OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 25, No. 2 • April 2003

Highlights

Appellate Cases—Real Estate

SYSTEM DEVELOPMENT CHARGES WITHSTAND CONSTITUTIONAL SCRUTINY

In *Homebuilders Association of Metropolitan Portland v. Tualatin Hills Park and Recreation District*, 185 Or App 729, 62 P3d 404 (2003), the Oregon Court of Appeals held that system development charges (SDCs) to finance parks withstood constitutional scrutiny.

The case was brought by several real estate developers and a developers association against a park district that had recently adopted an SDC ordinance under ORS Chapter 223. The district's SDC ordinance imposed a fee on new development to offset the cost of providing services to the growth associated with that development. The plaintiffs made a facial challenge to the ordinance, alleging violation of both statutory and constitutional provisions. The trial court granted partial summary judgment on only the constitutional claims and plaintiffs appealed.

The Court of Appeals quickly dealt with two preliminary issues (standing and the contours of the trial court decision) and then turned to the Oregon constitutional claim. The court rejected two alternative theories under Article I, section 18 of the Oregon constitution.

First, the court considered whether requiring a developer to pay an SDC imposes a regulatory taking because the exaction reduces the value of the property. Expressly disclaiming an answer to whether exacting money can ever be a taking, the court rejected the argument in this case. The court based its rejection on the Oregon Supreme Court's "general rule" of regulatory takings; *i.e.*, in order to establish a regulatory taking, a property owner must show that the government has taken "all substantial beneficial or economically viable use of the property." *Deupree v. ODOT*, 173 Or App 623, 630, 22 P3d 773 (2001), *rev den*, 334 Or 397 (2002). The court noted that the plaintiffs "do not, and could not" allege such a circumstance. 185 Or App at 734.

The court then discussed an alternative reading of the plaintiffs' argument: that the district appropriates the plaintiffs' money and that that act is a taking. The court noted that, under such a theory, most taxes, including the income tax, would be subject to a takings attack. The court emphatically rejected this argument, calling it a "radical conclusion." *Id.*

The court then turned to the federal constitutional claims, and rejected those as well. The court first discussed some of what it views as difficulties with the United States Supreme Court's jurisprudence in the takings area. The court noted that the parties' original arguments centered on whether the appropriate test was the "rough proportionality" test from *Nollan* and *Dolan*, or the "rational basis" test applied to "ordinary social or economic legislation." The court ultimately concluded that its recent decision in *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, 45 P3d 955, *rev den* 334 Or 492 (2002), *cert. denied*, ____U.S.____ (U.S. Mar. 10,2003) (No. 02-750) required it to hold that the "rough proportionality" test did not apply to the question at hand.

Nonetheless, the plaintiffs had suggested in supplemental briefing

that the court should adopt the "reasonable relationship" test described by the California Supreme Court in Justice Mosk's concurrence in *Ehrlich v. City of Culver City*, 50 Cal. Rptr 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929 (1996). The Court of Appeals has noted previously that the "reasonable relationship" test is not that different from the "rough proportionality" test and has applied it to *ad hoc* nonmonetary conditions on development, *e.g.*, *Art Picullel Group v. Clackamas County*, 142 Or App 327, 331, 922 P2d 1227 (1996). However, the court noted that SDCs are not *ad hoc* exactions, but rather "quasi-legislative." The court went on to note the "higher degree of judicial deference" given to legislative enactments. 188 Or App at 738.

The court then agreed with the district's position that the "rational basis" test should apply, noting that the Takings Clause does not prohibit the appropriation of property; it only requires the government to pay a fair price when it does so. Therefore, applying a takings analysis to taxes or appropriations of money would lead to incoherent results, *e.g.*, government can take money, but only if it pays for it.

The court also concluded that the district's SDC ordinance passed muster under the "reasonable relationship" test advocated for by the plaintiffs. The court first rejected the plaintiffs' argument that they were entitled to introduce expert testimony that the methodology was fundamentally flawed. The court held that, in most constitutional challenges to the adequacy of legislation, the court looks to whether, on any set of facts, the "challenged law is invalid *in toto*." *Advocates for Effective Regulation v. City of* Eugene, 160 Or App 292, 310, 981 P2d 368 (1999). With that conclusion out of the way, the court briefly summarized the SDC methodology and held that plaintiffs had not met their burden of showing that the SDC is unrelated to its stated objective or that the amount of fees imposed by the SDC is unreasonable or arbitrary. Accordingly, the court concluded that the SDC methodology met both the "reasonable relationship" and the "rational basis" tests.

William Kabeiseman

Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park and Rec. Dist., 185 Or App 729, 62 P3d 404 (2003).

Appellate Cases—Land Use

COURT OF APPEALS APPLIES UTSEY V. COOS COUNTY STANDING

The Court of Appeals' decision in *Doty v. Coos County*, 185 Or App 233, 59 P3d 50 (2002), *clarified and adh'd to as clarified on recons*, 2003 WL 753219, ___ Or App ___, ___ P3d ___ (Mar. 6, 2003), is interesting because it applies the Court of Appeals' closely divided decision in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), which changed the standing requirements for obtaining review of LUBA decisions.

In *Utsey,* although the League of Women Voters (League) had complied with the statutory standing requirements under ORS 197.850 (requiring it to have been a party to the proceedings before LUBA), the Court of Appeals dismissed the League's appeal because it had failed to demonstrate the additional constitutional requirement that the challenged decision would have a "practical effect" on its interests.

In *Doty*, the Court of Appeals held that the petitioner had demonstrated that she had standing under the *Utsey* standard. The court reversed and remanded a LUBA decision regarding a comprehensive plan map amendment and rezoning of two parcels from Industrial to Recreation to facilitate development of a 150-space RV park (the "Westbrook property") within the Coastal Shorelands Boundary. *Doty v. Coos County*, 42 Or LUBA 103 (2002). LUBA had required a remand to address an unexplained difference between the location of the shoreland boundary line used by the applicant and accepted by LUBA and the boundary line as interpreted by the Planning Director. The Court of Appeals also held that LUBA had correctly applied OAR 660-004-0018, which governs when the county must take a new exception in order to allow the proposed plan and zone changes. In the most important aspect of the decision, the Court concluded in footnote 1 that the petitioner had standing under *Utsey*:

> After oral argument in this case, we requested that the parties demonstrate that this controversy is justiciable. Specifically, we asked petitioner to demonstrate that she has standing under the standard articulated in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933(2001), *rev allowed*, 334 Or 75 (2002). In *Utsey*, we reasoned that (1) the party that invokes the jurisdiction of the court has the "obligation to establish the justiciability of its claim"; (2) to establish that the claim is justiciable, the party "must

> demonstrate that a decision in this case will have a practical effect on its rights"; and (3) "[t]he case law concerning the 'practical effects' requirement clearly states that an abstract interest in the proper application of the law is not sufficient." 176 Or App at 549–50.

185 Or App at 235 n 1. The Court of Appeals then determined that the petitioner had standing based on her affidavit, which stated,

> "The Westbrook property is located a short distance north of Bandon on the east side of Highway 101 and immediately south of the Coquille River. I pass by the property regularly. The Westbrook property is in a conspicuous location. Development of the property as proposed by Westbrook and as allowed by the county would significantly change the character of the vicinity and would adversely affect my use and enjoyment of the Coquille River estuary in the vicinity of the Westbrook property. I use the Coquille River estuary in the this vicinity for passive recreation, including the viewing of wildfowl and other birds."

Id. (quoting petitioner's affidavit).

Finally, the Court of Appeals cautioned that, although petitioner was given an opportunity on review to demonstrate her standing, parties should make such a demonstration before the initial decision-maker." *Id.*

Review of *Utsey* has been allowed by the Oregon Supreme Court, but for now, prudent persons or organizations should include a statement, supported by evidence in the record, explaining how the decision being challenged will have a "practical effect" on their interests. *Doty* provides a useful summary and application of the "practical effect" standing standard, including an example of what an adequate standing statement looks like after *Utsey*.

Editor's Note: *While the Utsey case was pending before the Oregon Supreme Court, the Utsey applicants withdrew their land use application and Coos County deemed the application "null and void." On February 25, 2003, the Oregon Supreme Court dismissed review of Utsey as moot and denied the appellants' motion to vacate the Court of Appeals' decision. Justice Riggs indicated that he would have allowed the motion to vacate. On March 18, the League of Women Voters moved for reconsideration of whether to vacate the Utsey decision.*

John Pinkstaff

Doty v. Coos County, 185 Or App 233, 59 P3d 50 (2002), clarified and adh'd to as clarified on recons, 2003 WL 753219, ___ Or App ___, ___ P3d ___ (Mar. 6, 2003).

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.

The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

CLASH OF THE CONDEMNORS

City of Keizer v. Lake Labish Water Control Dist., 185 Or App 425, 60 P3d 557 (2002), involved a dispute between the city of Keizer and the Lake Labish Water Control District over the flooding of a city park as a result of the operation of a dam controlled by the district. The city sued for inverse condemnation under Article XI, section 4 and Article I, section 18 of the Oregon constitution, as well as under ORS 553.090 and 553.270. The trial court dismissed these claims on the basis that only a private individual, not a city, may bring a claim for inverse condemnation. The city appealed, and the Court of Appeals reversed, holding that the city was entitled to bring an inverse condemnation claim against the district under Article XI, section 4 of the Oregon constitution, but not under Article I, section 18 or the cited statutes.

The court first examined claims brought under ORS 553.090 and 553.270. Those statutes authorized the district to acquire property by condemnation, including property already devoted to a "less necessary" public use. The court noted that the district was a creature of statute and that the district would violate the statutes if it acquired property by unauthorized means. However, the court held that the statutes at issue did not specify a remedy, much less the inverse condemnation remedy, and the court concluded that as a matter of law, a claim for inverse condemnation based *solely* on ORS 553.090 (4) and ORS 553.270 could not be brought against the district.

Next, the court turned to the Article I, section 18 takings claim, applying the three-component method of analysis described in *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992), which looks at (1) the specific wording of the disputed provision, (2) the case law surrounding it, and (3) the historical circumstances that led to its adoption. Article 1, section 18 states "Private property shall not be taken for public use without just compensation." The goal under the *Priest v. Pearce* analysis is to ascertain the meaning most likely intended by the framers.

The court's Article I, section 18 analysis focused on the meaning of the phrase "private property." After examining 19th-century case law from around the nation and discussing the distinction between property held by a governmental entity in its governmental capacity and property held in its proprietary capacity, the court held that a public park is owned by a city in a governmental, not a proprietary, capacity. Citing a 1937 Oregon Supreme Court case, *Etter v. City of Eugene*, 157 Or 68, 71, 69 P2d 1061 (1937), the court held that the city's park was not "private" property, and therefore, could not form the basis of an inverse condemnation claim under Article I, Section 18.

Finally, the court turned to the Article XI, section 4 claim, and once again applied the *Priest v. Pearce* analysis. Article XI, section 4 states, "No person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law." This time the court focused on the words "person" and "corporation." The district argued that it was not a "corporation" and that the city was not a "person."

Again, relying on 19th-century cases from around the nation, the court found that the term "person" was generally understood to include municipal corporations such as cities at the time of the adoption of the Oregon constitution. Based on that, the court determined that the framers would have understood the term "person" in Article XI, section 4, to include cities.

Turning at last to the term "corporation," the court conducted a textual analysis of Article XI. The court noted that Article XI uses the term "corporation" to refer to both private and public corporations. Section 2 of Article XI specifically refers to municipal corporations, while section 3 specifically refers to private business corporations. Since section 4 of Article XI simply employed the unadorned term "corporations" without any limiting language, the court held that the framers had intended a broad interpretation of that term in Article XI, section 4 that included both private and public corporations. The court buttressed this conclusion with dictum from the Supreme Court's decision in *State ex rel Eckles v. Woolley*, 302 Or 37, 726 P2d 918 (1986).

After a fairly lengthy discussion of the foregoing issues, the court disposed of two other issues rather quickly. First, the court noted that as a general rule the state legislature *may* authorize one governmental unit to take public property from another governmental unit without compensation, but that in this case the legislature had adopted no such statute. On the contrary, ORS 553.270 expressly stated that the district must pay for the privilege of condemning property already devoted to public use.

Second, the court cited the Supreme Court's decision in *Vokoun v. City of Lake Oswego*, 335 Or 19, 56 P3d 396 (2002), for the proposition that flood damage that causes "substantial interference" with the property rights of a landowner may give rise to a claim for inverse condemnation. The court found that the city's complaint was sufficient under *Vokoun* to state a claim for inverse condemnation, and remanded the case for further proceedings in the trial court.

The *Lake Labish* case is interesting in that it pits one governmental entity against another with claims that are typically brought against governmental entities by private property owners. Although both the city and the district have condemnation authority, the case did not examine the issue of whose condemnation authority trumped the other. Rather, the issues focused on questions of whether a governmental entity such as a city could bring an *inverse* condemnation claim and whether the city's claims for inverse condemnation were legally sufficient under the statutes and constitutional provisions alleged. While much of the *Lake Labish* case would be of interest only to prospective governmental plaintiffs seeking inverse condemnation, some of the court's rulings would appear to apply to *anyone* seeking inverse condemnation against a water district.

Steve Morasch

City of Keizer v. Lake Labish Water Control Dist., 185 Or App 425, 60 P3d 557 (2002).

U.S. SUPREME COURT DENIES CERT. IN TWO OREGON TAKINGS CASES

On March 10, 2003, the U.S. Supreme Court denied certiorari in two different takings cases originating from Oregon.

In the first case, *Rogers Machinery Company v. City of Tigard*, the Oregon Court of Appeals held that the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), did not apply to a legislatively adopted traffic impact fee structure that left "no meaningful discretion either in the imposition or in the calculation of the fee." 181 Or App at 400.

In the second case, *Boise Cascade Corporation v. United States* (reviewed in the last issue of the *RELU Digest*), the Federal Circuit held that restrictions against logging a 65-acre tract of land in Clatsop County to preserve northern spotted owl habitat did not effect a physical taking in violation of the Fifth Amendment.

Nathan Baker

Rogers Machinery Co. v. City of Tigard, 181 Or App 369, 45 P3d 966, rev den, 334 Or 492 (2002), cert. denied, ___ U.S. ___ (U.S. Mar. 10, 2003) (No. 02-750).

Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002), cert. denied, ___ U.S. ___ (U.S. Mar. 10, 2003) (No. 02-862).

NINTH CIRCUIT UPHOLDS RLUIPA IN CALIFORNIA PRISON CASE

In *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), defendant state prison officials brought facial challenges to the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, and appealed from a series of injunctions preventing their interference with Friday prayers by Muslim prisoners. The plaintiffs were Muslim inmates at the Solano State Prison. The defendants' challenges to RLUIPA were based on several constitutional provisions, including the Spending and Establishment Clauses. The plaintiffs originally brought the suit in 1996 on First Amendment grounds to prevent interference with religious services, and amended the complaint to add RLUIPA as a basis in 2000 following the enactment of that statute. The court reviewed the District Court actions on a *de novo* basis.

The court turned first to the Spending Clause challenges, noting that that clause requires conditions on state funds to be in pursuit of the general welfare, unambiguously stated, and, possibly, related to federal interests. The court held that Congress has a wide leeway in determining the nature of the general welfare, to which courts give great deference, and characterized the welfare objective in this case as protecting religious worship in institutions from substantial and illegitimate burdens, so as to guard against bias and infringement on fundamental freedoms.

RLUIPA, in the view of the court, meets all three of these requirements, because it prohibits states and local governments from such actions through unambiguous conditions on the receipt of federal funds, putting state and local governments on clear notice of their obligations. The court noted that the third spending clause requirement probably requires a nexus between conditions on the receipt of federal funds and the identified national interest. In any event, that relationship was established in this case by requiring that federal funds do not subsidize conduct that infringes on religious freedoms and in assuring that the rehabilitation of prisoners will occur. Because the court found the RLUIPA could be based on the Spending Clause, it did not consider attacks based on the Commerce Clause.

The court then turned to the challenges made on other constitutional bases, beginning with the Establishment Clause. The court found that, while Congress may not advance religion, it may require accommodation of religious practices. The court used the three-part test of *Lemon v. Kurtzman*, 403 U.S. 601, 612 (1971), to analyze the Establishment Clause claim. The court first found that RLUIPA had a secular purpose in alleviating significant governmental

interference with the ability of prisoners to practice their religion so as to allow religious institutions to carry out their missions within secular institutions. Secondly, by limiting itself to lifting burdens on religious practices within institutions, RLUIPA directs the accommodation of free exercise of religion, which the Constitution allows. Finally, by not requiring "pervasive monitoring," the statute does not foster "excessive entanglement" with religion. RLUIPA lifts burdens, according to the court, rather than bestowing benefits to religious practice. The court found no violation of the Establishment Clause.

Similarly, the court found no disturbance of the "core functions" of state governmental activity that might violate the Tenth Amendment, noting that the states retain the discretion of foregoing federal funds by deciding not to meet Congress's conditions. Nor was there an Eleventh Amendment violation, because plaintiffs were citizens of California, suing their own state officials in federal courts. Finally, the court found that RLUIPA did not violate the separation of powers standards set in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that laws of general applicability that create incidental burdens on religious conduct do not violate the First Amendment.

This is the first major federal appellate court opinion dealing with RLUIPA, and it may become the first vehicle for dealing with the constitutionality of that statute before the United States Supreme Court.

Edward J. Sullivan

Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002).

Federal District of Oregon

FEDERAL DISTRICT COURT DECLINES TO DISMISS ESA TAKINGS SUIT BROUGHT AGAINST OREGON STATE FORESTER

From time to time, a case decided at a preliminary stage signals a sea change. *Pacific Rivers Council v. Brown,* No. 02-243 (D. Or. Dec. 23, 2002) (order denying motions to dismiss) is such a case. The case stands for the proposition that federal courts have jurisdiction to determine whether state rules governing logging operations on private land must comply with the Endangered Species Act of 1973 (ESA).

The plaintiffs challenged the State Forester's routine approval of clearcut logging operations on private timberlands, claiming that the approvals are likely to cause takings of Oregon Coast coho salmon, and therefore violate the ESA. The specific practices that the plaintiffs objected to were: (1) clearcut logging on steep and unstable slopes where landslides would reach salmon habitat; (2) clearcut logging along small salmon-bearing streams with only a 20-foot no-cut buffer; and (3) clearcut logging along small non-bearing streams that flow into salmon-bearing streams, without a no-cut buffer. The plaintiffs sought an injunction to prohibit the State Forester from approving logging operations on private timberlands in these three situations.

Several industry trade associations and Tillamook County intervened on behalf of the defendant. The defendant and the defendant-intervenors moved to dismiss the plaintiffs' complaint on five grounds: (1) the action was not justiciable because the issues were not ripe for adjudication, (2) the action was not justiciable because the plaintiffs lacked standing, (3) the action was barred by the Eleventh Amendment, (4) the action was barred by the Tenth Amendment, and (5) plaintiffs failed to state a claim.

Ripeness

The defendants argued that the plaintiffs' complaint was a "programmatic challenge" to the forest regulations, *i.e.*, a general attack on the sufficiency of the forest practice program, rather than a challenge to a specific logging operation. A programmatic challenge was rejected in *Ohio Forestry Association v. Sierra Club,* 523 U.S. 726 (1998), because that program did not authorize or prohibit any specific action.

The court distinguished *Ohio Forestry* from this case because the plaintiffs had not raised a facial challenge to the Oregon forest practices program; rather, the plaintiffs had challenged the ongoing and continuing approvals by the State Forester of private logging in the three situations alleged to harm salmon. The court found that the plaintiffs had established a hardship that would flow from delaying review, in that these ongoing approvals were alleged to cause takings of protected salmon.

Standing

The defendants argued that the plaintiffs lack standing because there was no causal connection between the State Forester's approvals and the alleged harm to protected salmon. The court found that the plaintiffs had met the standing requirement by showing a reasonable probability that the State Forester's approvals threatened their "concrete interest"—namely, causing takings of protected salmon.

The defendants also argued that the plaintiffs lacked standing because the only actions that may cause takings of salmon under the ESA are the forest operations themselves, not the administrative actions of the State Forester. However, the court rejected this argument, finding that the plaintiffs

need only show a causal connection to establish standing.

Eleventh Amendment

The Eleventh Amendment prohibits federal courts from hearing actions by private citizens against any state without state consent. An exception is recognized for prospective relief against state officers to enjoin violation of federal law under *Ex parte Young,* 209 U.S. 123 (1908).

The defendants argued there must be a fairly direct connection between the State Forester and the enforcement of the state law being challenged for the *Young* doctrine to apply. The defendants argued that the complaint was directed at the rule-making authorities, rather than the State Forester, who has no authority to change the rules he must enforce. The plaintiffs replied that the State Forester is the front-line official who gives effect to state law when he reviews and approves private logging operations. The court agreed, finding that the *Young* doctrine allowed it to enjoin the State Forester from implementing regulations that violate the ESA.

The defendants argued that the plaintiffs' action was barred because it was the functional equivalent of an action against the state, *i.e.*, the relief requested was so much of a divestiture of state sovereignty as to effectively make the suit one against the state itself. Suits implicating a "core area of sovereignty" are barred by *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). The defendants pointed to Oregon's long-standing regulatory jurisdiction over land use, which the relief requested would replace with a blanket prohibition of logging.

The court held that *Coeur d'Alene Tribe* did not bar the plaintiffs, because their claim did not involve state-owned lands, but rather private timberlands. In effect, the court restricted the *Coeur d'Alene Tribe* doctrine to state-owned property, regardless of how widespread and invasive the impact of the requested relief might be.

In conclusion, the court agreed with other cases that the *Young* doctrine allowed actions to enjoin continuing violations of the ESA. The court's ruling on the Eleventh Amendment defense is the lynchpin of the case.

Tenth Amendment

The Tenth Amendment reserves to the states and the people all powers not delegated to the federal government. The defendants argued that the Tenth Amendment prohibited the federal government from compelling states to enact or administer a federal regulatory program such as the ESA.

The court quickly dismissed this argument. Requiring states to comply with general federal statutory obligations poses no Tenth Amendment constitutional problem. State officials may be enjoined from violating federal law without offending the Tenth Amendment.

Stating a Claim

The defendants argued that the plaintiffs had failed to state a claim under the ESA because the State Forester cannot be liable, as a matter of law, for ESA violations committed by private parties whose actions are incidentally subject to the State Forester's authorization. Any salmon taking is caused by the logging operators, not the State Forester. The defendants argued that the State Forester does not cause takings by failing to regulate strictly enough to prevent takings by private parties.

The plaintiffs argued that the State Forester's authorization of logging operations that are likely to result in takings *is itself* a cause of take, and therefore prohibited by the ESA.

The court agreed with the plaintiffs, noting other cases where the ESA was violated by governmental approval of private party actions that resulted in takings, such as commercial lobster pots that entangled right whales, use of strychnine-containing pesticides that killed endangered species by ingestion, and vehicular beach access during loggerhead turtle mating season.

The court concluded that the plaintiffs' allegations that the State Forester's approval is a prerequisite to certain logging operations that are likely to result in takings of protected salmon were sufficient to state a claim under the ESA.

Conclusion

In response to the court's decision, the Oregon Board of Forestry repealed the challenged regulations on January 27, 2003. Under the amended rule, prior approval by the State Forester is no longer required on landslide hazard areas. However, private timber operators are now informed they are responsible for compliance with the ESA in addition to, but separate from, state standards.

The Board of Forestry noted that the ESA envisions state cooperation to assist in the conservation of protected species, but does not require the state to go beyond what is required by the federal agencies that implement the ESA. In a public statement, the Oregon Department of Forestry criticized the litigation as creating disincentives for cooperative

efforts to protect and restore endangered and threatened species.

The amended rule should minimize disruption to lawful logging practices. Rather than changing logging practices, the main effect of the litigation appears to be a step backward in productive cooperation between agencies, industry operators, and concerned citizen groups such as the plaintiffs.

Stephen Mountainspring

Pacific Rivers Council v. Brown, No. 02-243 (D. Or. Dec. 23, 2002) (order denying motions to dismiss).

Cases from Other Jurisdictions

CALIFORNIA COASTAL COMMISSION VIOLATES SEPARATION OF POWERS DOCTRINE, SAYS CALIFORNIA APPELLATE COURT

In *Marine Forests Society v. California Coastal Commission*, 128 Cal. Rptr. 2d 869, (Cal. Ct. App. 2002), the California Court of Appeals upheld a Superior Court ruling that the structural makeup of the California Coastal Commission violates the separation of powers doctrine.

The California Coastal Act of 1976 (Coastal Act), Cal. Pub. Res. Code §§ 30000–30900, is California's coastal zone management program for the purposes of the federal Coastal Zone Management Act of 1972, #16 U.S.C. §§ 1451–1465. The Coastal Act created the California Coastal Commission as the state's coastal zone planning and management agency. The commission's duties include the adoption of rules (a legislative role), the investigation and review of local coastal programs for compliance with the Coastal Act (executive roles), and the administration of permits and cease and desist orders (quasi-judicial roles).

The commission is made up of twelve members. Four are appointed by the governor and eight are appointed by the legislature. Members serve a two-year term at the pleasure of their appointing authorities.

This case originated when the commission notified the plaintiff that it intended to begin cease and desist proceedings concerning the plaintiff's experimental man-made reef on the ocean floor off of Southern California. The commission ultimately issued a cease and desist order and the plaintiff responded by filing an action to enjoin the commission from implementing the order. The trial court issued the requested injunction, ruling that the legislature's ability to remove a majority of the commission members rendered the commission a legislative agency and that the commission had exceeded its authority by exercising an executive function and issuing the order.

On appeal, the Court of Appeals affirmed the trial court's decision. The court concluded that because the legislature appoints a majority of the members of the Coastal Commission and may remove those members at will, the legislature retains an impermissible control over the commission, which is supposed to be an executive agency. The court enjoined the Coastal Commission from exercising any quasi-judicial functions.

The commission argued that the legislature's appointment of a majority of the members does not violate the California constitution because the California constitution allows the legislature to appoint members of an executive branch agency.

The court disagreed; it stated, simply, that the California legislature "cannot exercise direct supervisorial control over the performance of the duties of an executive officer in his or her execution of the laws; rather, it can exercise control only indirectly by dictating the manner of execution of the laws via the enactment of legislation." 128 P.3d at 880.

The Court also rejected the Coastal Commission's argument that Marine Forests' claim was deficient because it did not present an "as applied" challenge or include any factual allegations that the legislature had actually directed or dictated the actions of its appointees. The court stated that "[i]t is the Commission members' presumed desire to avoid removal—by pleasing their legislative appointing authorities—which creates the subservience to another branch that raises separation of power problems." *Id.* at 882.

For more than 25 years, the Coastal Commission has been the 800-pound gorilla of planning and development for the California Coastal Zone. This case is not the Commission's death knell. On February 18, 2003, the California legislature passed A.B. 1xx, which deletes the requirement that members of the Coastal Commission serve at the pleasure of their appointing authority and which lengthens their terms to four years. A.B. 1, 2003-2004 Leg., 2d Ex. Sess. (2003). Two days later, the governor signed the bill into law, and it takes effect on May 19. In addition, on February 10, 2003, the Coastal Commission sought expedited review by the state Supreme Court to resolve questions that would be unanswered by the legislation—primarily the status of the more than 100,000 coastal zone permits.

Jeff Litwak

Marine Forests Soc'y v. California Coastal Comm'n, 128 Cal. Rptr. 2d 869 (Cal. Ct. App. 2002).

WASHINGTON COURT OF APPEALS UPHOLD COUNTY NOTICE PROVISIONS

In *Holbrook, Inc. v. Clark County*, 112 Wash. App 354, 49 P.3d 142 (2002), the plaintiff challenged defendant's designation of its land for forest resource purposes under the state's Growth Management Act (GMA). In particular, the plaintiff challenged the notice of the planning and zoning proceedings on statutory and constitutional grounds.

The plaintiff bought 75 acres in early 1993 with the intent of logging it and selling off the land in five-acre tracts—something it could have done at the time without further local review. Also in 1993, shortly after the plaintiff's purchase, the county adopted subdivision regulations. The county proposed a comprehensive plan later that year and held hearings until late 1994, when it adopted a final comprehensive plan. The plan placed 55 acres of the tract in a forest designation that had a minimum lot size of 40 acres for a house. However, while the plan was pending, a landowner could have sold off the land in five-acre tracts if subdivision approval had been obtained.

The county had provided for much informal notice of the pending planning and zoning proceedings, and in fact had given notice to all Clark County residents, but had not provided notice to property owners with addresses outside the county. In 1995, the plaintiff learned about the changed designation on its land and attempted to have its property reclassified, but was unsuccessful. The plaintiff brought the instant action under the Federal Civil Rights Act for downzoning its land without adequate notice. The trial court bifurcated the liability question from the damage question and found no constitutional or statutory deprivations. The plaintiff appealed and the Court of Appeals affirmed the trial court's decision.

The appellate court turned first to the plaintiff's statutory claims under the GMA statutes and regulations, which say that landowners should receive early and timely notice of pending changes. The court also found no basis under either the statutes or the regulations to require individual notice to all landowners, noting that the examples used in these requirements spoke to broad-based notice, but not individualized notice. The court also said that the Washington legislature had taken further action to require additional notice beginning in 1997, but these requirements were neither retroactive nor did they impose an obligation for individualized notice. Instead, these notice provisions gave several examples of how notice procedures ought to be put in place to require notice "reasonably calculated" to provide for knowledge of pending changes by property owners. The court noted that the Washington Attorney General had opined that such individualized notice was not required and said it gives attorney general opinions "considerable weight" in construing state statutory provisions on notice. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wash. 2d 819, 828, 748 P.2d 1112 (1988).

The court then turned to the plaintiff's contention that the state constitutional provision on privileges and immunities and the federal due process clause required individualized notification to property owners. The court rejected the application of *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), which found notice by publication inadequate; however, that case involved a judicial settlement of a trust account, which focused on only one property interest. In this case, however, the massive rezoning undertaken by the county was legislative in nature, and individualized due process rights applicable to judicial or quasi-judicial actions are not applicable in legislative matters. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). Even though these broad and policy-based zoning or rezoning actions affect individual properties, they are not rendered quasi-judicial by that fact.

The court then turned to the plaintiff's equal protection challenge to the county's decision to send notice only to Clark County addresses. The court found that strict scrutiny was not required, because no fundamental right or suspect classification was involved. Thus, only the rational basis test applied. In this case, the county chose to give notice only to the residents of Clark County, whether or not they owned land. There was a clear, rational basis for giving notice in this way, particularly because state law did not otherwise require individualized notice. The court said equal protection does not require that all persons be treated alike, but rather than all within a given classification be so treated and that there exists reasonable grounds for distinctions among classes. The county's creation of a class of all residents of Clark County was rationally based and there was thus no equal protection violation.

At the time, there was no statutory or valid state agency rule requiring notice for legislative land use proceedings, and the court found no state or federal constitutional provision to require such notice either. The disappointed expectations of property owners may trigger, as it has in Oregon, a push for legislative changes to require such notice. However, absent such a statutory requirement, the state and federal constitutions usually do not require individualized notice for legislative decisions.

Edward J. Sullivan

Holbrook, Inc. v. Clark County, 112 Wash. App 354, 49 P.3d 142 (2002).

FINALITY RULES THE DAY, EVEN WITHOUT NOTICE OF DECISION

In *Samuel's Furniture v. Washington State Department of Ecology*, 147 Wash. 2d 440, 54 P.3d 1194 (2002), the Washington Supreme Court held (5 to 4) that the Washington Department of Ecology is required to appeal a local government's determination that a project is not within the shoreline jurisdiction of the Shoreline Management Act of 1971, RCW Chapter 90.58, in order to challenge the determination. This case is interesting because Ecology apparently did not receive notice of the local government's initial determination.

When Samuel's Furniture built its store in 1990–91, the City of Ferndale did not require a shoreline permit. In 1998, Ferndale determined that an expansion of the store would likewise not require a shoreline permit. Although not stated in the decision, apparently and not surprisingly, Ferndale did not provide notice of this determination. As part of the permitting process, Samuel's completed an environmental checklist under the State Environmental Policy Act (SEPA), RCW Chapter 43.21C. The checklist noted that the project was in the immediate vicinity of the Nooksack River and within the river's 100-year floodway.

Pursuant to a fill and grade permit, Samuel's then placed 14,000 cubic yards of fill on the site. Subsequently, Ferndale issued a building permit and Samuel's began pre-construction demolition. Ecology learned of the project from a concerned citizen. It asserted that the project was within the floodway, and that a shoreline permit was needed. Ferndale issued a stop work order, reviewed its jurisdictional maps, and again determined that the project was not within the shoreline jurisdiction. Ferndale withdrew the stop work order. Ecology did not appeal the withdrawal of the stop work order.

In 2000, Ecology filed an action for declaratory judgment requesting that the Superior Court determine whether the property was within the shoreline jurisdiction. The Superior Court granted Samuel's summary judgment motion, ruling that Ecology had waived its right to challenge Ferndale's jurisdictional decision by failing to appeal the fill and grade permit, the building permit, or the withdrawal of the stop work order under Washington's Land Use Petition Act (LUPA), RCW Chapter 36.70C.

The Court of Appeals reversed, holding that because the Shoreline Management Act gave Ecology the authority to review a local government's determination, a local government's decision was not final for the purposes of LUPA.

The Supreme Court reversed the Court of Appeals. It concluded that the Court of Appeals' determination created a "nonfinal final decision depending on whether Ecology decides to 'review' the City's actions." 54 P.3d at 1200. It also concluded that the doctrine of finality required Ecology to timely appeal Ferndale's shoreline determination, and that the collateral attack via the declaratory judgment action could not affect Ferndale's decision.

This case presents a good discussion of what is a final decision under LUPA, but what makes this case so interesting is the issue of whether Ecology could have ever filed a timely appeal. The court noted that Ecology had "general notice" when Samuel's filed the SEPA checklist with Ecology, and that Ecology received specific notice of the City's decision to rescind the stop work order. The court further noted that LUPA requires only that a local jurisdiction provide general public notice of a land use decision by publication. One question that seems to linger is whether the court would have also determined that appeals of the grade and fill permit, the building permit, or the withdrawal of the stop work order would have likewise been collateral attacks on Ferndale's initial (and un-noticed) determination that the project was outside of the shoreline jurisdiction.

The court was deeply divided. The dissent focused on what and when Ecology knew, and was troubled by how Ecology could have filed timely appeals. The dissent noted that Ecology would need an "ability to receive notice of such decisions telepathically," and that as an alternative to acquiescing to a local government's determination, "Ecology need only appeal within 21 days an undated local government decision—and do so without having received any notice of that undated decision." 54 P.3d at 1210.

While the facts of this case indicate that Ecology might have been more vigilant in gleaning its jurisdictional concerns from what it did know, this is the second case in as many years in which the Washington Supreme Court has imputed a high level of vigilance to an agency with oversight over local governments. Had this case arisen in Oregon, Ecology might have attempted an appeal under ORS 197.830(3) or (4), which allow appeals after the deadlines when no hearing is held and no notice of the decision is provided.

Jeff Litwak

Samuel's Furniture v. Washington State Dep't of Ecology, 147 Wash. 2d 440, 54 P.3d 1194 (2002).

WASHINGTON COURT OF APPEALS HOLDS THAT OWNER OF MINERAL ESTATE NEED NOT SIGN SUBDIVISION APPLICATION

In *Harrison v. County of Stevens*, ___ Wash. 2d ___, 61 P.3d 1202 (2003), the Washington Court of Appeals held that a short plat application had been properly approved, despite the absence of consent by the owner of mineral rights on the parcel. Harrison, the owner of mineral rights, challenged a Stevens County decision that approved the short plat without his signature on the application.

In 1998, Robert Harrison obtained, by quitclaim deed, a mineral estate in 80 acres of land. The deed provided in relevant part for "[minerals] located in, under and upon" the 80 acres. Subsequently, Thomas and Barbara Crain purchased 20 of the 80 acres via a statutory warranty deed that noted the reserved mineral rights.

In 1999, the Crains applied to divide their 20-acre parcel into four 5-acre parcels. At the time, Stevens County required that a short plat application contain the signature of "all parties having any interest in the land subdivided." Based on this language, the Stevens County hearing examiner held, on appeal, that Mr. Harrison had an interest in the property and was therefore a necessary signatory to the application.

In 2000, Stevens County amended its short plat ordinance to require only the signature of "all parties having any *ownership* interest in the lands subdivided" (emphasis added). The Crains applied again, and on appeal, the hearings examiner held that Mr. Harrison's signature was not required.

The Superior Court reversed the hearing examiner's decision, finding that the language in the quitclaim deed to Harrison was "unique and created a special form of mineral rights constituting 'both a mineral estate and a limited surface estate.'"

The Court of Appeals reversed. It restated that when mineral rights have been reserved or granted to another, the title to the surface and the title to the mineral rights are severed. *McCoy v. Lowrie*, 42 Wash. 2d 24, 26, 253 P.2d 415 (1953). The Court concluded that the mineral estate, because it is separate and distinct from the surface estate, cannot affect the passing of title or the subdivision, and that the owner of mineral rights is not affected by the partitioning of surface land because the surface owners take their property subject to the mineral estate.

While dividing a 20-acre parcel into four 5-acre parcels may not affect the ability to extract minerals, one can imagine that dividing land into even smaller parcels and placing infrastructure in support of a subdivision might make mining quite a bit more difficult.

Jeff Litwak

Harrison v. County of Stevens, ___ Wash. 2d ___, 61 P.3d 1202 (2003).

COURT OF FEDERAL CLAIMS DISMISSES CALIFORNIA REGULATORY TAKINGS CLAIM

In *Beekwilder v. United States*, 55 Fed. Cl. 54 (2002), the plaintiff brought a regulatory taking claim against the United States, which moved to dismiss for lack of jurisdiction. In 1987, the plaintiff had purchased 63 lots in a subdivision in Placer County, California. The land was zoned for low-density residential use. In 1988, the United States Army Corps of Engineers (Corps) investigated an alleged violation of section 404 of the Clean Water Act (CWA) and issued a cease and desist order. One of the plaintiff's former partners applied for a permit and submitted a wetland delineation for a portion of the project. The court granted an "after the fact permit" for that portion of the project but, at the request of the partnership, held an additional permit for another portion of the project in abeyance. The Corps eventually withdrew the application because no action was taken thereon. The plaintiff bought out his partners in 1993 and sought local and Corps permits for ten lots and a road. The Corps approved the project, but it was never developed.

The City of Auburn, California, which had jurisdiction over the area, then rezoned the project from single-family residential to Open Space Conservation (OSC). While he never made a further application to the Corps, the plaintiff posed a number of questions about the potential development of his property, which the Corps turned aside, saying that no such questions could be answered in the abstract; rather, a response required a development plan for review. The Corps also informed the plaintiff that a private wetlands mitigation bank was available if he wanted to take advantage of development credits, something plaintiff ultimately declined to do.

The plaintiff then filed this takings claim, alleging that defendant, through the Corps, had denied the use of his land unless he purchased wetlands credits at a price that he deemed to be uneconomic. He also alleged that it was futile for him to make an application of any kind.

The court noted that it had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, subject to existing procedural limitations, such as ripeness. The court construed the motion to dismiss as assuming the truth of all of the allegations in the complaint and to be viewed in the light most favorable to the plaintiff. However, the court also said that the plaintiff had the burden of establishing jurisdiction, particularly with respect to ripeness.

The defendant said that the local government, not the federal government, had placed the OSC designation on the property, but that plaintiff suggested that the defendant had influenced the City of Auburn to do so. The court found no physical occupation of the

site by the local government under the auspices of federal law, and concluded:

> No authority exists under the local zoning ordinance for plaintiff to develop the subject property. Plaintiff has failed to establish that he could succeed in changing the zoning from Open Space Conservation to Single Family Residential, and plaintiff cannot receive federal compensation on the basis of a local zoning restriction. In light of the City of Auburn's Open Space Conservation zoning ordinance, plaintiff's claim for a taking against the United States must be rejected.

55 Fed. Cl. at 60.

The court then turned to the ripeness issue to assure that an actual present controversy existed, noting that if a claim is not capable of adjudication, the court lacks jurisdiction. The plaintiff bore the burden of demonstrating that the agency has arrived at a "final definitive position" as to how it would apply its regulations to the property. *Suitum v. Tahoe Regional Planning* Agency, 520 U.S. 725, 737 (1997). In this case, the plaintiff must show that he applied to the Corps for a permit to obtain a definite evaluation as to how the Corps would apply section 404 of the CWA. The court cited *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001), and other authorities to determine that the claim was not ripe. The court rejected the plaintiff's futility argument, requiring him to try all available remedies in order for the claim to be ripe. The plaintiff alleged that use of the mitigation bank would exceed the value of the property; however, the court noted that the Corps had repeatedly addressed the mitigation issue to the effect that the matter was bound by the facts and circumstances of the individual application, which the plaintiff had never filed. The court also noted that the plaintiff had disclaimed a facial attack on section 404. Because the Corps does not have a mitigation policy and had insisted that plaintiff file an application before such mitigation could be evaluated, the court found that the case was not ripe for adjudication. Unless such an application were made, the court could not assess whether the mitigation would exceed the value of the property and whether any such application would be futile. The motion to dismiss was thus granted.

This case reminds practitioners of the need to avoid posing speculative takings challenges to obviate the use of the administrative process. Ripeness remains a powerful antidote to takings claims.

Edward J. Sullivan

Beekwilder v. United States, 55 Fed. Cl. 54 (2002).

Appellate Cases—Landlord/Tenant

■ TRAGEDY OF THE COMMONS: THE COURT OF APPEALS APPROVES MOBILE HOME PARK LANDLORD'S FLAT FEE FOR WATER SERVICE

In *Beldt v. Leise*, 185 Or App 572, 60 P3d 1119 (2003), the Oregon Court of Appeals held that, pursuant to ORS 90.510(8), landlords may charge tenants a flat fee for utilities despite the likelihood that tenants who consume less electricity, water, or gas are forced to subsidize other tenants' use of the same services. However, the rental agreement must clearly explain how a tenant is charged for utilities. The court reversed and remanded the lower court's declaratory judgment that the plaintiffs' water service fee complied with ORS 90.510(8), because the defendant's rental agreement did not explain that in addition to paying for water used at her residence, she might be charged for water used in the park's common areas as well.

The dispute arose after the defendant, a resident of plaintiffs' mobile home park, refused to pay the plaintiffs' utility fee for water service. The defendant's rental agreement provided that the defendant would pay $13 per month for water service. The defendant complained that the plaintiffs' method of charging a flat fee for water usage violated ORS.510(8)(a), because the water bill for the entire mobile home park was divided equally among the lots in the park and not based solely on the amount of water used by each of the tenants.

A city-owned utility provided water to residents of the park, and all of the water used by the park's residents passes through two water meters. One of the meters serves a common area and a few of the residential spaces; the other meter serves the rest of the spaces. Rather than having the tenants pay the city directly for water, the plaintiffs pay the water bill on behalf of the tenants and then charge them a flat monthly fee for water service. This method of collecting utility fees is known as a pass-through fee. Although the tenants are sometimes charged more than the city bills the park, the plaintiffs refund the difference to the tenants at the end of the year. Conversely, the plaintiffs raise the monthly fee if the tenants actually pay less for water than the city billed the park in the previous year. The plaintiffs do not charge an administrative fee or make a profit from the transaction.

The defendant's argument that the fee was improperly apportioned hinged on her interpretation of ORS 90.510(8)(a), which states,

> If a written rental agreement so provides,

> a landlord may require a tenant to pay to the landlord a utility or service charge that has been billed by a utility or service provider to the landlord for utility or service provided directly to the tenant's dwelling unit or to a common area available to the tenant as part of the tenancy. A utility or service charge that shall be assessed to a tenant for a common area must be described in the written rental agreement separately and distinctly from such a charge for the tenant's dwelling unit. A landlord may not increase the utility or service charge to the tenant by adding any costs of the landlord, such as a handling or administrative charge, other than those costs billed to the landlord by the provider for utilities or services as provided by this subsection.

The defendant argued that the statute required the plaintiffs to charge a fee based on the amount of water actually used by the defendant because the statute refers to a "utility or service charge that has been billed by a utility or service provider to the landlord for utility or service provided *directly* to the tenant's dwelling unit." *Id.* (emphasis added). According to the defendant, the statute was written to assure that utility fees are fairly apportioned among tenants.

The court turned to the legislative history of ORS 90.510(8) to settle the question. Based largely on the testimony of John Van Landingham, a representative of tenants' interests and chief architect of the 1997 amendments to the landlord-tenant statute, the court rejected both of the defendant's arguments and found instead that the legislature only intended to assure fairness between landlords and tenants, rather than fairness among tenants. The court found that use of the word "direct" referred to the kind of service provided rather than the method used to allocate the costs of services among tenants. On the one hand, the court held that plaintiffs' method of evenly dividing the entire water bill between the tenants did not violate ORS 90.510(8)(a). Thus, landlords may, without violating ORS 90.510(8)(a), collect pass-through utility fees on a per capita basis, even when the individual allocation of such fees does not reflect the actual amount of usage by each individual tenant.

On the other hand, the court also found that the statute clearly required the plaintiffs to explicitly state how the water service fees charged to the defendant were calculated. The rental agreement violated ORS 90.410(8) by not referring to common areas. In addition, any calculation of common area charges could not be made until the plaintiffs install water meters that separately measure common area water used by individual units. Therefore, the court reversed and remanded and ordered the circuit court to enter a declaratory judgment that the plaintiffs' water service fee violated ORS 90.510(8).

Glenn Fullilove

Beldt v. Leise, 185 Or App 572, 60 P3d 1119 (2003).

■ MOTHER WINS REPRIEVE IN EVICTION BATTLE WITH SON

In *Bunch v. Pearson*, 186 Or App 138, 62 P3d 878 (2003), the Oregon Court of Appeals held that a forcible entry and detainer (FED) is not the proper action to take possession of real property when the defendant is an equitable owner under a land sale contract and no landlord-tenant relationship exists between the plaintiff and defendant.

The defendant, the plaintiff's mother, held equitable title to the subject property under a land sale contract. She assigned 90 percent of her interest to the plaintiff. Nine years later, the plaintiff filed this FED action to evict his mother.

The defendant claimed that the plaintiff was holding the property in trust for her benefit, but she offered no written evidence of a trust agreement to support this assertion. To make matters worse for the defendant, the plaintiff offered a letter written by the defendant asking the contract vendor to issue legal title to her son "in its entirety as he has given me monies for my needs over the years."

The trial court granted the plaintiff possession of the property because the plaintiff had made a sufficient showing that he was entitled to possession of the property. The Court of Appeals disagreed and reversed the trial court's ruling. Quoting *Purcell v. Edmunds*, 175 Or 68, 70, 151 P2d 629 (1944), the court held that "an FED action 'is not a substitute for an action of trespass or ejectment.'" 186 Or App at 143, 62 P3d at 881.

The court stated that an FED action to recover possession of property may only succeed where the defendant is unlawfully holding by force or took possession by forcible entry. Because the statutory definition of unlawful holding by force only refers to a landlord-tenant relationship, and none existed between the defendant and the plaintiff, the court reasoned that the plaintiff's FED action could only succeed if the defendant was in possession by forcible entry. However, the court dismissed the notion that the defendant's entry was by force,

because she was an equitable owner under the land sale contract.

In an attempt to establish the existence of a landlord-tenant relationship, the plaintiff argued that the defendant was either a tenant at sufferance under ORS 91.040 or a tenant at will under ORS 91.050. The court rejected both contentions, finding that neither definition applied to the facts in the case.

The court concluded by stating that, where both parties claim title to property and there is no landlord-tenant relationship, the proper action for determining possession is ejectment, not an FED action. Although the defendant won the first battle to retain the property, armed with legal title to the property and his mother's letter apparently granting him full possession, the plaintiff may ultimately win the war for possession.

Glenn Fullilove

Bunch v. Pearson, 186 Or App 138, 62 P3d 878 (2003).

COURT RELIES ON DOCTRINE OF PART PERFORMANCE IN ENFORCING ORAL LEASE

In *Aylett v. Aylett*, 185 Or App 563, 60 P3d 1114 (2003), the Oregon Court of Appeals applied the doctrine of part performance in determining that an oral lease is enforceable notwithstanding ORS 41.580(1)(e), the Oregon statute of frauds.

The plaintiffs were Jedehiah Aylett and the estate of his wife Juanita, and the defendants were Earl Aylett and his wife Deborrah. Jedehiah is Earl's father. The plaintiffs and the defendants owned as tenants in common agricultural property (the "Aylett property") that until 1998 had been leased to Mike Allison pursuant to a five-year lease. Before Allison's lease expired, the defendants and the plaintiffs entered into an oral lease agreement by which the defendants leased the property on the same terms as Allison had, to commence upon expiration of the Allison lease. In 1998 the defendants took possession of the property and began farming it.

The parties also had for some years leased adjacent property owned by the U.S. Navy (the "Navy property") and subleased it to Allison. When the lease on the Navy property expired, the defendants signed a new lease for that property. At trial, neither party disputed that they intended to be colessees on the Navy property lease. Pursuant to an oral agreement, the defendants paid rent to the plaintiffs on the same terms as Allison had previously paid the parties.

The plaintiffs sought a judicial declaration pursuant to ORS 28.010 that no lease existed and a judgment for the rental value of the Aylett property. The plaintiffs also brought claims for breach of contract and quantum meruit with respect to the Navy property. The defendants counterclaimed for a declaratory judgment, claiming that they held a farm lease for both properties. Relying on the doctrine of part performance, the trial court ruled that the defendants leased both properties pursuant to an enforceable oral lease agreement.

On appeal, the plaintiffs attacked the trial court's part performance ruling on two grounds. First, the plaintiffs agreed that the doctrine did not apply because the doctrine is equitable, and not cognizable in actions at law. The Court of Appeals held that the plaintiffs had not adequately preserved the issue for appeal.

The plaintiffs next argued that the doctrine could not take the lease out of the scope of the statute because the defendants' acts were not exclusively referable to the agreement. The court observed that, under established Oregon law, for part performance to take the lease out of the scope of the statute of frauds the performance must be "exclusively and unequivocally referable to the lease" and "'must not be susceptible of being otherwise reasonably accounted for.'" 185 Or App at 569 (quoting *Strong v. Hall*, 253 Or 61, 70, 453 P2d 425 (1969)).

The plaintiffs argued that the defendants' conduct on the properties was not exclusively referable to the lease because the parties were co-tenants, and the defendants therefore had the right to farm the land (although the defendants were required to pay the plaintiffs the rental value of the plaintiffs' interest). The plaintiffs relied on Oregon part performance case law involving co-tenants, *Le Vee v. Le Vee*, 93 Or 370, 376, 181 P 351 (1919), and family members, *Brown v. Lord*, 7 Or 302 (1879), in arguing that the "exclusively referable" element was not satisfied.

Before applying *Le Vee* and *Brown* to the facts of the case, the *Aylett* court briefly discussed its standard of review. Relying on *L&E Farms v. Leonard*, 170 Or App 528, 533–34, 13 P2d 527 (2000), the *Aylett* court concluded that because the nature of the claim (the defendants' counterclaim for declaratory relief) was equitable, the standard of review was *de novo*. Citing *Howland v. Iron Fireman Manufacturing Co.*, 188 Or 230, 309 (1950), the court observed that "[e]vidence of part performance need not be undisputed and it may be shown by a preponderance of the evidence." 185 Or App at 571.

Turning to the facts of the case, the *Aylett* court observed that the relationship between the defendants and the plaintiffs was poor, that they had tra-

ditionally leased the properties to others, and that at the end of the Allison lease, they did not attempt to find third parties to lease the properties, which would have been typical if not for an oral agreement. The court reasoned that these facts distinguished *Le Vee* and *Brown*: in the case at hand, unlike in those cases, a substantial change in how the properties were used had occurred at the time of the alleged oral agreement.

The *Aylett* court went on to observe that while neither co-tenant had previously farmed the properties, the defendants had entered onto the properties, obtained a long-term grass seed contract, began growing crops, and made substantial repairs to and capital investments in the properties, without any contribution of the plaintiffs. The court reasoned that "[a]n impartial observer, knowing all of the surrounding circumstances, including the past conduct of the parties and their strained relationship, would have concluded that there was a different relationship from the absent-owner cotenancy relationship that had existed previously." 185 Or App at 571. The court concluded that "[b]ecause defendants' use of the properties cannot reasonably be explained without a change in the relationship between the parties, we conclude that the defendants' acts of part performance are exclusively and unequivocally referable to the oral lease agreement" and the lease was therefore enforceable. *Id.*

Aylett is a good example of a well-established method for removing agreements from the statute of frauds, but the doctrine of part performance is not the only available method in the real estate context. In attempting to remove such agreements from the statute, practitioners should also consider equitable estoppel, promissory estoppel, and the restitution-based remedy of constructive trust, depending on the procedural stature and facts of the case. *See, e.g.*, *Barman v. Union Oil Co. of California*, 2002 WL 31133363 (9th Cir. Sep. 26, 2002) (unpublished opinion) (because elements of promissory estoppel were satisfied, alleged agreement to sell Oregon real estate was removed from statute of frauds); *Berean Fundamental Church Council, Inc. v. Braun*, 281 Or 661, 576 P2d 361 (1978) (discussing requirements for constructive trust); *Engelcke v. Stoehsler*, 273 Or 937, 544 P2d 582 (1975) (discussing elements of equitable estoppel and part performance); *Wayt v. Buerkel*, 128 Or App 222, 875 P2d 499 (1994) (discussing equitable estoppel and part performance).

Rene Gonzalez

Aylett v. Aylett, 185 Or App 563, 60 P3d 1114 (2003).

SAVE THE DATE!

The **RELU ANNUAL MEETING** will be held **August 8-9, 2003 at Eagle Crest Resort**. Eagle Crest is a full-service destination resort located just outside Redmond on 1700 acres in the high desert of Central Oregon. A block of rooms has been set aside for the conference. You can call Eagle Crest at 800/682-4786 or check out their website *at www.eagle-crest.com.*

Once again, Friday evening's reception is free (with no-host bar) so plan to bring your family! The reception will be held on a multi-level deck overlooking the Deschutes River.

Topics for the conference include: water law, the new federal legislation regarding small businesses and brownfields, the effect of RLUIPA on land use, periodic review, title problems and solutions, ethics, condemnation, real estate exchanges, system development charges, real estate financial abuse, and more. Legislative and case law updates will be featured on Saturday.

Look for your brochure in early June. If you have any questions, contact Norma Freitas at 503/222-7006 or email to: *nsfreitas@aol.com.*

Presorted Standard
US Postage
PAID
Portland, OR
Permit #341

Oregon State Bar
Section on Real Estate and Land Use
5200 SW Meadows Road
Lake Oswego, OR 97035-0889