OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 24, No. 4 • December 2002

Highlights

Appellate Cases — Landlord/Tenant

LESSEE AVOIDS EVICTION FOR UNILATERAL MISTAKE IN LATE PAYMENT OF RENT

The Oregon Supreme Court's 7-0 en banc message in *2606 Building v. Mica OR I Inc.*, 334 Or 175, 47 P3d 12 (2002), is that rental provisions in a lease no longer can be strictly enforced if the harm to the lessee from eviction would be overly disproportionate to the harm to the lessor from delay in payment.

After having leased a commercial building in Portland for thirteen years, the lessee began to pay rent late, accrued late fees, and failed to renew the insurance. The lease deemed the unpaid premium and late fees to be additional rent. The lessor gave notice of default and time to cure, under threat of termination. When the demanded rent was not timely received, the lessor sued for eviction. Shortly thereafter, the check arrived, but the lessor refused acceptance. The alleged reason the rent was not delivered on time was that the lessee had made a typographical error by addressing the envelope to *464* Ridgeway Road instead of *434* Ridgeway Road.

In the trial court, the lessee moved for leave to amend the answer to add the equitable affirmative defense of excusable neglect. The Honorable Michael H. Marcus denied the motion, holding that a unilateral mistake could not form a valid defense to an eviction. The Court of Appeals affirmed, ruling that the defense is within the equity jurisdiction of the courts, but it was not available to the lessee, because the mistake was unilateral on the part of the lessee, uninfluenced by the lessor or a third party.

The Supreme Court reversed and remanded. The court decided that allegations of a unilateral mistake in the performance of a commercial lease are sufficient to raise an equitable defense of excusable neglect if the claim is based on a *contractual* default, but are not sufficient if the claim is based on a *statutory* violation. Additionally, equitable defenses may be allowed if the harm that would flow to the parties under all of the circumstances would be materially asymmetrical.

According to the Supreme Court, the allegations regarding the circumstances under which the envelope containing the rent payment was misaddressed were sufficient to permit the lessee to raise the defense of excusable neglect. The case was remanded to the trial court to decide whether it would be equitable to allow the lessee relief from the eviction sought by the lessor under all of the evidence, including the circumstances of the breach by the lessee and the potential harm that would be suffered by the lessee if the lease were terminated and by the lessor if the lease were not terminated.

The equitable defense of excusable neglect has been recognized in Oregon as an affirmative defense to eviction for more than 50 years. Its availability depends upon whether the action is based on contract or statute, because equity may not defeat legislative will. Thus, the defense is available if the eviction is based on a default of a contractual provision, but not if based on a statutory violation. Where the tenancy is governed by a lease, and the forfeiture provisions in the lease differ from those in state statutes, the issue is one of contract interpretation and enforcement, and equitable defenses may be raised.

The availability of the defense also turns on the relative fault of the parties. Excusable neglect may be raised when the lessor induces, knew, or should have known of the mistake. It is not available if the lessee engaged in a scheme to avoid its contractual obligations or merely forgot to pay the rent. Midway between these extreme fact patterns, the defense has been held available where the mistake was due to the negligence of the agents of the lessee, where the lessee acted in good faith, and the fault was not of such character as to warrant forfeiture of the lease.

The instant fact pattern was one of first impression, because the mistake was made entirely by the lessee. The Supreme Court held that equitable principles are sufficiently broad to justify raising equitable defenses based on a unilateral mistake in the performance of the contract, because forfeiture provisions are considered as mere security for payment. Late payment of the rent, including late fees and interest, justifies relieving the lessee from eviction because payment makes the lessor whole and realizes the reasonable contractual expectations of both parties. In addition, equitable relief is justified to prevent the enormous harm that would flow to the lessee from eviction in comparison to the min-

imal harm that trickled to the lessor from waiting several days to receive the rent. In other words, equity will not enforce the power of termination if payment makes the lessor whole.

It is unclear whether this case applies only to commercial FEDs, or also to residential evictions under oral rental agreements, written rental agreements, and/or ORS Chapter 90.

If lessors want to foreclose lessees from raising equitable defenses to nonpayment or late payment of rent, they should consider amending their lease forms to substitute by incorporation the applicable statutory provisions governing termination for nonpayment of rent. If lessees want to leave open an opportunity to raise an equitable defense to nonpayment or late payment of rent, they should negotiate grace periods and notice and cure provisions that differ from the applicable statutory provisions.

Mary Johnson

2606 Building v. MICA OR I Inc., 334 Or 175, 47 P3d 12 (2002)

Cases from Other Jurisdictions

SELECTION AND PAYMENT OF HEARINGS OFFICER VIOLATES DUE PROCESS, SAYS CALIFORNIA COURT

In *Haas v. County of San Bernardino*, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (Cal. 2002), plaintiff challenged the manner of selection and payment of defendant's locally appointed hearings officer hired on an ad hoc basis to deal with ordinance violations and other administrative hearings. Defendant county contracted with the hearings officer, a private attorney, and plaintiff claimed that the hiring process gave the hearings officer an impermissible financial interest in the outcome, because prospects for future employment depended upon keeping the employing power's good will. The trial court found for plaintiff and the county appealed.

Plaintiff was the owner of a massage parlor, an employee of which allegedly exposed her breasts to a customer and proposed a sexual act. Plaintiff's license was revoked after a preliminary hearing and plaintiff requested a full hearing. Plaintiff objected to the ad hoc system of hiring hearings officers and proposed either that Plaintiff hire the hearings officer or that the county contract with the state Office of Administrative Hearings. Plaintiff moved that the hearings officer recuse herself on these grounds.

On inquiry at the hearing, it was revealed that this hearings officer was at her first hearing for the county, that the assistant county counsel had hired her based on his understanding of her qualifications, that the hearings officer was paid at the same rate as other hearings officers, and that she was hired because the other hearings officer had heard the preliminary revocation matter. Plaintiff raised the issue of selection and payment of the hearings officer and suggested that it did not appear to be fair to have the moving party select the decision-maker, and offered to split the cost with the county in having another hearings officer selected. Plaintiff also stated that, while an independent hearings department existed under the county code, there was no county employee with those duties, because the county apparently had a practice of hiring temporary hearings officers. After this colloquy, the hearing was conducted and the hearings officer revoked the license, the only penalty available under the county code for violations.

Plaintiff appealed to the Board of County Commissioners,which affirmed the hearings officer's decision. Plaintiff then filed for a writ of administrative mandamus to challenge the decision and the Superior Court granted the same, based on plaintiff's contentions regarding the selection and payment of the hearings officer.

The county appealed the matter to the California Court of Appeals, which affirmed, stating that the hearings officer's selection, standing alone, did not create an impermissible pecuniary interest, but that the totality of the particular circumstances of this case acted to deprive plaintiff of constitutionally protected rights. In particular, counsel for the moving party both selected the hearings officer and represented the county at the hearing, and there had been no restrictions on hiring the hearings officer to ensure a reasonable degree of impartiality. The state Supreme Court granted review.

The court set out the issues in this way:

> The question presented is whether a temporary administrative hearings officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will. We conclude the answer is yes. To summarize the governing principles, due process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearings officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently. 45 P.3d at 285–86 (footnotes omitted)

The court determined that a fair hearing is the essence of due process and that an impartial decision-maker is a requirement, noting that of all the challenges to impartiality, pecuniary interest has the least forgiving scrutiny. All other grounds for bias are the subject of legislative discretion, but there is no presumption of impartiality for those who have a financial interest in the outcome. One need not show actual influence, but only a possible tendency that, by participation in a decision, the decision-maker might adjust the balance.

The court traced the principle against pecuniary bias to *Bonham's Case*, 77 Eng. Rep. 638 (K.B. 1610), where Lord Coke determined that no man may be a judge in his own case. The principle applies in both civil and criminal cases and has led to the separation of prosecutorial and adjudicative functions in administrative agencies. When the same agency undertakes both functions, higher standards are required of adjudications, especially when judges are asked to judge in their own cases or their compensation depends upon the results of adjudication. For example, under the old "fee system," prosecutors and plaintiffs were able to select their magistrates, and the magistrates were compensated by the number of cases to be heard, a practice long since held to violate the federal due process clause.

The court said that the ad hoc selection of hearings officers and the possible selection without standards both presented the same issues. By analogy, where the prosecuting attorney selects the judge, future income is based on maintaining the goodwill of the prosecution and rational self-interest may affect the rulings. No overt ruling evidencing bias need be shown—only the "possible temptation" not to be scrupulously fair which is, in and of itself, offensive to the Constitution. The possible temptation is to give steady customers the benefit of the doubt. That is why splitting the hearings officer's fees between the parties would also be unsatisfactory; the expected or anticipated repeat business is the problem. The hearings officer in this case had no enforceable expectation to do further work for the county. But there is a direct, personal pecuniary bias when income from judging depends on the volume of cases heard or the selection of the judge is made by frequent litigators. Finally, the court equated pecuniary bias to actual bias by holding that the pecuniary bias here was not cured by review on the record before the Board of Commissioners.

The county contended that the three-part balancing test of *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), allows it to take the cost of hiring hearings officers into consideration in the due process calculus. The court said *Matthews* is inapplicable when bias is the issue, as opposed to the cost of procedural safeguards in dealing with the risk of erroneous deprivation of rights.

The court compared this situation to the California Administrative Procedure Act, which has detailed standards for the hiring and retention of administrative law judges. *See, e.g.*, Cal Gov't Code § 11512. In this case, the county may permanently fill the position of county hearings officer or may contract with the state office of administrative hearings, among other alternatives. The court concluded that

> [t]o satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearings officers will be rewarded with future remunerative employment for decisions favorable to the county. The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on the good will of frequent litigants who pay the adjudicator's fee.
>
> 45 P.3d at 294–95. Justice Brown concurred and dissented, agreeing with the result based upon the relationship of the prosecution and the hearings officer, but stating that he was unwilling to impose a general rule on local governments based on the rationale of the fee systems cases, because in those cases the pecuniary interest was direct, personal and substantial, and he suggested that in many local government cases the interest is tangential.

This case raises the issue of the due process implications of the selection and expected future compensation of decision-makers. It is an important issue that should be analyzed thoughtfully. Justice Brown's resistance to formulate general rules from the particular facts of a single case also warrants further consideration.

Edward J. Sullivan

Haas v. County of San Bernardino, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (Cal. 2002).

Oregon Real Estate and Land Use Digest

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

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

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NO AUTHORITY TO REQUIRE DEFENDANT TO PAY FOR PROSECUTION COSTS, SAYS CALIFORNIA COURT

In People v. Minor, 116 Cal. Rptr. 2d 591, 96 Cal. App. 4th 29 (Cal. Ct. App. 2002), defendant was convicted of violating a county ordinance by allowing trash, rubbish, and junk to accumulate on his land, using a storage unit as a residence, and maintaining a hog farm without a conditional use permit. Defendant was ordered to bring the property into compliance, with an additional condition to repay the county $1,014.00 for the costs of investigating, analyzing, and prosecuting the criminal actions under a provision of the county code. An intermediate appellate court found the repayment to be unlawful, and the Fourth District of the California State Court of Appeals transferred the case to itself.

Defendant contended that in the absence of authorizing legislation, the county could not require him to pay for the costs of his own prosecution, and also challenged the conviction itself. The appellate court reviewed the conviction de *novo*.

The $1,014.00 represented the investigating officer's time for investigating and preparing the case for trial. Under California case law, such costs are paid for by the government, in this case by the county. The case law was decided in the context of allocation of costs for one held for a crime but sent to a mental hospital before trial. Nevertheless, the court found that the reasoning of those cases was persuasive in this context, so that a defendant could not be subject to pay the costs of investigation and prosecution. While the county ordinance asserted the power to impose these costs, it could not actually vest the trial court with that power without general state authorizing legislation, because counties are limited to the criminal penalties provided for by statute. If the county goes beyond its authority, it acts unconstitutionally.

The county also argued that it must be able to recover the costs of investigation and prosecution because it has no system of civil enforcement and because the costs of the criminal system are high. The court also noted that a civil abatement process requires a county to expend its resources "up front" and place a lien on the property, with all the attendant risks of collection. The court conceded that these are problems and said it was not unsympathetic to the county's plight, but it was required to apply the law as it exists, and the county's remedy lies with the legislature. The court thus affirmed the remand of this case for resentencing.

This case raises an issue of great concern to cash-strapped local governments. It is likely that an Oregon court would reach the same result as the California court did in this case, at least with regard to criminal penalties.

Edward J. Sullivan

People v. Minor, 116 Cal. Rptr. 2d 591, 96 Cal. App. 4th 29 (Cal. Ct. App. 2002).

CALIFORNIA FEDERAL COURT ENJOINS EFFORTS TO DEFEAT CHURCH USE THROUGH CONDEMNATION

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), plaintiff sought injunctive relief from defendant city redevelopment agency's use of its eminent domain power.

Plaintiff owned 18 acres in Cypress, California, and sought to construct a 4,700-seat auditorium and associated church uses. Defendant agency believed the best use of the site was for a Costco outlet and began eminent domain proceedings, which plaintiff sought to enjoin. The redevelopment agency directors are by statute the members of the city council. The area had a history of land use controversy and was part of a larger area in which voter approval was required for certain uses, a Specific Plan was required, and the redevelopment agency had a plan for the development of the area. Most of the land in the area had remained undeveloped for years and the use of the subject site was a key for the redevelopment of the area.

Plaintiff church had grown exponentially since its founding in 1983, and had trouble handling the crowds of worshippers and its ministries at its original site. It determined it needed a church in this area, given the demographics of its membership, and assembled the 18-acre parcel from four owners. The proposed church would take up 300,000 square feet, have a 200-child daycare, and contain multiple uses, including a gym. The church approached the city for land use approval.

The city noted that the church was a permitted use, but said that the use was probably not consistent with the policies, goals, and objectives of the Specific Plan. When plaintiff completed the assembly of the parcel, it applied for a conditional use permit and was told that the application lacked the design review studies required by its code. The city then began revising the Specific Plan to provide for a "Town Center" which would include plaintiff's property. The city imposed a moratorium on all incomplete applications, nominally for 45 days, but which lasted for nearly two years before the plaintiff could be heard on the merits of its application. In the meantime, the city investigated other uses and determined that the Town Center approach was not viable, so it developed a new revision to the Specific Plan that applied only to plaintiff's property in order to allow a Costco store. The city council then agreed with plaintiff that it was not required to submit design review plans at the early stage, so that the application could go forward as soon as plaintiff paid $10,000 for environmental studies. The redevelopment agency then made an offer to purchase plaintiff's land, and plaintiff refused. The redevelopment agency opted for the Costco use as an amendment to the Specific Plan and the city council authorized an eminent domain action. Plaintiff filed state and federal court actions challenging the eminent domain proceedings, and the actions were consolidated into this federal suit.

In ruling on the preliminary injunction claims, the court said there must be showings of irreparable injury, inadequacy of legal remedies, a strong likelihood of prevailing on the merits, a greater hardship on balance than if relief were denied, and a public interest in granting the requested relief. The court held that the Anti-Injunction Act, 28 U.S.C. § 2283, did not apply in this case because the federal action was filed first, the requested relief would aid the court's jurisdiction to prevent the very thing complained of from happening during this litigation, and the injunction was authorized under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which allows for suits for "appropriate relief." 42 U.S.C. § 2000cc-2(a). Neither did the court find reason to abstain when federally protected civil rights are involved and when the federal action is filed first.

As to success on the merits, the court noted a host of federal and state constitutional and statutory claims in the case. At issue was the level of scrutiny to be applied to the facts. Plaintiff claimed that RLUIPA requires any substantial burden on religious freedom to be examined under strict scrutiny standards. The court agreed that this test applies where "individualized assessments," as opposed to generally applicable laws, were made. The court found the conditional use proceedings to be individualized assessments and quasi-judicial in nature. Further, the court weighed other governmental actions, seemingly neutral, within their circumstantial context, noting the absence of any action concerning the subject site until plaintiff wanted to develop a church, the limitation of the Specific Plan area to plaintiff's property, and the use of eminent domain. While these matters must be decided following a trial, the court found that plaintiff had a fair probability of success on the merits to warrant the issuance of a preliminary injunction.

Similarly, the court found under RLUIPA a substantial burden on religious exercise, because plaintiff could no longer use its existing facilities for its large congregation. The proof of a substantial burden requires a showing of a choice between following religious precepts and forfeiting benefits on one hand, and abandoning religious precepts on the other. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). Here, the lack of a facility meant that some religious services could not be performed. This burden, under RLUIPA, must be justified by a compelling state interest. The burden here was the need to meet in one location at one time and provide for numerous religious ministries, so as to have a large and multifaceted church for the 400-person congregation. The two reasons given to justify the denial of the conditional use permit and the use of eminent domain—blight prevention and income generation—were not sufficient justifications. The church construction, the court found, would prevent blight, rather than aid it. Revenue generation is not a type of activity needed to protect public health or safety. Nor was there any showing of general impact on the city's finances by allowing the church. Finally, there had been no showing of use of the least restrictive means to further any alleged compelling state interests, as required by RLUIPA.

The court also questioned whether eminent domain had occurred for a "public use," because the Costco project could occur on other property in the area. The court said that it could and would make an independent judgment as to whether the exercise of eminent domain had indeed been for public use and that there was a fair question on the merits to justify a preliminary injunction. Similarly, the court found an irreparable injury if it had not stepped in to allow a hearing on the merits of the eminent domain proceeding to be examined at trial.

As to the public interest and balance of hardships, the court found that the balance tipped toward protection of religious freedom from local interference, as RLUIPA provides, and the public interest counsels caution in the use of eminent domain where the use is only questionably public. The court found "incredible" any city claim that it would suffer harm from the issuance of an injunction, because only 10% of the Specific Plan area was affected, the city had done nothing on the site for years, and the ultimate area affected included only plaintiff's property. However, plaintiff would suffer "immense hardship" if it were to allow the church land to be turned over to a private retail developer, which could redevelop before the matter came on for trial. That result would require plaintiff to "go back to the drawing board" to serve the needs of its congregation. Under the circumstances, the court believed the balance of hardships tipped toward plaintiff.

Finally, the court held that under the Ninth Circuit's "alternative test," plaintiff would also have been entitled to a preliminary injunction. *See generally Stanley v. University of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994); *Caribbean Marine Servs Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988); *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983).

This case is one of the first to come down under RLUIPA requiring a government to justify its actions under the least restrictive means test and the other provisions of RLUIPA. However, the court strongly suggested that the preliminary injunction would have issued in any event under First Amendment case law.

Edward J. Sullivan

Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

Appellate Cases — Land Use

CERT. PETITION PENDING IN OREGON TAKINGS CASE

The United States Supreme Court has been asked to hear a case involving a takings claim against the state of Oregon. Marsha and Alvin Seiber of Sweet Home, Oregon allege that an Oregon Department of Forestry administrative order prohibiting logging on 41 acres of their 196-acre property to protect northern spotted owl habitat has effected a *per se* physical taking of their property.

The Seibers' claim was rejected by the Linn County Circuit Court on December 8, 1999. The Oregon Court of Appeals affirmed without opinion. 17 Or App 319, 37 P3d 259 (2001). The Seibers unsuccessfully requested review by the Oregon Supreme Court. 334 Or 260, 47 P3d 486 (2002). On August 30, 2002, they filed a petition for certiorari review of the Court of Appeals' decision.

At first, the state of Oregon waived its right to file a brief in opposition to the cert. petition, but then at least one Supreme Court justice requested that it respond. Accordingly, the state filed its response on November 27. The Pacific Legal Foundation has filed an amicus curiae brief in support of the cert. petition.

The case may be tracked at *www.supremecourtus.gov/docket/02-348.htm*.

Nathan Baker

Seiber v. Oregon, 17 Or App 319, 37 P3d 259 (Or. Ct. App. 2001), *rev. denied*, 334 Or 260, 47 P3d 486 (2002), *petition for cert. filed* (U.S. Aug. 30, 2002) (No. 02-348).

OREGON COURT OF APPEALS UPHOLDS NUDE DANCING BUFFER

Real estate and land use lawyers are often confronted with various uses where free expression issues are alleged to exist. These include the solicitation of signatures in a mall or at a major shopping store, the placement of adult bookstores in particular geographic areas, places of entertainment where lap dancing and other activities occur, and nude dancing. The analytical framework for making decisions concerning free expression is evolving, and land use and real estate lawyers need to be familiar with its broad outlines.

On October 30, 2002, the Court of Appeals handed down *City of Nyssa v. Dufloth*, 184 Or App 631, 57 P3d 161 (2002). Nyssa had adopted an ordinance that required the audience to be at least four feet from areas where nude dancing occurs. The Nyssa municipal court convicted the defendants, even though they demurred, and they appealed on the ground that there had been an unconstitutional interference with their free expression under Article I, Section 8 of the Oregon Constitution.

The opinion by Judge Kistler concluded that nude dancing is not protected under the state constitution. His reasoning is based on *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), wherein the Supreme Court established an analytical framework that divides such regulations into two broad categories: regulations directed at the *expression* itself and regulations directed at the *effects* of the expression. Within the expression category, all expression is protected against regulation unless it comes within a well-established historical exception. Judge Kistler concluded that because nude dancing itself falls within a well-established historical exception to the free expression protection, a rule requiring a buffer of four feet is constitutional.

While *City of Nyssa* is significant to local government lawyers, the seminal case is *State v. Ciancanelli*, 181 Or App 1, 45 P3d 451, *rev. pending* (2002), and *City of Nyssa* is based on it. An Oregon statute, ORS 167.062, makes unlawful the management or presentation of a "live public show in which the participants engage in . . . sexual conduct." In *Ciancanelli*, a sting resulted in evidence that the accused had committed or arranged acts defined as sexual conduct (*e.g.*, masturbation or apparent sexual stimulation) and on another occasion in "lap dancing" (*i.e.*, clothed contact designed for sexual stimulation). The defendant argued that the statute was overbroad and unconstitutional as applied under both the Oregon and U.S. constitutions. Judge Landau, writing for the majority, held that because the conduct fell wholly within a historical exception, the conduct was not protected free expression under either the state or federal constitutions. Review of *Ciancanelli* has been accepted by the Oregon Supreme Court.

The *City of Nyssa* majority distinguished away *City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988), where the issue was zoning to prevent urban blight and the subject ordinance was characterized as directed against one disfavored type of verbal or pictorial communication. The Oregon Supreme Court in *Tidyman* had held that such an ordinance was facially unconstitutional. Based on *Ciancanelli, the City of Nyssa* court drew a distinction between nude dancing and the pictorial or verbal communication in *Tidyman*, and said that nude dancing is wholly within a well-established historical exception.

The majority opinion also says the Court of Appeals' decision in *Sekne v. City of Portland*, 81 Or App 630, 736 P2d 959 (1986), can no longer be sustained, and it overrules that decision. The *City of Nyssa* court criticized *Sekne* because it did not focus on the "well-established historical exception" rule. In *Sekne*, the argument was presented that the Portland ordinance at stake, which prohibited nude dancing in taverns, allowed nude dancing on the stage of theaters, so it should be allowed in taverns. The *Sekne* court struck down the Portland ordinance on the ground that it was overbroad. With the demise of Sekne, live nude dancing can be regulated and arguably prohibited anywhere in Oregon.

Steven R. Schell

City of Nyssa v. Dufloth, 184 Or App 631, 57 P3d 161 (2002).

OREGON SUPREME COURT DECIDES A TAKINGS CASE AND REFINES DEFENSE OF DISCRETIONARY IMMUNITY

In *Vokoun v. City of Lake Oswego*, 335 Or 19, 56 P3d 396 (2002), *recons. denied*, ____ Or ____ , ____ P3d ____ (Dec. 3, 2002) the Oregon Supreme Court reversed in part a Court of Appeals decision rejecting Plaintiffs William and Paula Vokoun's claims for inverse condemnation and negligence against the City of Lake Oswego.

In 1989, the Vokouns purchased a house in a Lake Oswego subdivision that was developed in the early 1970s on a hill above Tryon Creek State Park. The house was located on the south side of the property, and on the north side, the land sloped down into a ravine at the bottom of a hill. Critical to the court was the fact that in approving the subdivision plat, the city had accepted the developer's installation of a storm drain that ran underground along a drainage easement near the western border of the property. An outfall pipe near the northwest corner of the property discharged water into the ravine. Before the subdivision was built, storm water from one acre of land drained to the location of the present storm drain. The Vokouns presented evidence that after the subdivision was built, the outfall pipe discharged runoff from about seven acres of land, causing extensive erosion.

The city had a complaint-driven repair policy for maintaining storm drains. It also had a five-year capital improvement plan (CIP) that included projects such as storm drains. As part of the city's budget, the CIP addressed projects costing $25,000 or more. To undertake a capital improvement project that cost more than $25,000 and was not in the plan, the city could adopt a supplemental budget. The city did not consider whether to include the storm drain and drainage course in the CIP or in a supplemental budget to repair the erosion problems associated with the storm drain.

Before buying their property, the Vokouns discovered a hole about eight feet deep around the storm drain outfall pipe that appeared to have been caused by erosion from water coming out of the pipe. Although the discharge point was beyond the property line, the hole had swallowed a property marker at the northwest corner of the lot. After the Vokouns notified the city, the hole was filled with asphalt debris. The city maintenance department did not inform the Vokouns that they were responsible for inspecting the area to determine whether filling the hole had stopped erosion at the outfall site or drainage course. Apparently, filling the hole did not stop the erosion.

On February 8, 1996, after a 100-year flood event, a landslide occurred on the hillside on which plaintiffs' property was located. As the slide grew over a period of months, it caused a four-foot drop in the land approximately nine feet from the Vokouns' house and a 20-foot drop approximately 19 feet from the house. The slide damaged a deck and a dog run, so that both had to be removed. The slide destroyed many trees and would have eventually destroyed the house but for the Vokouns' remedial action.

The Vokouns filed a claim for inverse condemnation, alleging that the city had "taken" their property for a public use "by constructing a storm drain pipe and outfall pipe in a manner that destabilized the soils on and adjacent to plaintiff's property, causing a landslide." 335 Or at 23, 56 P3d at 399. Plaintiffs also alleged that the city was negligent by failing to properly inspect the outfall and drainage course to discover the erosion and take reasonable steps to prevent a catastrophic landslide. In its answer, the city admitted that it built the storm drain, but contended that the city was immune from liability for negligence under ORS 30.265(3)(c).

The Vokouns presented evidence that the speed of the water coming from the outfall pipe likely caused the erosion, which had been occurring from the time the subdivision was built, and that the primary cause of the landslide was erosion in the drainage course that removed the toe of the slope that supported the hillside on which plaintiffs' property is located. An expert testified that the city should have been aware of the potential for erosion when it filled the hole in 1989. Plaintiffs also presented evidence that the city could have prevented the landslide if it had backfilled the length of the drainage course or constructed a pipe from the outfall along the drainage course to Tryon Creek, repairs that would have cost more than $25,000 each.

At the close of plaintiffs' case the city moved for directed verdicts, arguing that as a matter of law, the damage to the property from the landslide was not a taking and that under ORS 30.265, discretionary immunity barred the negligence claim. The trial court denied the motions and the jury returned verdicts for the Vokouns. On appeal by the city, the Court of Appeals viewed the inverse condemnation claim as being predicated on the city's negligence and held that as a matter of law, "negligent interference with property rights does not support a claim for inverse condemnation." 335 Or at 25, 56 P3d at 400. The Court of Appeals also held the city had made discretionary policy decisions that entitled it to immunity under ORS 30.265.

On appeal to the Supreme Court, the Vokouns first argued that the Court of Appeals had erred in holding that a takings claim cannot be based on interference with property rights that is merely a consequence of negligent government conduct. Second, they argued that the court had erred by mischaracterizing the inverse condemnation claim as being predicated on the city's negligence.

The Supreme Court explained the posture of a claim for inverse condemnation under Article I, section 18 of the Oregon Constitution, which commands that private property may not be taken for public use without just compensation. In the event a government entity fails to condemn, a plaintiff is not required to show that the government deprived the plaintiff of all use and enjoyment of the property to establish a "taking" of property by inverse condemnation. 335 Or at 26, 56 P3d at 400 (citing *Morrison v. Clackamas County*, 141 Or 564, 568, 18 P2d 814 (1993)). Substantial interference with the use and enjoyment of property is sufficient to establish a claim. *Hawkins v. City of La Grande*, 315 Or 57, 68–69, 843 P2d 400 (1992). The Vokouns argued that a public body is liable for inverse condemnation regardless of fault or whether the consequences are expected or intended, and alternatively, that the Court of Appeals had erred in predicating their inverse condemnation claim on the city's omissions rather than acts regarding maintenance of the drainage course and erosion repair.

The city responded that *Morrison* and *Tomasek v. Oregon State Highway Comm'n*, 196 Or 120, 248 P2d 703 (1952), stand for the principle that a purposive act is an element of an inverse condemnation claim, that the city's only action was accepting the drainage system in the plat dedication, and that failing to maintain and repair are not "purposive" acts. The city also argued that no taking was established because plaintiffs failed to show that the damage from the landslide amounted to substantial interference with their use and enjoyment of property.

The court disagreed with the Vokouns' first argument that a takings claim can be based on interference with property rights that is merely a consequence of *negligent* government conduct. "The court long has held that a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the *intent* to take the property for a public use." 335 Or at 27, 56 P3d at 401 (citing *Gearin v. Marion County*, 110 Or 390, 402, 223 P 929 (1924)) (emphasis added). The "intent to take" may be inferred from the defendant's action if "the natural and ordinary consequence of that action was the substantial interference with property rights." 335 Or at 29, 56 P3d at 402. But this does not eliminate the requirement to show the intent.

Turning to the second claim of error, the Supreme Court agreed with plaintiffs that the Court of Appeals had mischaracterized the inverse condemnation claim as being predicated on the city's negligent maintenance of the outfall pipe. The question is whether plaintiffs had presented evidence from which a jury could find that the natural and ordinary consequence of the city's construction of the storm drain was to destabilize plaintiff's property, causing the landslide. While noting that the jury heard conflicting evidence on every issue regarding the claim for inverse condemnation, including the cause of the landslide, the court also noted that the plaintiffs' complaint "states that their claim for inverse condemnation was based on the city's construction of the storm drain pipe and outfall in a manner that created a drainage course where one had not been previously, and caused accelerated erosion along that course, thereby destabilizing the soils on and adjacent to plaintiffs' property." 335 Or at 29, 56 P3d at 402. The court found it reasonable to infer from the evidence that the landslide was "the natural and ordinary (even inevitable) consequence of the city's construction of the storm drain in that manner." Id. The court also held that the jury could find that there had been substantial interference based on the evidence that the landslide caused a significant drop in the land within a few feet of their home such that a deck and a dog run had to be removed.

The Supreme Court remanded the case to the Court of Appeals to address other assignments of error, including those involving discretionary immunity. To qualify for protection, the city had to show that it made a decision involving the making of policy, as opposed to a routine decision by employees in the course of their day-to-day activities. The burden is on the governmental defendant to establish its immunity. The court concluded that the response to the erosion problem that was brought to the attention of the city under its complaint-driven policy "was a routine decision made by employees in the course of their day-to-day activities" and that deciding to repair the erosion by filling the hole with asphalt debris did not qualify for discretionary immunity. 335 Or at 33, 56 P3d at

404. Even if the city had inspected its repair and found that it had not solved the erosion problem and that additional repairs costing more than $25,000 were necessary, the CIP would not have barred the city from making such repairs, because "city policy permitted the city council to adopt a supplemental budget to pay for repairs costing more than $25,000." *Id.* The city did not present evidence that the city council had considered adopting a supplemental budget to make repairs, and the fact that the city had adopted a CIP that did not include purchasing the drainage course did not establish the city's immunity.

This decision may compel cities in an abundance of caution to reexamine their inspection procedures and budget review processes.

Joan S. Kelsey

Vokoun v. City of Lake Oswego, 335 Or 19, 56 P3d 396 (2002), *recons. denied*, ____ Or ____, ____, P3d ____ (Dec. 3, 2002).

■ A CLASSIFICATION DECISION BY ANY OTHER NAME IS SUBJECT TO EXCLUSIVE LUBA JURISDICTION JUST THE SAME

In *Hardtla v. City of Cannon Beach*, 183 Or App 219, 52 P3d 437 (2002), *rev. denied*, ____ Or ____, ____ P3d ____ (Nov. 19, 2002), the city approved a building permit to build a single structure containing a 912-square foot garage and a 912-square-foot "guest room" above. The guest room included areas labeled as a bedroom and a bathroom and an area that was not labeled as a kitchen but that included a sink, cupboards, microwave, and refrigerator. On the city application form, the applicant described the proposed use as a "garage w/ guest house." Before approving the application, the city building official changed the description to a "garage w/guest room."

As built, the structure contains electrical, plumbing, telephone and cable services. Non-paying guests have occupied the guest room, on average, two weekends per month.

More than three months after the city approved the permit, the owner of an adjoining property (plaintiff) sought a city council hearing to review the permit decision. The city council denied plaintiff's request, reasoning that it had no role to play, and that the local code allows the disputed structure as a garage and "accessory structure," a term defined by the city code. The city manager informed the plaintiff of the city council decision in writing after the fact.

More than two-and-one-half years after the city manager's letter, plaintiff filed a complaint in circuit court alleging that the city's decision to approve the permit violated its land use regulations and seeking an injunction to remove the structure. The court dismissed the complaint on motion for summary judgment, reasoning that the city council action was a "land use decision" over which LUBA had exclusive jurisdiction. ORS 197.825(3)(a).

Plaintiff appealed, arguing that the city's decision was subject to circuit court jurisdiction under ORS 197.015(10)(b) as a decision approving a "building permit issued under clear and objective land use standards." Plaintiff argued that a general interpretative rule in the local code required the city to construe the use as either a "guest house" or an "accessory dwelling," which is limited by definition to a maximum of 450 and 600 square feet, respectively. Whichever applies, there is an objective standard that the city violated by allowing a structure containing 912 square feet.

The owners of the garage/guest room (defendants) argued that the city classified the residential part of the structure as an accessory use, and that the act of deciding how to classify the use is not subject to clear and objective standards and is a land use decision, citing *St. John v. Yachats Planning Comm'n*, 138 Or App 43, 47, 906 P2d 304 (1995) and *Tirumali v. City of Portland*, 169 Or 241, 7 P3d 761 (2000), *rev. denied*, 331 Or 674 (2001).

The Court of Appeals found that the hybrid structure the defendants built was neither of the uses the plaintiff alleged it was. The question for the court was whether the city code is ambiguous about the classification of defendants' use. If it is, the classification is a land use decision and subject to exclusive LUBA jurisdiction. The court concluded that the classification of the use was ambiguous.

Plaintiff also claimed that the circuit court had jurisdiction to enforce land use regulations under ORS 197.825(3)(a). But the court found that the plaintiff had failed to articulate a separate basis for this claim. That is, the claim is founded on the proposition that the defendants' structure necessarily was either a "guest house" or an "accessory dwelling." The court said this claim "is inextricably intertwined with the issues properly before LUBA" and amounted to a collateral attack on the city's classification decision. 183 Or App at 227, 52 P3d at 441.

Larry Epstein

Hardtla v. City of Cannon Beach, 183 Or App 219, 52 P3d 437 (2002), *rev. denied*, ____ Or ____, ____ P3d ____ (Nov. 19, 2002).

Appellate Cases—Real Estate

■ COURT RULES "UNIT OF PROPERTY" IN BALLOT MEASURE 50 MEANS BOTH LAND AND IMPROVEMENTS

The meaning of the phrase "each unit of property in this state" in 1997's Ballot Measure 50 was at issue in *Flavorland Foods v. Washington County Assessor*, 334 Or 562, 54 P3d 582 (2002). The factual context in which the issue arose was that in the tax year 1995-96 the value of the subject real property was $455,000 (land) and $3,267,820 (improvements), for a total of $3,722,820. In the tax year 1998-99 the land value had increased to $691,130 and the value of the improvements had *decreased* to $2,080,030, for a total of $2,771,160.

The taxpayer contended that the cut and cap provisions of Ballot Measure 50 apply to the land value and improvement value separately, because each is a "unit of property in this state," while the assessor contended that the combined value of land and improvements constitutes a "unit of property." The taxpayer's interpretation would lead to an assessed value of land of $421,785, a reduction of $270,345.

The court analyzed the meaning of the phrase "each unit of property in this state," first by reviewing the plain meaning of the terms and finding no support for either point of view. The court next looked at the context of the measure, again finding no particular support. The court remarked that the taxpayer's

argument *assumed* without *demonstrating* the voter's intent in outlining the effect of the measure if the assessor's point of view was accepted.

The court also reviewed the predecessor to Ballot Measure 50, Ballot Measure 47, holding that there was sufficient relationship between the two for a meaningful analysis. Once again, however, the court determined that there was no persuasive finding in that analysis. Additionally, the court also looked to Ballot Measure 5 and found that not only was it closely related enough to provide a basis for analysis of the phrase, it also supports a finding that the term "property" means "a specific unit of realty (with or without improvements)." 334 Or at 573–74, 54 P3d at 587–88. Such a finding was made in *Shatzer v. Dept. of Revenue*, 325 Or 211, 219, 934 P2d 1119 (1997), which was decided prior to the adoption of Ballot Measure 5. As a consequence, the voters "were on notice when they adopted Measure 50 that this court had interpreted the word 'property' as being synonymous with the phrase 'unit of realty,' with or without improvements, that is identified by tax lot number or by some other method." 334 Or at 574, P3d at 588.

The court also considered arguments relating to ORS Chapter 308, which provides for separate accounts for land and improvements, but found that they were not persuasive. Finally, the court also reviewed the ballot measure's history, title, explanatory statement, and legislative arguments in support and held that they are "an indication that the phrase 'each unit of property in this state' in Measure 50 refers to all the property in a property tax account," *i.e.*, including both land and improvements. 334 Or at 578, P3d at 590.

While it is difficult to identify another analytical device than the "voter's intent," it is interesting to contemplate the resulting society if voters were as knowledgeable and sophisticated as portrayed in the court's decision.

Alan Brickley

Flavorland Foods v. Washington County Assessor, 334 Or 562, 54 P3d 582 (2002).

OREGON COURT OF APPEALS INTERPRETS "VIEW EASEMENT" NARROWLY

In *Olson v. Van Horn*, 182 Or App 264, 48 P3d 860, *rev. denied*, 334 Or 631, 54 P3d 1041 (2002), the Oregon Court of Appeals interpreted a deed that granted a "view easement" in a manner that did not satisfy the easement holders. The court held that the easement allowed the easement holders access to the burdened property to maintain the height of vegetation within the easement area but did not prohibit the building of a house within the easement area. The court declined to read an implied prohibition on the erection of structures into the easement.

In 1992, Oscar and Estrid Furnes partitioned a 15-acre tract of land into three parcels of approximately equal size, with the intent that each parcel have a building site with a view of the ocean. The intent was for Parcel 3 to be burdened with a view easement for the benefit of Parcel 2, and Parcel 2 to be burdened with a view easement for the benefit of Parcel 1. The view easement benefiting Parcel 2 (referred to as "View Easement 2") was at issue in this case.

With the help of their friends, the Olsons, who later became the plaintiffs in this lawsuit, the Furneses drafted language creating the View Easement 2 burdening Parcel 3 for the benefit of Parcel 2. They sold Parcel 2 to the Olsons, giving a deed that contained the following grant of easement:

> Together with the right to enter upon the land and maintain the vegetation height within the area shown as 'View Easement 2' on Exhibit 'A' attached.

In 1997, the Furneses sold Parcel 3 to Van Horn. Although there was no language in her deed about the easement, Van Horn knew of the existence of the easement. Van Horn began to build on her lot in June 1999. Although the Olsons visited the construction site almost daily, they did not complain until two months after construction began that the house might be encroaching on their view easement. Van Horn hired a surveyor to conduct an informal survey. The surveyor concluded the house probably was located in the easement, but he could not tell for sure without conducting a formal survey. Van Horn chose not to undertake a formal survey.

By early August 1999, Van Horn had spent more than $70,000 on construction of the house, which included the laying of the foundation and completion of 90% of the framing. At that time, the Olsons filed for an injunction and had a formal survey done. The survey revealed that the house extended 22 feet, plus or minus 5 feet, into the approximately 120-foot-wide easement. From pictures, the court concluded that the "vast majority" of the Olsons' view remained undisturbed.

The Olsons argued that the words "view easement" were ambiguous because they could reasonably be interpreted to grant rights in addition to those specified, such as the right to remove all obstructions that would impede the view. The trial court held that the terms of the easement are ambiguous, and admitted extrinsic evidence to prove that the Furneses' original intent was to prohibit construction of any kind that would impede view of the ocean. The trial court ruled that Van Horn's home violated the terms of the easement and should be removed or modified.

The Court of Appeals reversed, holding that the terms of the easement are not ambiguous, and that the easement does not prohibit Van Horn from building a house in the easement. In reaching its conclusion, the Court relied on ORS 42.230, which provides that a court is not to "insert what has been omitted, or to omit what has been inserted" in an instrument. The court expressly followed *Tipperman v. Tsiatsos*, 327 Or 539 (1998), in which the Oregon Supreme Court held that the court would look beyond the wording of an easement "only where there is an uncertainty or ambiguity."

The court rejected the Olsons' argument that interpreting the easement to allow construction of structures would make the easement a nullity. The court commented that, "[i]f plaintiffs' right to maintain vegetation height becomes a nullity at some point in the future, it is because the easement language was poorly drafted."

The Court's decision highlights the need, when drafting easements, to use care to articulate the scope of rights and responsibilities the parties intend to create. In particular, it illustrates the danger of relying on an assumption that rights expressly specified in a grant of easement will be deemed to imply the existence of other related rights. The decision indicates that the Court is willing to hold parties to the language they have agreed upon and suggests that the court will not let poor drafting be used as a reason to look to extrinsic evidence of the parties' intent.

Susan Glen

Olson v. Van Horn, 182 Or App 264, 48 P3d 860, *rev. denied*, 334 Or 631, 54 P3d 1041 (2002).

LUBA CASES

LOCAL PROCEDURE

Comprehensive Plan Map Amendment

In an apparent case of first impression, LUBA examined the circumstances under which ORS 215.427(3), the "fixed goal post" statute, applies to an application to amend a combined comprehensive plan and zoning map in *Rutigliano v. Jackson County*, ___ Or LUBA ___, LUBA No. 2002-054 (Aug. 30, 2002). Under that statute, "approval or denial of the application [for a permit, limited land use decision, or zone change] shall be based on the standards and criteria that were applicable at the time the application was first submitted" if it was complete when first submitted or was made complete within 180 days of that date. ORS 215.427(1) establishes a 150-day deadline for a county to make a final decision on such an application. (The counterpart statutes for cities are ORS 227.178(3) and 227.178(1), which establishes a 120-day deadline for final action.)

Petitioner in this appeal applied for a comprehensive plan and zoning map amendment to change the designation of his property from Exclusive Farm Use (EFU) to Rural Residential (RR-5). Following LUBA's remand of the county's first decision approving the comprehensive plan and zoning map change, the county amended the applicable criteria.

The specific issue LUBA analyzed was whether the county erred in relying on ORS 215.427(3) and applying the criteria in effect when the original comprehensive plan and zoning map application was submitted, rather than the amended criteria in effect at the time the county made the challenged decision on remand from LUBA. The old criteria required the county to approve a Goal 3 exception to apply a non-EFU designation to EFU-zoned land, even where the soils were "nonagricultural" and not subject to Goal 3. The new criteria eliminated the need for a Goal 3 exception in these circumstances. The county nevertheless applied the old criteria, concluded the applicant had failed to satisfy them, and denied the requested comprehensive plan and zoning map change.

LUBA first examined the statutes establishing the 150-day deadline and the fixed goal post rule. In LUBA's view, these statutes reflect two important principles. First, the fixed goal post rule is part of a statutory scheme designed to insure that three kinds of decisions receive a final decision in 150 days: permits, limited land use decisions and zone changes. Second, where a comprehensive plan or land use regulation must be amended to allow an application for a permit, limited land use decision or zone change to be approved, the 150-day deadline does not apply.

Here, the county had a unified (*i.e.*, single-document) comprehensive plan and zoning map. Thus, any zone change application always requires a comprehensive plan map amendment and, as a result, the 150-day deadline will not apply. Under these circumstances, LUBA concluded that the fixed goal post rule also does not apply. As LUBA interpreted the fixed goal post rule, the term "zone change" is not broad enough to include a combined zone change and comprehensive plan map amendment. Accordingly, LUBA remanded the decision to the county to allow it to consider petitioner's comprehensive plan and zoning map amendment request under the new approval criteria. LUBA emphasized that its ruling was limited to the circumstances presented in this case, namely the unitary nature of the county's comprehensive plan and zoning map.

Board Member Tod Bassham wrote a separate concurring opinion in which he highlighted the potential implications of LUBA's ruling. He questioned whether LUBA's ruling is truly limited only to situations where a local government has a unified comprehensive plan and zoning map. In his view, LUBA's reasoning may also apply to dual map situations in which a local government has separate comprehensive plan and zoning maps. In such situations, an application to amend both the comprehensive plan map and the zoning map may also not be subject to the fixed goal post rule. Additionally, where an applicant combines an application to amend a comprehensive plan map and zoning map together with an application for a permit, the fixed goal post rule may not be applicable as well. Recognizing that "there may be excellent reasons why our holding in this case should be confined to the circumstances of this case," he simply identified these issues as open questions that await resolution in future cases. Slip Op. at 14.

Notice

In *Ramsey v. Multnomah County*, ____ Or LUBA ____ , LUBA No. 2001-171 (Sep. 17, 2002), LUBA analyzed the language of ORS 215.060 and concluded that the county's failure to give notice as required by the statute invalidated the county's adoption of an ordinance. ORS 215.060 describes the type of notice a county must give for actions involving its comprehensive plan and, unlike many notice statutes, describes the consequence of failing to give notice in the prescribed fashion as follows:

> Action by the governing body of a county regarding the plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the members of the governing body approve the action. The notice provisions of this section shall not restrict the giving of notice by other means, including the radio and television.

The action challenged in *Ramsey* was Multnomah County's adoption of an ordinance that applied City of Portland comprehensive plan and zoning ordinance provisions to the portion of the unincorporated county that is inside the Metro urban growth boundary. Petitioner argued that the county had failed to give published notice as the statute requires and, therefore, the county's ordinance has no legal effect.

Based on its review of the facts and the plain language of ORS 215.060, LUBA agreed with the petitioner and remanded the county's decision. The county sent individual mailed notice to affected property owners, including petitioner, to comply with Ballot Measure 56. However, the county did not publish notice of the county board's initial public hearing in "a newspaper of general circulation in the county" as the statute requires. The county argued that the individual notice petitioner received was better than the published notice the statute calls for and that the legislature could not have intended to invalidate a county action because the county gave better notice than the legislature intended. LUBA disagreed:

> The individual written notice is no doubt better notice to the landowners who were actually sent individual written notice, but that notice is not better notice to the county's citizens who do not own affected land and were therefore provided no notice at all. While affected property owners may be more directly impacted by the disputed ordinance, all county citizens have an interest in its land use legislation. Therefore, even if we were free to pursue the substance over form approach to construing ORS 215.060 that the county suggests, it is not at all clear that would necessarily mean the issue would have be resolved in the county's favor. Slip Op. at 5–6.

The more fundamental problem LUBA identified with the county's position is the very specific legal consequence the statute prescribes when a county fails to give published notice: the county's ordinance is "of no legal effect."

Finally, LUBA resolved any potential ambiguity created by the last sentence of the statute, concluding that it allows a county to give additional notice by other means, but does not eliminate the county's responsibility to give the mandatory published notice. LUBA also rejected any suggestion that the statute allows the county to choose the method of giving notice and concluded that "[i]t is simply implausible that the legislature intended the final sentence of ORS 215.060 to leave the method of providing notice entirely to the governing body." Slip Op. at 8.

LUBA remanded the county's decision so that the county could give the required published notice and hold a new hearing.

TAKINGS

In *Hallmark Inns and Resorts, Inc. v. City of Lake Oswego*, ___ Or LUBA ___, LUBA No. 2002-049 (Sep. 26, 2002), LUBA rejected a takings challenge to the city's denial of a request to modify a condition of a previously approved development permit concerning public walkways and sidewalks shown on the site plan.

As approved in 1993, the site plan depicted a public walkway along the south-facing front of petitioner's corporate headquarters building. The walkway was to be located within a previously vacated portion of Collins Way, which connected Collins Way and a residential neighborhood to the west with Hallmark Drive along the east site of the property. A condition of the 1993 development permit required petitioner to "provide easements for all public walkways/sidewalks and public utilities... to the satisfaction of [the] City Engineer." Petitioner built the walkway between Collins Way and Hallmark Drive, but never provided the public walkway easement for it.

The disputed walkway, which provides access to the main entrance to petitioner's corporate headquarters building, was open to the public from early 1994 to mid-1996. In response to increased vandalism, petitioner built a fence at the western edge of the property in 1996. The fence effectively closed off access to petitioner's property from Collins Way and the neighborhood to the west. The city cited petitioner for failing to comply with the condition of the 1993 permit. In return, petitioner filed suit and asked the circuit court to declare that it was not required to provide the walkway or, in the alternative, to award compensation for a taking of its property. The city and petitioner agreed to hold the enforcement and declaratory judgment proceedings in abeyance while petitioner pursued an application to modify the condition of approval. Petitioner asked the city to clarify whether the condition applies to the disputed walkway and, if it does, to remove the easement requirement. The city's design review commission denied the requested modification and, on appeal, the city council affirmed the commission's decision. The council concluded that the condition of approval applied to the disputed walkway and that modification of this condition would be inconsistent with city code provisions governing walkways and accessways.

On appeal to LUBA, petitioner argued that the condition requires petitioner to dedicate a public easement for the disputed walkway and that the city's refusal to approve the requested modification to this condition resulted in an unconstitutional exaction. In petitioner's view, the city had previously determined that it did not need part of Collins Way for public access when it vacated the portion of the street that is now part of petitioner's property. Petitioner contended the city can not now change its mind and require petitioner to provide the public access that the city had voluntarily relinquished in the street vacation. Even if the city's 1993 permit approval decision establishes a need for pedestrian access across its property, petitioner argued that the city's decision failed to establish that the required 160-foot by 5-foot walkway is roughly proportional to the impact of its development.

LUBA reviewed the city's decision and concluded that the city had identified a public need that was affected by petitioner's development and had adequately demonstrated that retaining the condition requiring dedication of a public easement for all walkways and sidewalks was roughly proportional to the impact of petitioner's development. The specific public need the city identified is for pedestrian and bicycle access, as reflected in city code requirements for public pedestrian and bicycle accessways to be provided in conjunction with all developments that involve building a new structure. The city's findings also explained that a part of Collins Way had been previously vacated to facilitate development of the six lots comprising petitioner's property as a unit. At the time the street vacation was approved, it was anticipated that public pedestrian and bicycle access would be required and provided within and across the property. The city noted that if each of the six lots had been developed separately, each lot owner would have been required to dedicate and develop public sidewalks. This requirement was not negated by petitioner's decision to acquire all six lots and develop them commonly. According to the city, the common development approach could in fact have even exacerbated the identified public need.

LUBA agreed with the city "that there is a nexus between the requirement that petitioner grant an easement for access across its property and the city's policy regarding connectivity." Slip Op. at 13–14. The fact that the city did not retain a public access easement across the vacated portion of Collins Way did not prevent the city from determining at the time the 1993 permit was approved that there is a need for such access. This is particularly true where the proposed development would have the effect of impeding access across the property.

Finally, LUBA rejected the petitioner's argument that the city had improperly retained the condition based on speculative future development and petitioner's challenge to the city's demonstration of rough proportionality. LUBA concluded that the city had properly considered the impacts of allowed uses on the property and the

impacts of neighborhood residents who might patronize the building and travel to it on foot or by bicycle. Such impacts reasonably flow from the approval and are permissible for the city to consider under *McClure v. City of Springfield*, 37 Or LUBA 759, *aff'd*, 175 Or App 425, 28 P3d 1222 (2000). Additionally, LUBA ruled that the city had adequately quantified the impacts of petitioner's development and demonstrated that the condition is roughly proportional to the impact of the development. The city's findings considered the types of uses in the vicinity and the impacts of petitioner's development on access to and from these uses and on the pedestrian and bicycle system. In short, LUBA concluded that "the city has adequately quantified the impact and the exaction, and could conclude, based on that quantification, that the exaction is roughly proportional to the impact of petitioner's development." Slip Op. at 15. Accordingly, LUBA affirmed the city's decision.

Editor's Note: *Petitioner appealed LUBA's decision to the Court of Appeals. The court heard oral arguments on December 2, 2002.*

Kathryn S. Beaumont

Announcements

NEW ASSISTANT EDITOR

Over the years, the Oregon Real Estate and Land Use Digest has been fortunate to have an assistant editor who provides invaluable help in producing and publishing the Digest in a timely manner. The Digest is pleased to welcome Nathan Baker as our new assistant editor. Nathan is a graduate of Northwestern School of Law and a staff attorney with the Friends of the Columbia Gorge. If you have questions, comments, or articles to submit to the Digest, please contact him at nathanb@mindspring.com. Welcome, Nathan!

LANDLORD/TENANT AUTHOR NEEDED

The Digest seeks the assistance of an attorney willing to summarize landlord/tenant cases on a regular basis. The time commitment is small, but the benefit to the Section is significant. If you are interested in volunteering, please contact the editors.

Gorge Commission Decisions Now Online

For practitioners in the Columbia River Gorge National Scenic Area and others interested in following the Columbia River Gorge Commission, the Commission's appellate decisions are now available online. To view the decisions, visit ***www.gorgecommission.org/appeals.htm***.

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