during the moratoria. The Court noted that that injunction-based moratorium was not before it in this case.

Plaintiff, Tahoe Sierra Preservation Council (Council), is a landowner organization of 2,000 members, some of whom own land with steep slopes and within the SEZ areas. The Council sought damages for alleged takings resulting from the 32-month moratorium initiated by TRPA. Using the three *Penn Central* factors (*i.e.*, economic impact on the plaintiff, interference with reasonable investment-backed expectations, and the character of the regulation), the district court found no taking, chiefly because there were no individualized facts concerning any of the property owner claims. However, the district court felt that, though there was some value to the land during the moratorium, the landowners in the basin were deprived of all viable economic use during that period, and compensation was required for that loss under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Both parties appealed to the Ninth Circuit. TRPA challenged the *Lucas* 32-month moratorium takings claim upheld by the district court, and the Council unsuccessfully appealed the district court's denial of its further claim based on the three-year injunction. The Ninth Circuit found no basis for a *Lucas* claim and reversed the district court. The Ninth Circuit used a takings analysis based on three dimensions: the physical (size and shape of the property), the functional (use or disposition of the property), and the temporal (relating to the duration of the regulation at issue). The court rejected plaintiff's contentions that any temporal denial of all use constituted a taking. In rendering its decision, the Ninth Circuit distinguished *Lucas*, which involved a denial of all use for the foreseeable future, and *First English Evangelical Church v. Los Angeles County*, 482 U.S. 304 (1987), which dealt with the remedy for a temporary taking without establishing a new test for when a taking has occurred. The Court concluded that the three *Penn Central* factors effectively established the test for temporary takings. Plaintiff petitioned the United States Supreme Court for review of the Ninth Circuit decision, which was addressed only on the 32-month moratorium. The Court granted certiorari and affirmed.

The Court's majority opinion, authored by Justice Stevens, characterized the Council's attack as a facial one, which requires plaintiff to show that the "mere enactment" of the regulation effected a taking and, thus, the three *Penn Central* factors need not be weighed. He cited Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001), to say that the Court eschewed "categorical rules" for takings and drew a careful distinction between *physical* takings claims, where property has been invaded, and regulatory takings claims, where use of property has been restricted and the takings analysis is based on "ad hoc, factual inquiries." The court added: "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions."

In this case, the Council relied on the second prong of the United States Supreme Court's *Agins* test, contending that its members were deprived of all viable economic use of their land. However, the majority used the Ninth Circuit's three-dimensional analysis of this prong of *Agins* to avoid weighing property interests too narrowly in determining whether plaintiff's members were deprived of all viable economic use of their property. The Court noted it had upheld restrictions that allowed use of some, but not all, portions of land and indicated that these restrictions would not normally result in a taking.

The majority opinion noted that *First English* established a rule regarding the *remedy* for a taking, but did not provide guidance as to when such a taking occurred. The Court also pointed out that, in *First English*, on remand, the California court did not find a taking, and the Supreme Court had denied review. The majority further observed that in *First English*, the Court had exempted from categorical takings those restrictions mandated for safety reasons, as well as normal delays in issuing permits. Thus, unlike the *Lucas* decision, the restriction was not "unconditional and permanent." Anything less than a total loss of value requires the application of the *Penn Central* analysis because to do otherwise, the majority reasoned, would require every delay, like any permanent denial of use on a portion of a parcel, to be equated to a taking. Instead, the Court said it must focus on "the parcel as a whole," concluding that "The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." [Footnote omitted.]

The Court noted the Restatement of Property defines a property interest in both its physical and temporal dimensions, so that a total denial of both must occur to effect a taking. Mere fluctuations if value are incidents of ownership and do not necessarily result in a categorical taking. Additionally, the Court said that a standard of "fairness and justice" also should be weighed in determining whether a taking occurred, so as to prevent individuals from bearing the burdens that should be borne by the public as a whole. However, there was no per se taking in this case to justify a categorical rule that any deprivation of all use, however brief, could be equated to a taking. To do so, the Court observed, would render ordinary governmental exercises of power quite impossible and would encourage hasty decision-making and such a path would not be consistent with the Supreme Court's approach of weighing all the circumstances. The majority opinion concluded that "fairness and justice" are indefinite terms, but that moratoria are recognized as essential tools to regulate development. In addition, such tools are most prone to singling out individual property owners for unfairness and present a modicum of confidence that property values will continue to rise. The majority opinion specifically rejected any set time after which a moratorium would result in a taking, preferring to look at the circumstances of each case, and affirmed the decision of the Ninth Circuit.

The Chief Justice, joined by Justices Scalia and Thomas, dissented, characterizing the deprivation of viable economic use as one for six years, instead of 32 months. The dissenters would have found a taking and would have stressed the first *Penn Central* factor, *i.e.*, the impact of the regulation on the plaintiff. The dissenters suggested that TRPA actually caused the six-year development delay because the injunction was issued against TRPA's arguably poorly drafted plan, making TRPA the "moving force" behind the entire six-year development delay. Moreover, the dissenters saw a taking as a one-dimensional matter, i.e., all development was prohibited for a time, which would automatically equate to a taking, and saw a danger in encouraging governments to label restrictions to be "temporary" in nature. The dissenters asked rhetorically whether an order to freeze development in the Lake Tahoe Basin for six years while TRPA went about acquiring land would have been the "practical equivalent" of a taking so as to require compensation. The dissenters also faulted the majority for stressing property value, rather than prohibition on use, for takings purposes. While conceding the statutory period of delay may be a part of the background of state property law under Lucas and might be valid up to approximately one year, the six-year period at issue, according to the dissenters, effected a taking and required compensation.

Justice Thomas, joined by Justice Scalia, also dissented, to deal specifically with the "parcel as a whole" rule, which it opined was not settled law at all. This dissent also suggested that *First English* did provide substantive takings law, as opposed to confining itself to the remedy for a taking. The dissent would find all deprivation of property use, even for a temporary period, to equate to a taking.

Perhaps with the virtue of hindsight, this decision is unsurprising. Justice Stevens, as the senior justice for the majority, assigned the case to himself. He asked in oral argument whether a ten-minute deprivation of use constituted a taking, and counsel for the Council was logically obliged to answer in the affirmative. That answer effectively ended the case. To some extent, it is Justice Stevens who had the last word through his opinion. On the denial of a petition for rehearing en banc, Judge Kozinski contended that his brethren in the Ninth Circuit majority in this case had adopted Justice Stevens' *First English* dissent and suggested that the majority of the Supreme Court thought otherwise on the takings question. This was a fairly effective way of signaling to the conservative majority on the court that Justice Stevens' views, adopted by the Ninth Circuit, should be rejected once more in this case if certiorari were requested and granted. However, it is Judge Kozinski who has the dilemma of answered prayers—certiorari review was sought and granted; however, the opinion that resulted was something other than what Judge Kozinksi had predicted.

Edward J. Sullivan

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, (Apr. 23, 2002).

District Court Upholds RLUIPA as Constitutional

Freedom Baptist Church v. Middletown Township is the first federal court opinion addressing the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 (42 USC § 2000cc, hereinafter "RLUIPA"). This is a significant case given the United States Supreme Court decision in *City of Boerne v. Flores*,

521 U.S. 507 (1997), regarding the Religious Freedom Restoration Act of 1993 (42 USC § 2000bb, hereinafter "RFRA"). (Other federal court decisions have addressed the applicability of RLUIPA. *See, e.g., DiLaura v. Ann Arbor Township*, 30 Fed. Appx. 501, 2002 WL 273774 (6th Cir.(Mich.)); and *C.L.U.B. v. City of Chicago*, 157 F.Supp.2d 903 (N.D. Ill. 2001). But none have addressed its constitutionality. For cases in the pipeline, see <www.rluipa.com>.)

In *Boerne*, in a plurality opinion by Justice Kennedy in which four justices joined, the Court held that RFRA was unconstitutional as it applied to the States. *Boerne* involved a decision by a city to deny a building permit for expansion of a church, based on the city's historic preservation law. The church appealed, alleging a violation of RFRA.

RFRA prohibited federal, state or local governments from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden furthers a compelling governmental interest and is the least restrictive means of doing so. (42 USC § 2000bb-1).

In enacting RFRA, Congress relied on its power to enforce the 14th Amendment, which prohibits states from enacting laws that abridge privileges and immunities, due process, or equal protection. In *Boerne*, the Court recognized Congress could prohibit conduct which is not itself unconstitutional to enforce the 14th Amendment, noting it has done SO repeatedly in civil rights and voting cases. But Congress cannot change or add to constitutional rights. Moreover "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

The Court found much less support in the record for RFRA compared to the voting rights cases. It concluded that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."

After a lengthy review of the history of the 14th Amendment and the courts' role in adjudicating such matters since *Marbury v. Madison*, 1 Cranch 137, 176 (1801), the Court concluded RFRA did not pass constitutional muster. The Court observed that "[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."

Several concurring opinions focused on whether the Court should reconsider its holding in *Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), another 5 to 4 plurality which upheld denial of unemployment benefits to two state workers who used peyote, in violation of a general civil law, despite a claim that it was ingested for religious purposes. Justice Scalia concurred with a discussion of why constitutional history did not support RFRA. Only Justice Stevens considered and would have found that RFRA violated the Establishment Clause, noting that, if the building in Boerne was owned by an atheist, it would get no protection under RFRA.

RLUIPA was adopted largely to overcome the constitutional infirmities with RFRA identified in *Boerne*. No doubt to provide more proportionality between the prescriptions and remedies in the Act and the need for them, RLUIPA is supported by a much larger record of alleged discrimination against religious assemblies and practices than was RFRA and a fuller examination of Congress' authority under the Spending and Commerce Clauses and the 14th Amendment, which the court reprised in *Freedom Baptist*.

In relevant part, RLUIPA prohibits government from imposing or implementing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution" furthers a compelling governmental interest and is the least restrictive means of doing so. (§(a)(1)). RLUIPA applies to any case in which "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." (§(a)(2)(C)) Therefore RLUIPA applies to all legislative and quasi-judicial decisions regarding religious institutions, including land use and limited land use decisions.

The facts in *Freedom Baptist Church v. Middletown Township* are these. A church proposed to rent space in an office building in order to conduct religious services. Such a use was not permitted in the zone in which the building was situated. The church applied for a use variance, which the township denied. The church appealed to state court, and, early in 2002, the church and township settled the dispute, allowing the church subject to certain conditions regarding parking and times of use.

In the meantime, the church filed a §1983 action in federal court, alleging the township law violated RLUIPA. The township moved to dismiss, alleging RLUIPA is unconstitutional on its face. At oral argument on the motion, all parties agreed the constitutionality of RLUIPA controls, and the remainder of the 43-page decision addressed that issue.

First, the court addressed the township's claim that RLUIPA violates the Establishment Clause, because it "arms religious entities with almost blanket immunity from land use requirements, while providing no such immunity or protection to non-religious entities," echoing Justice Steven's terse concurring opinion in *Boerne*, 521 U.S. at 536-37. Noting Justice Stevens alone raised this issue, and the other justices in *Boerne* dwelt on the Free Exercise element of RFRA, the district court was not persuaded by the township's argument. The opinion cited to several post-*Boerne* cases that have upheld RFRA as to the federal government (*Kikumura v. Hurley*, 242 F.3d at 959-60; *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 833 (9th Cir. 1999); and *In re Young*, 141 F.3d 854, 861 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998)) and to pre-*Boerne* cases that have sustained exceptions to laws of general applicability based on religion (*e.g., Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) and *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987)). Therefore the court

concluded RLUIPA enforces the Free Exercise clause and does not invoke the Establishment clause.

Second, the court considered the township's argument that Congress exceeded its authority under the Commerce Clause when it adopted the RLUIPA, because the township alleged religious institutions have no effect on interstate commerce. But the court recognized rental of property and use and development of land does substantially affect interstate commerce. *See., e.g., Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205-06 (5th Cir. 2000)("an act of discrimination that directly interferes with a commercial transaction," such as the purchase, sale or rental of property, "is an act that can be regulated to facilitate economic activity"); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295-99 (1985) (a religious foundation is an "enterprise engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act).

In so doing, the court declined to "quibble with Congress's ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations." The court identified a parallel in the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)), which limits local authority to regulate cell towers and the like under Commerce Clause authority. Thus the court said, "insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause."

Third, the court found zoning ordinances by their nature involve case-by-case adjudication, making them different from laws of general applicability, likening the situation to that in *Sherbert v. Verner,* 374 U.S. 398 (1963), where the Court ruled a state could not withhold unemployment benefits to a member of a church who would not work on Saturday, which is the Sabbath Day of her faith, when the state allowed exemptions for good cause. The Court found that, absent a compelling state interest, a religious reason is a good cause. The court continued by citing to other cases in which the courts have disapproved of unequal treatment of religious activities measured against secular ones. *See, e.g., Fraternal Order of Newark Police Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999)(prohibiting beards on police with secular exceptions); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)(prohibiting ritual killing of animals with secular exceptions). Thus, the court concluded, "§§ 2(b)(1) and (2) of the RLUIPA are constitutional because they codify existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions or which 'discriminate' against them based on their religious affiliation."

Fourth, the court found that §(b)(3) of RLUIPA, which prohibits regulations that totally exclude or unreasonably limit religious assemblies in a jurisdiction, is consistent with Supreme Court First and Fourteenth Amendment jurisprudence, citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986)(where the city unsuccessfully defended exclusion of adult theaters by saying patrons could go elsewhere for it); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 447-48 (1985)(where an ordinance required a home for the mentally retarded to have a special use permit where other similar uses were allowed as of right); and *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981)(where the borough sought to totally exclude live entertainment).

However, the township disagreed that RLUIPA codifies existing law, arguing that "[w]hat RLUIPA actually does is change the standard by which courts analyze land use cases." The court agreed with this argument, conceding "RLUIPA *is* something new under the federalism sun... It in fact places a statutory thumb on the side of religious free exercise in zoning cases." (emphasis in original) However, after reciting the many cautions in Justice Kennedy's opinion in *Boerne*, the court concluded tersely that RFRA differs from RLUIPA in that the latter is more narrowly drawn and applied (*i.e.*, only to zoning laws), and that its enforcement depends on individualized assessments, consistent with the principle in *Smith* that heightened scrutiny is warranted "where the State has in place a system of individual exemptions," but nevertheless "refuse[s] to extend that system to cases of 'religious hardship.'" *Smith*, 494 U.S. at 884. Thus, the court upheld RLUIPA as constitutional and certified the case for interlocutory appeal to the Court of Appeals, which, no doubt, will follow.

The case raises a dilemma, among others, under ORS 215.416(8)(a) and 227.173, which require land use and related decisions to be "based on standards and criteria, which shall be set forth in the development ordinance." RLUIPA is not in any local development ordinance familiar to this author.

A few religious institutions have raised RLUIPA in local proceedings where this author serves as hearings official. This author generally has declined to apply the statute, based on ORS 215.416(8)(a) or 227.173. In one recent case, where, after appeal of a decision in which the hearings officer refused to apply RLUIPA, the governing body directed the hearings officer to apply it, this author found that the applicant in that case was substantially burdened by a prohibition on religious assemblies in industrial zones. Although there was a compelling interest in preserving industrial land for industrial use, the local government failed to show that a prohibition of the use in industrial zones was the least restrictive means of furthering that interest.

In response to that decision, the local government counsel advised its governing body that it will be difficult under RLUIPA to deny most requests to locate churches in zones where they have not heretofore been allowed. However, because RLUIPA depends on the facts of the case, this author offers no opinion about the application of RLUIPA in other cases.

Larry Epstein

Freedom Baptist Church v. Middletown Township, No. 01-5345, (E.D. Pa. filed May 8, 2002).

LUBA

LUBA Awards Attorney Fees Against City

Local governments are not immune from the risk of attorney fee awards in land use appeals. In *6710 LLC v. City of Portland*, ____ Or LUBA____, LUBA No. 2001-069, 2/6/02 (Order on Motion for Attorney Fees), *aff'd* 181Or App 467, 46 P.3d 229 (2002), LUBA made its first-ever award of attorney fees against a local government, concluding that the City of Portland's position on the merits of the appeal was "lacking in probable cause," and that an award of fees to the petitioner was warranted.

The case involved the city's approval of an adjustment to a zone boundary line through a Type I "mapping error correction" process, which allows for administrative adjustments to zone boundary lines where the existence of an error can be established. The specific code provision relied upon by the city allows for such corrections where the city determines that the existing zone line does not match the line as shown in the ordinance that originally applied the zoning designation. However, in making its decision the city failed to review the 1959 ordinance and associated map that originally created the zoning designation, and did not include any part of that ordinance or map in the record.

Petitioner 6710 LLC objected to the city's failure to consider the documents necessary to make an administrative "error correction" under the city code, and appealed to LUBA on that basis. LUBA remanded the city's decision, concluding that the city had failed to consider the requisite ordinance and map, and that there was no evidence in the record to support the decision. In granting petitioner's motion for attorney fees, LUBA concluded that the city's response brief essentially failed to respond to petitioners arguments, and merely recited the city's inadequate findings. LUBA concluded that "to the extent the city's brief can be read to offer a response to petitioner's assignment of error, we hold that no reasonable lawyer would conclude that the argument that is presented in the city's brief has merit. Therefore, petitioner is entitled to its reasonable attorney fees and expenses pursuant to ORS 197.830(15)(b)." LUBA's Order awarding fees was affirmed without opinion by the Court of Appeals.

Roger A. Alfred. Mr. Alfred is an attorney with Perkins Coie, LLP.

6710 LLC v. City of Portland, Or LUBA, LUBA No. 2001-069, 2/6/02 (Order on Motion for Attorney Fees), 181 Or App 467, 46 P3d 229 (2002).

Editor's Note: The Oregon Supreme Court recently denied the City's Petition for Review.

GOAL 14

In *Friends of Linn County v. Linn County and City of Harrisburg*, _____ Or LUBA _____, LUBA Nos. 2001-165/168 (2/13/02), LUBA ruled the County failed to satisfy Goal 14, Factors 1 and 2, when it approved an expansion of Harrisburg's UGB on the basis of improved livability. Harrisburg proposed to add 9.5 acres to its UGB and planned to use 2.5 acres for a park and detention pond, 2 acres for additional Cramer Avenue right-of-way and the remaining 4.7 acres for residential development. A 1999 revision to Harrisburg's buildable lands inventory indicated Harrisburg would need 68 acres of land designated for single-family residential use by the year 2017 and estimated a 136 acre supply of this land. The inventory also indicated Harrisburg will need 26 acres of land for parks and open space, and estimated that 26 acres of the surplus single-family residential-zoned land would be available to accommodate this need.

Petitioner argued the County erred by approving the UGB expansion on the basis of improved livability, because the county did not identify any population changes that demonstrate a need for additional parks or residential land and, therefore, the expansion is not required to address livability issues. While the UGB expansion might benefit Harrisburg, particularly by enabling Harrisburg to use Cramer Avenue as the boundary between urban and rural uses, petitioner asserted this was insufficient to establish a need to expand the UGB. Intervenor Harrisburg contended the primary purpose of the UGB expansion was to add park land and improve transportation links on the city's east side, and that the small acreage added for residential uses was in incidental benefit. Harrisburg also cited *City of Salem v. Families for Responsible Government*, 64 Or App 238, 668 P2d 395 (1983), for the proposition that some land may be included in a UGB, even if it is not needed, if it is nevertheless committed to urban uses. In this case, Harrisburg argued the 4.7 acres added for residential use are committed to urban uses because they more logically divide urban and rural uses and they allow public facilities to be used more efficiently.

While acknowledging the precedent Harrisburg cited, LUBA nevertheless concluded there is no showing that the 4.7 acres included in the UGB expansion is committed to urban uses. It is vacant, not served by city sewer or water and is bordered on three sides by property zoned EFU. LUBA found insufficient the County's determination that including this land allows Cramer Avenue to be used as a boundary between urban and rural uses. Harrisburg's desire for a more logical urban/rural boundary, additional park land and improved transportation links does not adequately demonstrate a need for the UGB expansion under Goal 14, Factors 1 and 2, particularly since a park is allowed as a conditional use in the EFU zone and Cramer Avenue is already designated as a minor arterial in Harrisburg's Transportation Systems Plan. Moreover, evidence in the record demonstrated that Harrisburg intended to proceed with both park development and improvement of Cramer Avenue regardless of whether the UGB expansion is approved. In the absence of any demonstrated need, LUBA concluded the County erred in approving the UGB expansion.

LUBA Jurisdiction

Electrical Generating Facility

In *Rita Thomas Soc, Inc. v. City of Turner*, LUBA No. 2001-170 (4/4/2002), LUBA ruled that the state Energy Facility Siting Council, not LUBA, has jurisdiction to review a city administrator's letter. In the letter, which intervenor Calpine Corporation solicited, the administrator concluded that Calpine's proposed natural gas fired turbine electrical generating facility is a conditional use in the city's Industrial (M-1) zone. Petitioners appealed the letter to LUBA. Calpine moved to dismiss the appeal on the grounds, among others, that EFSC, not LUBA, has jurisdiction to review the letter and that the letter is not a final land use decision. LUBA found Calpine's first argument dispositive and dismissed the appeal.

LUBA based its ruling on the statutes governing energy facility siting. To site an energy facility, an applicant must obtain a site certificate from EFSC. Issuance of a site certificate depends on a showing of compliance with the statewide planning goals. The applicant may make this showing by obtaining land use approvals from the local government in which the energy facility will be located or by requesting EFSC to determine the proposed facility complies with the local comprehensive plan and land use regulations. EFSC's determination of local land use compliance is referred to as a "path b" determination.

The applicable statutes also include an expedited process for energy facilities. Under the expedited process, the applicant must demonstrate to the Oregon Office of Energy that the proposed facility is either a permitted or conditional use under the local zoning scheme. When an applicant uses the expedited process, the only available method for showing compliance with the statewide planning goals is the "path b" determination. To assist in making a "path b" determination, the OOE establishes a local government advisory group to advise OOE on whether the proposed facility complies with local land use approval standards. By statute, LUBA has no jurisdiction over either a local government land use approval for the facility or the advisory group's recommendation. The Oregon Supreme Court has sole jurisdiction to review EFSC's determination in these circumstances. As LUBA concluded "the statutory scheme sets out a clear intent that review of any local government decision related to the siting of energy facilities does not lie with LUBA." (Slip Op. at 6)

Nothwithstanding this statutory scheme, petitioners argued that the letter Calpine obtained was an administrative decision under the local code and that nothing in the energy facility siting statutes negates LUBA's jurisdiction over these kinds of local decisions. LUBA acknowledged that petitioners' argument was plausible, but rejected it because "we do not believe the legislature intended LUBA to have jurisdiction over ancillary local government decision involving the siting of energy facilities." LUBA reasoned:

> The statutory scheme does not expressly anticipate the current situation, where an applicant requests clarification of the zoning code from a local government during the threshold inquiry for obtaining expedited review.
>
> Given that LUBA does not have jurisdiction over any other aspect of the energy facility siting review process, it is difficult to imagine that the legislature intended for LUBA to have jurisdiction over a local government decision rendered as part of the process to determine whether a proposed facility qualifies for expedited review. Jurisdiction over such matters lies with EFSC with appeal to the Oregon Supreme Court, and not with LUBA. (Slip Op. at 7)

Accordingly, LUBA dismissed the appeal.

Timeliness

LUBA phrased the controlling question in *Warf v. Coos County*, LUBA No. 2002-010 (4/18/02), as "whether petitioners' right of appeal on the date they first learned of the county's October 31, 2001 decision was governed by the procedure the county *should have followed* in making its October 31, 2001 decision or by the procedure the county *actually followed*." LUBA concluded that under the 1999 revisions to ORS 197.830(3) and (4), petitioners' only option was to appeal to LUBA. Since petitioners appealed to LUBA after they unsuccessfully tried to file a local appeal and, as a result, filed their appeal well beyond the 21-day appeal period, LUBA dismissed the appeal as untimely.

The underlying facts are straightforward. The county planning director approved intervenor/applicants' property line adjustments on October 31, 2001. Petitioners first learned about the property line adjustments on December 13, 2001 and filed a local appeal on December 28, 2001. The county's attorney informed petitioners on January 4, 2002 that the county viewed the property line adjustments as ministerial decisions and that the county's code provided no local right of appeal. Petitioners filed their appeal to LUBA on January 24, 2002.

Intervenors moved to dismiss the appeal as untimely. They argued that the appealed decision was ministerial and, therefore, that LUBA lacked jurisdiction to review it. Even if the decision could be viewed as discretionary, intervenors contended the deadline for appealing to LUBA under ORS 197.830(3) expired while petitioners were attempting to pursue a nonexistent local right of appeal. Petitioners, on the other hand, asserted that the county's decision was discretionary and that they were required to exhaust their local appeal rights. Accordingly, petitioners argued their appeal to LUBA was timely filed.

The county's code authorizes the planning department to approve property line adjustments, but does not identify any particular process the planning department must use to do so. In this case, the county approved the property line adjustments as a ministerial decision. It did not follow the code process for making administrative decisions, which requires written notice of the decision to the applicant and surrounding property owners. Under the code, administrative decisions are discretionary decisions and include decisions made by staff without a prior public hearing and decisions that are made initially by a hearings body after a public hearing. The code makes clear that an administrative decision may be appealed through a local appeals process and may not be appealed directly to LUBA.

LUBA examined petitioners' two key arguments supporting

their contention that their LUBA appeal was timely. First, they asserted the county's decision was discretionary and should have been made according to the county's process for issuing administrative decisions. Second, they argued the county should have provided a local appeal even though the county did not purport to approve the property line adjustments as administrative decisions. Even if petitioners' first argument was correct, LUBA concluded their second argument was wrong. Under ORS 197.830(3), once petitioners discovered the county erred by not following the administrative decision making process in the code, the only appeal route was directly to LUBA.

LUBA traced the history of its rulings in similar circumstances where, as here, a local government makes a decision without a hearing and petitioners belatedly discover the decision. In particular, LUBA noted that the Court of Appeals narrowly affirmed LUBA's decision in *Tarjoto v. Lane County*, 29 Or LUBA 408, *aff'd* 137 Or App 305, 904 P2d 641 (1995), in which LUBA concluded that petitioners were required to exhaust their administrative remedies, because the county in that case actually provided a local appeal. In doing so, the Court expressly left open the possibility that ORS 197.830(3) provides a direct right of appeal to LUBA under different circumstances. Specifically, the Court signaled its view that "the legislature adopted ORS 197.830(3) to provide a right of direct appeal to LUBA in such cases, except in cases where the petitioners also seek a local appeal and, for whatever reason, the local government grants a local appeal." (Slip Op. at 12)

LUBA also reviewed the legislative history of ORS 197.830(3) and (4) and concluded these subsections now comprehensively describe the deadlines for appealing land use decisions to LUBA in cases where a local hearing is not provided in advance of the decision, stating:

> We conclude that ORS 197.830(4) only applies where a local government is attempting to render a permit decision without a prior hearing "pursuant to ORS 215.416(11) or 227.175(10)." We also conclude that ORS 197.830(3) applies in all other cases where a local government adopts a land use decision without providing a hearing, including cases where the local government mistakenly believes its decision is not a discretionary "permit" decision as that term is defined by ORS 215.402 and 227.160(2), and for that reason does not provide the required notice of decision and opportunity for a local appeal. (Slip Op. at 16)

LUBA acknowledged that this conclusion is inconsistent with its ruling in *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001). Stating that "[w]e no believe that the choice between ORS 197.830(3)(and (4) is governed by the procedure the local government actually followed," LUBA expressly overruled its decision in *Neighbors for Sensible Dev*.

Turning to the facts of this appeal, LUBA concluded that ORS 197.830(3) applies because the county made its decision without a hearing and did not treat it as a discretionary permit decision. Under that statute, petitioners could have appealed that decision either within 21 days of receiving actual notice where notice is required (197.830(3)(a)) or within 21 days of the date petitioners knew or should have known of the decision where no notice is required (ORS 197.830(3)(b)). Assuming petitioners are correct that county erred in failing to treat the decision as a discretionary permit, petitioners were entitled to written notice of the decision. Accordingly, they were entitled to appeal the decision directly to LUBA within 21 days after they received actual notice of the decision on December 13, 2001. Since petitioners failed to do so and pursued a local appeal instead, LUBA concluded that the appeal they filed with LUBA on January 24, 2002 was untimely and dismissed the appeal.

Building permits

Petitioners in *Tirumali v. City of Portland*, LUBA No. 2000-005 (1/03/02), challenged the City's issuance of building permits for a single family residence and a letter from the planning director explaining the city's calculation of height for purposes of the permits, arguing the city erroneously approved a house that exceeded the applicable height limit. LUBA initially dismissed the appeal for lack of jurisdiction, ruling the permits were issued under clear and objective standards and, therefore, were not reviewable "land use decisions" under ORS 197.015(10)(b). On further appeal, the Court of Appeals remanded LUBA's decision because the court concluded the applicable height regulations were susceptible to at least two plausible interpretations and were not decision based on clear and objective standards. The court declined to rule on the status of the letter.

On remand, the city renewed its motion to dismiss the appeals for lack of jurisdiction. The city argued that despite the Court of Appeals' ruling, the building permits were not land use decisions because the city did not apply land use regulations in processing the permits. LUBA disagreed, ruling that the building permits clearly apply the zoning code's methodology for calculating height and, therefore, are land use decisions. However, LUBA agreed with the City that the challenged letter from the planning director is not a land use decision. LUBA characterized the letter as simply providing an explanation of how building height was calculated for purposes of approving the building permits. It did not independently apply a land use regulation.

Of particular interest in this decision is LUBA's ruling that while the building permits are appealable land use decisions, they are not discretionary permits within the meaning of ORS 227.160 and 227.175. Generally, the circumstances in which a building permit has been held to be a discretionary "permit" involve a question concerning the nature of the proposed use or whether the use is permitted at all in a particular zone. LUBA noted that it has never held that a building permit for an allowed use is also a discretionary permit solely because the local government interpreted an ambiguous term in an applicable land use regulation during the course of issuing the building permit. Here, there is no dispute that the residence for which the building permits were issued is an allowed use in the underlying zone. The city exercised its discretion only in interpreting the term "finished surface" for the purpose of determining the grade from which height should be measured. LUBA concluded : "We do not believe that an interpretation of such a code provision under such circumstances is the type of 'discretionary approval' that

results in a 'permit' under ORS 227.160(2)." LUBA also examined differences in relevant statutory language and the city's code, which it perceived to supported its determination that the building permits were not discretionary permits. Accordingly, LUBA rejected the petitioners' claim of error.

Ordinance regulating tree removal

Even though Eugene adopted new tree removal and replacement regulations as part of the its environment and health code, not its land use code, LUBA concluded the ordinance adopting the regulations is a reviewable land use decision in *Home Builders Association of Lane County v. City of Eugene*, LUBA No. 2001-060 (2/28/02). The city previously housed all of its tree removal regulations in the environment and health code. As part of a code update, the city bifurcated its regulations so that tree removal provisions applicable to land use development applications were moved to the city's land use code and tree removal provisions not associated with land use development remained in the environment and health code. The city argued the challenged ordinance was not a land use decision because the regulations it adopted were not land use regulations. However, DLCD's 1981 acknowledgment report indicated the city originally adopted the tree removal regulations in its environment and health code as a Goal 5 implementing measure. The fact that the environment and health code now regulated only tree removals not associated with development was irrelevant in LUBA's view, as LUBA made clear:

> The 1981 tree ordinance was adopted to protect some of the city's Goal 5 resources. As far as we can tell, the 1981 tree ordinance did not distinguish between preservation of trees in the context of land use approvals and other contexts: it simply regulated removal of trees. There is no suggestion in any of the materials submitted to us that tree preservation requirements outside the context of land use approvals are not part of the city's program to achieve Goal 5. In short, there is a clear connection between the 1981 ordinance amended by the challenged decision and Goal 5. Because the tree ordinance amended in this decision is a Goal 5 implementing regulation, the challenged decision implicates Goal 5. Therefore, the challenged decision is a land use decision, and we have jurisdiction to decide this appeal. (Slip Op at 5-6)

The city conceded that if LUBA determines Goal 5 applies, the ordinance must be remanded because the city failed to provide notice to DLCD. Accordingly, LUBA remanded the decision.

LUBA Procedure

Extending deadlines for petitions for review

In an order issued in *Confederated Tribes of the Warm Springs Reservation v. Jefferson County*, LUBA Nos 2002-17 – 2002-021 (4/29/02), LUBA concluded it had the authority to extend the deadline for filing petitions for review without a stipulation by the parties where, as here, it failed to notify all parties of the date the record was received and that failure was prejudicial. LUBA received the record on April 10, 2002, but failed to send a letter to all of the parties notifying them of this fact. Various intervenor-petitioners did not become aware of the record transmittal until as late as April 23rd. They moved to extend the deadline for filing their petitions for review and argued that unless the deadline is extended, the 14-day time period for filing record objections will elapse *after* the petitions for review are due. The county opposed extending the filing deadline for the petitions.

LUBA concluded OAR 661-010-0065(4) provides express authority for LUBA to extend the due date for the petitions for review on its own motion, where such an extension is necessary to avoid prejudice to one or more parties' substantial rights under the circumstances presented here. The rule LUBA cited explains the effect of filing a motion with LUBA. It states that except for certain motions "or as may otherwise be ordered by LUBA on its own motion," filing a motion will not suspend any time limits in the review process. Since LUBA failed to notify the parties of the date it received the record, a critical date that determines the deadline for filing record objections and petitions for review, LUBA concluded it was appropriate to extend the due date for the petitions.

Nature of record and decision makers in ODOT proceeding

Petitioners in *Witham Parts and Equipment v. ODOT*, LUBA Nos. 2001-176 – 2001-178 (Order, 4/18/02) challenged ODOT's design approval of proposed improvements to the North Medford Interchange at the intersection of Interstate Highway 5 and State Highway 62. They filed a motion with LUBA seeking to take evidence outside of the record to determine the identity of the ODOT decision makers and to identify the items that were placed before the decision makers. LUBA acknowledged that when, as here, the challenged land use decision is only a small part of a larger approval process, there is the possibility of confusion about the actual ODOT decision makers for the design review. After petitioners filed their motion, however, ODOT identified three individuals to whom decision making authority had been delegated. Since petitioners did not dispute ODOT's assertion, LUBA denied their motion to take additional evidence to determine the actual decision makers. LUBA also denied the portion of their motion seeking to take evidence to determine the composition of the record, ruling the motion was premature until LUBA ruled on petitioners' record objections and the parties filed briefs.

LUBA similarly denied petitioners' record objections. Again, LUBA noted that because the challenged design decision is part of a larger state and federal approval process, it may be difficult to determine which documents produced for the entire approval process are part of the record of the design approval. Often, the determination of whether particular documents were "placed before" the decision maker depends on whether the decision maker's conduct toward the documents created a reasonable expectation that the documents are part of the record. In this case, which involved an environmental assessment, LUBA concluded that "it is the nature of the environmental assessment process itself and the reasonable expectations of the parties to that process, rather than the conduct of the decision makers" that is critical in determining the scope of the record. (Order at 5) Applying that principle to the

facts here, LUBA ruled that "so long as the documents in the record were created as part of the process that was initiated by the Oregon Transportation Commission to construct the North Medford Interchange or were submitted to ODOT as part of that process, and those documents were maintained in manner so that a reasonable person would expect those documents to be available to the state and federal decision makers that must ultimately approve the project and they are in fact available to the final decision makers, we believe they are properly viewed as part of the record." (Order at 6-7) Since ODOT asserted the disputed documents were part of the record and petitioners failed to show they were not, LUBA denied the record objection.

Award of Costs

Can a petitioner be deemed a prevailing party and be awarded costs when the LUBA appeal petitioner filed is ultimately dismissed? Petitioner in *Central Klamath County CAT v. Klamath County*, ____ Or LUBA ____, LUBA No. 2001-175 (Order on Costs, 1/18/02) filed a second LUBA appeal challenging the county's approval on remand of a cellular phone tower application. After petitioner filed its appeal, the applicant withdrew its local application and the county rescinded its decision approving the cell tower. The county moved to dismiss the appeal as moot and petitioner supported the motion, stating that it had achieved its desired result in filing the appeal. LUBA thereafter dismissed the appeal.

Petitioner filed a cost bill and argued, over the county's objection, that it was the prevailing party. The county relied on ORCP 54 A(3) to support its argument and noted that the Court of Appeals viewed that ORCP as highly instructive in determining who is a prevailing party in cases that are dismissed before LUBA issues a final decision on the merits. ORCP 54 A(3) addresses costs and disbursements and states that "Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party." Based on a review of its prior decisions involving circumstances similar to this appeal, LUBA concluded that "In order for a petitioner to be deemed the prevailing party when a LUBA appeal is dismissed, the petitioner must establish that the petitioner's appeal played some causative role in the local government action that mooted or otherwise justified dismissal of the appeal." In this case, the county rescinded the appealed decision in response to the applicant's request, not in response to the appeal. Accordingly, LUBA determined the petitioner was not the prevailing party in this appeal and denied petitioner's cost bill.

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