OREGON
REAL ESTATE
AND
LAND USE
DIGEST

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

Vol. 25, No. 3 • June 2003

Highlights

Appellate Cases — Takings

IOLTA SURVIVES CONSTITUTIONAL CHALLENGE

In *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), the federal Supreme Court considered whether Washington's interest on lawyers trust accounts (IOLTA) program constitutes a taking under the Fifth Amendment. This program requires interest on certain funds placed in lawyers' trust accounts and on certain real property trust accounts to be paid to the Washington Legal Foundation, which uses these funds for law-related charitable and educational purposes. Washington's IOLTA program was created by state supreme court rule as a part of that court's authority to regulate the practice of law.

Brown involved two individuals who contended that interest on their trust accounts had been "taken" under the Washington IOLTA program. The district court found that the takings analysis must focus on what a plaintiff has lost, not what the public has gained, and found that because the interest would not have been payable to the plaintiffs otherwise, there had been no taking.

In the meantime, the Supreme Court issued its decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). In *Phillips*, the Supreme Court upheld the Ninth Circuit's determination that the interest generated by Washington's IOLTA funds is the private property of the owner of the principal, but expressed no opinion as to whether the IOLTA program results in takings. The court noted the traditional obligation of lawyers to separate client funds from other funds and stated that, before 1980, those funds had been held in non-interest-bearing checking accounts. In 1980, new federal legislation allowed for interest to be generated by checking accounts held by for-profit corporations if the deposits are made pursuant to a program where a charitable organization holds the exclusive right to the interest. In 1981, the IOLTA concept was devised, and it was later extended to every state and the District of Columbia, and generally used to provide legal services for the poor. The Supreme Court remanded for a determination of whether there had been any takings.

In *Brown*, the majority of the Ninth Circuit relied on *Phillips* to remand the case and, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), found that, under the circumstances of this case, there had been no taking. The Ninth Circuit decided that the plaintiff had suffered neither a loss nor an interference with investment-backed expectations and that the regulation of the use of the property was permissible. Three dissenters found that there had been *per se* takings, so that the balancing test of Penn Central need not be used. The plaintiffs sought review on these issues and also raised a further issue: whether an injunction could be obtained because recovery of multiple small amounts would be impractical.

Justice Stevens, speaking for the five-justice majority, first found that the funds had been appropriated for a public use: "[T]he overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a 'public use' within the meaning of the Fifth Amendment." 123 S. Ct. at 1417.

He then discussed the differences between physical and regulatory takings, noting that the first usually require just compensation, while the latter usually require careful evaluation of the circumstances. The majority of the Supreme Court said a *per se* takings analysis was more appropriate here than the balancing test of *Penn Central*. The majority analogized the circumstances of this case to the required occupation of a small rooftop space that occurred in *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419 (1982). The Court said a taking had occurred here and next turned to the question of whether just compensation need be given.

Using Justice Holmes' analysis in *Boston Chamber of Commerce v. Boston*, 217 US 189, 195 (1910), that a takings analysis focuses on what the plaintiff lost, not what the public gained, the Court concluded that the plaintiff was entitled to be put in as good a position as if the taking had not occurred. In this case, there had been no damage because the Washington Supreme Court rules require the use of non-IOLTA accounts whenever net earnings could be generated for the client. The court concluded,

> To recapitulate: It is neither unethical nor illegal for lawyers to deposit their clients' funds in a single bank account. A state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a "regulatory taking." A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of "just compensation" to the client. Because that compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case. It is therefore unnecessary to discuss the remedial question presented in the certiorari petition. Accordingly, the judgment of the Court of Appeals is affirmed.

123 S. Ct. at 1421.

Justice Scalia dissented, joined by the Chief Justice and Justices Thomas and Kennedy, on the ground that the plaintiffs were entitled to the fair market value of the interest. He noted that *Phillips* held that the interest on the principal belongs to the owner of that principal, rather than to the Legal Foundation of Washington, the designated recipient under the state's IOLTA program. He added that the defendant state supreme court avoided a takings award only because the interest generated on multiple small accounts would not have existed except for the IOLTA program. The dissent did not accept the owner's net loss—which here was zero—as the measure of the taking, but maintained that fair market value would be the proper measure.

Justice Scalia also criticized the Court's theory that there had been no net gain (*i.e.*, interest minus administrative costs). He added that the majority had "arbitrarily" cut off all possibility of recovering the "net interest" by declaring that there had been no net gain under IOLTA. Justice Scalia also suggested that a remand might have been appropriate to determine whether the plaintiffs were entitled to earn interest in non-IOLTA accounts. 123 S. Ct. at 1427. He concluded,

> Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.

Id. at 1428.

Justice Kennedy concurred with Justice Scalia's dissent and also hinted at free speech problems, noting that the Washington Supreme Court had granted itself a monopoly to support recipients it favored but that, under *Phillips*, the property belonged to the plaintiffs. He suggested that alternative methods for pooling small funds should be pursued so that clients could support programs of their own choosing.

Whatever one may say of this case's results (which indeed are important), one cannot help being uncomfortable with the reasoning of the majority. As pointed out by Justice Scalia, the majority's reasoning appears inconsistent with the decision of the same members of the same court in *Phillips*. Instead of reconsidering *Phillips* (an approach that might have lost one or more votes of this razor-thin majority), the principal opinion accepts the proposition that appropriation of IOLTA interest must be judged under the Fifth Amendment. The majority compounded its error (perhaps again to gain the fifth vote) by accepting that the appropriation was a *per se* taking, and thus avoided a *Penn Central* analysis, but found that there had been no property to take. This approach worked in the instant case, but the court may come to regret its approach when reviewing future cases involving funds allegedly "taken" by fees, such as development charges.

Edward J. Sullivan

Brown v. Legal Found. of Washington, 123 S. Ct. 1406 (2003).

Appellate Cases — Land Use

FEDERAL SUPREME COURT FINDS NO UNCONSTITUTIONALITY IN FAIR HOUSING CLAIM

In *City of Cuyahoga Falls v. Buckeye Community Hope* Foundation, 123 S. Ct. 1389 (2003), the U.S. Supreme Court held that a city government's referral of a site plan review matter involving low-income housing to a public referendum did not violate the Equal Protection and Due Process Clauses of the federal Constitution.

The plaintiff bought the subject site in 1995, and submitted its application for approval of a low-income housing development in 1996, which, despite considerable neighborhood opposition, the planning commission and city council granted. The city charter allows for the referral of any council ordinance or resolution. A group of citizens filed a petition seeking a public vote on the ordinance, which, under the charter, would not be effective until the voters approved it. The plaintiff sought an injunction against the referendum, asserting that this was an administrative matter and therefore could not be referred under the Ohio constitution. A state trial court denied the injunction, but the plaintiff nevertheless sought building permit approval, which the city rejected because of the pending referendum on the site plan approval. The permits were stayed pending the outcome of the litigation. The Ohio Supreme Court ultimately reversed the trial court on the basis that referendums can only be held in relation to legislative acts, and not administrative acts, such as approval of the plaintiff's application. Accordingly, the state supreme court ordered the issuance of the injunction. *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539, 697 N.E.2d 181 (1998). The city then issued the permits and the plaintiff began construction.

In July 1996, while the state court litigation was pending, the plaintiff filed this federal court case, claiming violation of the Equal Protection and Due Process Clauses of the federal Constitution and of the federal Fair Housing Act (FHA), and requested an injunction, as well as declaratory relief. The federal district court denied the city's motion for summary judgment. After the Ohio Supreme Court's decision on the referendum, which reduced the plaintiff's case to a claim for damages for delay in construction, the city again moved for summary judgment. This time, the district court granted the city's motion in full.

The Sixth Circuit reversed, finding that there was sufficient evidence to go to trial on an equal protection claim as to whether the city's action to stay the construction gave effect to racial prejudices. That court added that, even if there were no equal protection claim, there might be a claim under the FHA for disparate impact based on race and family status. Finally, on the substantive due process claim, the court found sufficient evidence to show arbitrary and irrational governmental conduct.

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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As to the equal protection claim, the Supreme Court found insufficient evidence and allegations on which to base a constitutional claim, pointing to the requirements of racially discriminatory intent and purpose. *See Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Because the plaintiff's alleged injury came from the referendum process and not from the referendum itself (which never even went into effect), none of the official acts the plaintiff complained about reflected a discriminatory intent. The submission and processing of the petition for a referendum was facially neutral and mandatory under the city's charter. The same may be said for the elections process. Similarly, the denial of the requested building permits had been, under the city charter, a ministerial matter.

The Court also held that statements made by voters during a public campaign do not constitute "state action" for equal protection purposes. The statements were neither attributed to the defendant city nor its officers, nor could they be. The Court found that by strict adherence to the procedures of state election law and its charter, the city had merely enabled the debate over the issue to occur. A referendum is an instrument of democratic government and may not be prohibited just because the issue is offensive or controversial. Additionally, the plaintiff never presented evidence showing any influence by the city or its officials over the voters' decision. Summary judgment could not be sustained based on the citizens' statements, as opposed to the actions of the city.

As to the plaintiff's substantive due process claim, the Sixth Circuit found a property interest in the approved site plan and found that the city council had acted arbitrarily in denying the plaintiff the benefit of that claim. The plaintiff also argued a substantive due process violation because the council had submitted an administrative act to a public vote, which, the plaintiff claimed, was *per se* arbitrary. The Supreme Court did not reach the property interest question because it found no arbitrary conduct, noting in particular that the city had followed the advice of its attorney in holding up permits until the referendum results were in. The Court also refused to draw a line from a constitutional standpoint separating administrative and legislative acts and noted that the people may ultimately reserve all power to themselves. *See James v. Valtierra*, 401 U.S. 137 (1971). While the *result* of a referendum might be arbitrary and capricious, the plaintiff had not alleged that point. Subjecting the site plan to the referendum process was not a *per se* due process violation, said the Court. The Court dismissed the equal protection and due process claims with prejudice and noted that the plaintiff had abandoned the FHA claim.

Justice Scalia, joined by Justice Thomas, concurred and added that, in his view, even if there had been arbitrary conduct, that fact would not, by itself, establish a due process violation. He said,

> It would be absurd to think that all "arbitrary and capricious" government action violates substantive due process—even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges. The judicially created substantive component of the Due Process Clause protects, we have said, certain "fundamental liberty interests" from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. . . . Freedom from delay in receiving a building permit is not among these "fundamental liberty interests." To the contrary, the Takings Clause allows government confiscation of private property so long as it is taken for a public use and just compensation is paid; mere regulation of land use need not be "narrowly tailored" to effectuate a "compelling state interest." Those who claim "arbitrary" deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and Graham v. Connor, 490 U.S. 386, 395 (1989), precludes the use of "'substantive due process'" analysis when a more specific constitutional provision governs.

123 S. Ct. at 1396.

Justice Scalia also said that there was nothing procedurally defective about having low-income housing subject to the referendum process, nor would this give rise to a substantive-due-process claim. He noted that the delay in issuance of building permits was compelled by the city charter, which was "surely" due process of law. *Id.*

It seems that the court's logic on the equal protection claim is unassailable, assuming that the Ohio Supreme Court was correct in its distinction between legislative and administrative activities. The city carried out the provisions of its charter and Ohio election law and should not be responsible for statements made by citizens in the hearing and the electoral processes. To the extent that substantive due process was an issue, the court correctly found no arbitrary and capricious conduct. An analysis of Justice Scalia's concurring opinion shows him to be skeptical of substantive due process in suggesting that it does not apply to relatively trivial matters but rather is limited to judicially permitted fundamental liberty interests.

Edward J. Sullivan

City of Cuyahoga Falls v. Buckeye Community Hope Found., 123 S. Ct. 1389 (2003).

CELL TOWER SIGNALS NOT YET CLEAR

In *Sprint PCS v. Washington County*, 186 Or App 470, 63 P3d 1261 (2003), the court of appeals dealt at length with ORS 215.275, enacted in 1999, which governs the siting of utility facilities in EFU zones. The decision provides some guidance for applying that statute, while leaving other questions unanswered.

The statute states that a utility facility is "necessary for public service," and is therefore a permitted use under ORS 215.213(1) and 215.283(1) if it "must be sited in an exclusive farm use zone in order to provide the service." It goes on to provide that the facility is necessary if the applicant demonstrates that "reasonable alternatives have been considered" and that the facility must be located in an EFU zone because of one or more of six listed factors.

In its application for a cell tower site, Sprint identified its objectives as serving a section of a highway and surrounding rural area and also creating antenna space that could be leased to other wireless communication providers. Sprint identified a "search ring" within which the tower could be located, with 63 potential sites, 26 zoned for rural residential use and 37 zoned EFU. All of the rural residential sites were rejected—17 because the elevations were too low and the remainder because the company had been unable to secure a lease. Therefore, according to Sprint, the tower had to be put on EFU land.

This application was submitted for a particular EFU location. The neighbors, the Fritzes, opposed the application and submitted testimony of an engineer to the county hearings officer. The hearings officer denied the application and adopted a memorandum submitted by the Fritzes' attorney as findings of fact and conclusions of law.

On Sprint's appeal, LUBA remanded for the county to make its own findings. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002). On the merits, LUBA held that the hearings officer erred in how he (apparently) factored in the goal of farmland preservation and in the alternatives which he (apparently) required be considered. The Fritzes appealed LUBA's decision on the substantive issues.

The court of appeals agreed with LUBA that the statute itself "strike[s] the balance between the need to site facilities on EFU land and the need to preserve farmland," and therefore local governments "may not import additional policy considerations into their analysis." 186 Or App at 475. The legislature implicitly precluded consideration of factors other than the six listed.

The court then moved on to the question of what "reasonable alternatives" might mean. "Reasonable alternatives" does not mean consideration of "different methodologies for providing a utility service." *Id.* at 478. In this case, for example, Sprint need not consider land lines as an alternative to cell towers. The statute refers to reasonable alternative sites on property not zoned EFU, rather than a comparison with other EFU land. Consideration of reasonable alternatives "may include an obligation to consider different designs to adapt a utility's chosen methodology to non-EFU land." *Id.* at 479.

The specific question in this case was whether co-location of Sprint's antenna on an existing tower must be considered a "reasonable alternative" given that one of the company's stated objectives was to have a new tower on which it could lease space to other providers. LUBA had held that the line between reasonable and unreasonable alternatives should be defined based on the utility's stated objectives. The court disagreed, and instead defined the test as follows: "[L]ocal governments should ask whether that objective advances the statutory goal of providing the utility service." *Id.* at 481. Sprint, of course, argued that providing extra capacity in order to gain revenue from other providers is a crucial element of providing the service; the Fritzes, of course, said it was not. The court left this issue to be decided by the county as a question of fact on remand.

Michael Judd

Sprint PCS v. Washington County, 186 Or App 470, 63 P3d 1261 (2003).

IMMUNITY UNDER NOERR-PENNINGTON *DOCTRINE EXTENDS TO STATE LAW TORT CLAIMS*

In *Kovac v. Crooked River Ranch Club & Maintenance Association.*, 186 Or App 545, 63 P3d 1197 (2003), petition for recons filed (Mar. 26, 2003), the Oregon Court of Appeals, in a case of first impression, extended the immunity provided under the *Noerr-Pennington* doctrine to a state law tort claim. Federal district courts in the Ninth Circuit are split on whether the *Noerr-Pennington* doctrine applies to state tort law claims.

The *Noerr-Pennington* doctrine immunized attempts to persuade government to make policy decisions from antitrust liability. *See Eastern R.R. Presidents Conference v. NoerrMotors*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657 (1965). In *Noerr*, the Supreme Court found that a publicity campaign by 24 railroad companies to obtain government action adverse to the interests of trucking companies was not illegal. Justice Hugo Black opined that a decision to uphold an antitrust claim would "substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at 137. Justice Black found that such a holding would be inconsistent with representative democracy and would raise important constitutional issues, including the right to petition government protected by the Bill of Rights. Four years later in *Pennington*, the Court reiterated its prior holding and found that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

Crooked River Ranch is a residential development in

Jefferson County. The covenants, conditions, and restrictions (CC&Rs) of the ranch established the defendant Crooked River Ranch Club and Maintenance Association. On behalf of the association, an architectural committee reviews all development projects.

On February 13, 1995, Tom Kovac submitted a request to the architectural committee to use a portion of a rental home as an office for conducting real estate business. Contemporaneous with this request, Mr. Kovac applied with the Jefferson County Planning Department for a conditional use permit. At the time, two other real estate businesses operated on ranch property.

The architectural committee reviewed and denied the request, providing its bases for denial in writing to the planning department. The reasons for denial included safety, noncompliance with the county zoning rules and CC&Rs, and discrepancies in the application. The board of directors of the maintenance association also submitted a letter to the planning department supporting the architectural committee's decision.

The planning department conducted a hearing before the Jefferson County Planning Commission on April 27, 1995. Numerous letters were submitted in support of the application. In addition, a member of the board of directors spoke in opposition to the application and read the architectural committee's decision into the record. The Commission denied the application, and the plaintiff appealed the denial to the Jefferson County Board of Commissioners.

The county board also voted to deny the application. The findings in support of the denial included (1) access to the location was determined to be a hazard, (2) the request did not meet the definition of a home occupation because Mr. Kovac would not occupy the home full-time, and (3) the application failed to "preserve assets of particular interest to the community" as required by the zoning ordinance.

Instead of appealing the decision to LUBA, Mr. Kovac filed an action against the association in circuit court, alleging a claim under state antitrust law (ORS 646.725) and a tort claim for interference with a business relationship. In defense, the association submitted a motion for summary judgment, arguing immunity from both claims under the *Noerr-Pennington* doctrine, and requested attorney fees. The trial court granted the motion and awarded attorney fees based on Kovac's failure to appeal to LUBA. Kovac appealed.

The Oregon Court of Appeals found that the petitioner had failed to provide evidence of an "agreement" between the County and the Association to support the antitrust claim. The court dismissed the tort claim as well, stating "[t]he same rationale that underlies antitrust immunity in this case—concern for the free speech implications of penalizing political advocacy—applies with equal force with respect to the tort claim." 186 Or App at 552. This holding is consistent with *Willamette Dental Group v. Oregon Dental Service*, 130 Or App 487, 882 P2d 637 (1994), *rev den*, 320 Or 508, 888 P2d 569 (1995), which denied a claim for tortious interference for conduct that was permitted under the antitrust laws.

Finally, the Court of Appeals reversed the award of attorney fees, concluding that the failure to file an appeal with the LUBA was an insufficient basis for awarding attorney fees.

Christopher A. Gilmore

Kovac v. Crooked River Ranch Club & Maintenance Ass'n., 186 Or App 545, 63 P3d 1197 (2003), petition for recons filed (Mar. 26, 2003).

FAILURE TO ASSIGN ERROR IS NOT FATAL IN RAISING ISSUE BEFORE LUBA

In *Hallmark Inns & Resorts, Inc v. City of Lake Oswego*, 186 Or App 710, 65 P3d 300 (2003), the court of appeals reversed and remanded a LUBA decision that in part had determined that the petitioner had not properly assigned error to the city council's decision that a disputed condition of approval for a development permit had been properly applied. 43 Or LUBA 62 (2002) (reviewed in the Dec. 2002 issue of the *RELU Digest*).

Ten years ago, in 1993, the city had attached a variety of conditions to a development permit issued to Hallmark. One condition required Hallmark to provide easements for, among other things, public walkways and sidewalks. The pathway at the heart of the appeal had been constructed in front of the corporate headquarters between two city streets, Collins Way and Hallmark Drive. This "pathway" was open to the public from early 1994 to mid-1996. However, because of vandalism, Hallmark blocked the sidewalk with a fence at the western edge. Responding to neighborhood concerns, the city contended that this violated the condition of approval, and cited Hallmark for failing to comply. Hallmark filed a declaratory judgment action in Clackamas County challenging the decision. After a variety of motions and hearings, that action was abated pending resolution through the traditional LUBA process.

In 1999, Hallmark sought a decision from the city declaring that the condition requiring a public easement did not apply to its disputed pathway. In the alternative, Hallmark sought a modification of that condition to remove the easement. Hallmark wanted the fence to stay.

The city's development review commission denied the request for modification. Hallmark appealed the decision to the Lake Oswego City Council, which affirmed the development review commission's decision. Hallmark then appealed to LUBA.

Before LUBA, Hallmark presented only two assignments of error. In its first assignment of error, Hallmark argued that the city had erred in determining that the requested modification did not meet the Lake Oswego development standard, which did not require Hallmark to deed its property to the city to connect the public streets. Hallmark's second assignment of error asserted that the city had erred in concluding that the easement was not an unconstitutional taking.

In affirming the city's decision denying Hallmark's request to modify the development permit condition, LUBA made a preliminary and critical determination, which the court of appeals reversed and remanded. LUBA determined that Hallmark had not properly assigned error to the city council's decision that the disputed condition required an easement for the pathway to ensure public access. Specifically, LUBA stated that, "petitioner's assignments of error appear to take as given that Condition B(2) applies to the disputed walkway and requires that petitioner provide an easement to the City for the disputed walkway." 43 Or LUBA at 66–67

Hallmark appealed LUBA's decision, specifically disagreeing with LUBA's characterization of the nature and legal sufficiency of its challenge before LUBA. Hallmark contended that it had in fact preserved its claim that the original condition requiring the easement did not apply to the pathway in front of its corporate headquarters.

The court of appeals agreed with Hallmark that it had indeed raised the issue before LUBA, and agreed that LUBA should have considered the issue. Although the court found that LUBA correctly determined that Hallmark did not assign a specific error to the city's decision, it did not necessarily follow that that issue was not before LUBA for review. First, the court noted that Hallmark had argued in its petition for review before LUBA that the condition did not apply to the pathway. The court observed that LUBA in the past had considered arguments that were not included under a separately stated assignment of error. *Lang-Luttig et al v. City of Beaverton*, 39 Or LUBA 80, 82–83 (2000); *Heiller v. Josephine Co.*, 23 Or LUBA 551, 554 (1992).

Secondly, the court also found it significant that not only had Hallmark argued in its petition for review before LUBA that the condition did not apply to the pathway, but that the city also responded to that argument. Clearly, both parties, Hallmark and the city, presented full argument to LUBA about the applicability of the condition. Thus, there had been a "fair opportunity" to address the issues. 186 Or App at 717 (citing *Gildroy v. Board of Tax Service Examiners*, 184 Or App 227, 56 P3d 441 (2002); *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or 487, 499-500, 982 P2d 1117 (1999)).

Finally, the court, almost as an afterthought, concluded that Hallmark's first assignment of error before LUBA was sufficiently broad to include the additional and related argument that the required condition was inapplicable to the disputed pathway.

In summary, the court concluded that Hallmark's first assignment of error before LUBA, and the arguments raised under that assignment of error, were sufficient to raise the matter of the applicability of the condition to the pathway, and that LUBA had erred in refusing to consider it. The court remanded this matter to LUBA for reconsideration of this one, possibly pivotal, issue.

Editors' Note: Jack Hoffman serves on the Lake Oswego City Council and was on the Council when it affirmed the development review commission's decision.

Jack D. Hoffman

Hallmark Inns & Resorts, Inc v. City of Lake Oswego, 186 Or App 710, 65 P3d 300 (2003).

■ NINTH CIRCUIT FINDS CHALLENGE TO LAKE TAHOE PLAN BARRED BY RES JUDICATA

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064 (9th Cir. 2003) is the twelfth published opinion (and the fourth from the Ninth Circuit) in litigation between these two parties since 1984. This case involved challenges made to the defendant agency's 1987 plan adoption that are similar to those dismissed by the Ninth Circuit in 2000. Because the claims in this case arose out of the same nucleus of facts and generally involved the same parties, the court found them barred by *res judicata*.

The 1987 Tahoe Regional Planning Agency (TRPA) plan created an Individual Parcel Evaluation System (IPES) that rates each parcel and which no party had attacked. The agency then set an "IPES Pass/Fail Line" so that only those parcels above the line could submit an application for development. About 300 parcels per year were granted development permission. Parcels within ten percent of the line were allowed to pay a "mitigation fee" to enable them to submit an application as well. The line could move down, enabling more parcels to be eligible for development, if the environmental status of the Lake Tahoe Basin as a whole becomes more secure and more sensitive land is protected from development. Those private parcels that remain below the IPES line are ineligible for development.

This litigation involves claims attacking the 1987 plan. The court had previously rejected challenges to the plan on takings and other grounds, but the plaintiffs contended that their takings and other claims arose out of actions taken subsequent, but pursuant, to the 1987 plan, including the failure to adjust the IPES line. The plaintiffs contended that these actions were either categorical takings or that they did not substantially advance legitimate state interests. Those plaintiffs within ten percent of the IPES line contended that the "mitigation fee" is an "exaction" for which there was no nexus under *Nollan* and *Dolan*. Those within the "no development" category of private landowners contended that an absolute ban on development is an inherent taking. Finally, the plaintiffs contended that the use of a different IPES line in California than in Nevada denied them equal protection.

The trial court found that all claims regarding the 1987 plan were barred by the statutes of limitations (two years in Nevada and one year in California), and the statutes of limitations did not recommence with actions taken pursuant to the plan, such as deciding whether to move the IPES line. The trial court rejected the claim of landowners within ten percent of the IPES line regarding the mitigation fee, because no party had ever utilized the mitigation procedure, which must be done to bring an "as applied" challenge.

The Ninth Circuit found the claims time-barred as well, because they were based on the 1987 plan—specifically based on actions taken under that plan from 1987 to 1991. With one exception, these claims could have, and should have, been litigated in previous cases. The exception was the class of those within ten percent of the IPES line, whose claims were dismissed on ripeness grounds.

The *res judicata* defense requires identity of claims, final judgment on the merits, and privity between the parties. Identity of claims includes those raised, or which could have been raised, under the same nucleus of facts. In particular, the changes to the IPES lines were authorized in the 1987 plan, and even the bases for moving the lines were well-established by 1990, long before any claim was ever made. The changes to the IPES lines were granted by the 1987 plan and additional 1990 criteria. Thus, the failure to challenge those matters within the applicable statutes of limitations precluded a later attack.

Moreover, the federal district court had dismissed a similar set of claims in a different suit by some of the same plaintiffs on statute of limitations grounds, which the Ninth Circuit regarded as *res judicata*. The lead plaintiff and a number of individual plaintiffs were parties to that earlier suit and are bound by the decision made there. The principle of *res judicata* also applies to those parties who had a "sufficient commonality of interests." *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983). In this case, all the plaintiffs were members of the lead plaintiff council, an entity that had participated in the previous case. The description of the purposes of the council as pled in the 1987 case convinced the court that the requisite commonality existed.

Similarly, the facial challenges by the so-called "ten-percent plaintiffs" had run years ago and were barred by the statute of limitations. To the extent that such challenges were as-applied challenges, they were not ripe, because no individual plaintiff had made an application. *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Accordingly, the Ninth Circuit affirmed the dismissal.

This case presents an interesting discussion of statutes of limitations and *res judicata* defenses in takings cases. Of greatest interest is the refusal to entertain an as-applied challenge if the subject action is directed by an earlier, unchallenged, regulation that leaves no room for the exercise of discretion.

Edward J. Sullivan

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064 (9th Cir. 2003).

Appellate Cases — Real Estate

■ *A FENCE IS NOT ENOUGH*

In *Nguyen v. Conner*, 186 Or App 627, 64 P3d 1181 (2003), the court of appeals held that the presence of a fence enclosing disputed property does not, by itself, establish adverse possession under either the common law or ORS 105.620.

The plaintiffs' property was adjacent to the defendant's southern lot line. Since 1941, a fence ran 10 feet north of defendant's southerly lot line, parallel to the parties' common property line. The defendant rebuilt the fence in 1978 in the same location. The plaintiffs purchased its property in 1992. The plaintiffs and the defendant treated the fence as the border. The plaintiffs maintained and used the disputed property, but a 1997 survey revealed that the fence was ten feet inside the defendant's property.

The plaintiffs filed suit in 1999, seeking a declaration that they had acquired the disputed property by adverse possession. At trial, the plaintiffs did not introduce any evidence regarding the use of the disputed land by any of their predecessors, except for testimony regarding the existence of the fence. Nevertheless, the trial court ruled that the plaintiffs were the owners of the strip of property through adverse possession.

Stating that the existence of a fence, by itself, is not sufficient to establish adverse possession, the court of appeals reversed the trial court. Because the plaintiffs had owned the property for less than ten years before filing suit, the action to quiet title failed.

Tod Northman

Nguyen v. Conner, 186 Or App 627, 64 P3d 1181 (2003).

Cases from Other Jurisdictions

■ *NEW JERSEY SUPREME COURT FINDS* MOUNT LAUREL *DECISION STILL EFFECTIVE*

In *Toll Bros., Inc. v. Township of West Windsor*, 173 N.J. 502, 803 A.2d 53 (2002), the New Jersey Supreme Court revisited two previous historic decisions, both entitled *Southern Burlington NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) and 92 N.J. 158, 456 A.2d 390 (1983). Those cases established a duty under the New Jersey constitution for local governments to provide a realistic opportunity for the development of their fair share portion of the regional need for affordable housing.

One significant part of the second *Mount Laurel* decision was to provide a "builder's remedy." Under this scheme, a builder could seek judicial authorization of a project meeting the regional need—even if the local government prohibits the project under its zoning regulations—if that local government has not otherwise met its fair share of the regional need. In 1985, the state legislature enacted the New Jersey Fair Housing Act (FHA) to provide a system to remove most *Mount Laurel* litigation from the courts and place it within the jurisdiction of a new administrative agency, the Council On Affordable Housing (COAH). Once that agency certifies a local government's plan to meet the regional fair share, the local government is immune from *Mount Laurel* litigation for six years, and under recent amendments to the FHA, for ten years.

In this case, the defendant township was a defendant in pre-1985 *Mount Laurel* litigation, and a 1984 judgment set the defendant's fair share at 1,619 units, which was lowered by COAH to 592 units in 1986. The defendant adopted new zones to allow for elderly and multi-family housing, and designated eleven sites, including one owned by the plaintiff, to meet that need. The eleven sites would have provided for 1,461 affordable housing units, in addition to the rehabilitation of another 37units. The 1,498 total units consisted almost exclusively of multi-family housing.

Under state law at the time, the COAH order approving the township's plan for the 1,498 units was effective for six years. In 1993, after the expiration of the COAH order, the plaintiff sued, alleging violation of *Mount Laurel* requirements and noting that the defendant had failed to apply for a second-round "substantive certification" (equivalent to acknowledgement on housing issues in Oregon). Only two of the eleven sites had been developed, resulting in 139 new units, while a "massive amount"of non-affordable housing development had occurred in non-residential and single family zones, generating more than 3,000 new market-rate units in the township during the same time period. *Toll Bros., Inc. v. Township of West Windsor*, 303 N.J. Super. 518, 553 (N.J. Super. Ct. Law Div. 1996). The plaintiff alleged that the disparity was caused by environmental constraints; the costs of providing public facilities; public resistance to, and delays in the processing of applications for, development of affordable housing (the plaintiff alleged that it went through more than 50 public hearings on its sites in three and one-half years); the defendant's failure to include single-family houses on small lots within its zoning for affordable-housing sites; and other restrictive zoning standards and cost-generative ordinances.

The trial court found the defendant had violated its *Mount Laurel* obligations in 1995. Specifically, the court found the defendant's current fair share to be 929 units, minus 241 units it was credited with for approved development, leaving a deficiency of 688 units.

The trial court found that the municipality bore the burden to show how, in light of this numerical deficiency, it was meeting its constitutional obligations under *Mount Laurel*. The trial court found a breach of those obligations and found the township had done little for affordable housing except provide for new zoning districts. Additionally, the court noted the absence of single-family detached units and the township's reliance instead on multi-family and unconventional single-family alternatives for which there was no viable market. The court also disapproved of methods that required assemblage of land, and followed the recommendations of a special master it appointed who found many practical development restrictions on most of the eleven lots. The lower court concluded that a maximum of 505 units could be developed on those sites, so there would be a 183-unit deficiency even if all eleven sites were developed. The trial court awarded the plaintiff a builder's remedy, predominantly on the ground that the housing allowed did not comport with market demand (especially in the exclusively multi-family zones, which comprised most of the township's strategy for affordable housing).

The intermediate appellate court decided that market viability was a legitimate factor in evaluating Mount Laurel compliance, and noted that COAH had included this market demand as a factor in reviewing housing plans for substantive certification. *Toll Bros., Inc. v. Township of West Windsor*, 334 N.J. Super. 109 (N.J. Super. Ct. App. Div. 2000). The appellate court agreed with the trial court that there was little multi-family demand and reiterated that the object was the encouragement of affordable housing. Moreover, that court found that the defendant could not require a developer to pay all of the costs of a sewer project up front.

Following an extensive review of the *Mount Laurel* cases and the FHA, the state supreme court turned to the certified questions on review. The court said that the *Mount Laurel* case required a realistic opportunity to meet affordable housing needs. The realistic opportunity requirement was codified in the FHA and, even though COAH does not require market studies, its administrative regulations indicate that market demand is an important element in creating that realistic opportunity. The court concluded,

> To state the obvious, developers are motivated by profit, and there is likely no greater area of concern for a developer than the marketability of its project. The colloquial phrase 'if you build it, they will come' does not translate well to the building of homes. The realities of our market system must be a critical factor in the application of *Mount Laurel* mandates.

803 A.2d at 85. Thus, the court found that the trial court had correctly considered market demands in evaluating *Mount Laurel* compliance and in determining that the use of multi-family zones and specialty single-family zones had not been market-responsive to the total affordable housing needs, especially in light of the expansive single-family market. The court also affirmed the trial court's determination that the defendant's sewer policies had impeded compliance with its *Mount Laurel* obligations, and found that the record supported the trial court's conclusion that the defendant had breached those obligations.

The court then turned to the issue of whether the plaintiff was entitled to a builder's remedy. This required the plaintiff to show a project with a substantial affordable-housing component on a suitable site, assuming a *Mount Laurel* violation were proved. The fact that the plaintiff did not actually bring an application was of no import to the court, because the plan to provide affordable housing would have required variances, which were unlikely to be granted. The court also said that there would be no enforceable relief to the statutory and constitutional violations without a builder's remedy, especially because 48% of New Jersey municipalities (including the defendant township) had, as of the date of the opinion, failed to submit housing plans to COAH. Unless municipalities avail themselves of the COAH processes, they must do more than provide vague and broad promises for accommodation of affordable housing needs. The trial court decision imposing the builder's remedy was thus affirmed.

Justice Stein filed a partial dissent, joined by one other justice, differing only on the relief granted. He characterized the relief granted by the majority as "far too generous." 803 A.2d at 92. The dissent noted that this was the first *Mount Laurel* case decided since 1986 with respect to a builder's remedy and said that the court should have discussed some of the questions that had been raised by the amicus parties. The dissent also found "disturbing" the fact that the poorest families were not helped by COAH's definition of "affordable housing," which was based on 40% of median income, concluding:

> In view of this Court's specific requirement in Mount Laurel II that affordable housing units include units affordable to low income families, including the urban poor, it would be a bitter irony if courts implementing the builder's remedy—a judicially created enforcement mechanism—should fail to assure that a significant number of the affordable housing units are within the reach of low-income households, including households whose incomes are below forty percent of median income.

Id. at 97.

The dissent also expressed concern over the use of a 15% set-aside for affordable housing in this case (and also under COAH's regulations), as opposed to the 20% set-aside figure used in *Mount Laurel II*, and questioned COAH's calculation of regional need allocations. The dissent said that the court should have addressed these and other issues and suggested that the *Mount Laurel* decisions have been undermined by improper COAH implementation.

This is a very significant case. It stresses the uniqueness of the New Jersey system in dealing with affordable housing on a constitutional basis, particularly in light of subsequent legislative action, which appears to be less committed to those objectives. The choice made in the two *Mount Laurel* decisions to use the state constitution to review local housing plans has been heavily criticized. In the absence of that choice, however, it is almost certain that little affordable housing would have been built. It appears that resolution of affordable-housing issues is better conducted in a political and administrative manner, as Oregon has chosen to do, rather than through constitutional adjudication. But so long as legislatures fail to respond, it may fall to the courts to deal with these issues.

Edward J. Sullivan

Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 803 A.2d 53 (2002).

■ EIGHTH CIRCUIT UPHOLDS DISMISSAL OF MINNESOTA TAKINGS CLAIM AS UNRIPE

In *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003), the plaintiff developer brought a takings claims against the defendant city and appealed from a dismissal for failure to state a claim on which relief could be granted. The plaintiff had been granted a conditional use permit in 2000 for property he had acquired in 1992. The permit was subject to nine conditions, which the plaintiff claimed were disproportionate to the impact the development would have on the city. After unsuccessfully seeking to remove the conditions, the plaintiff filed suit.

The city argued that the matter was not ripe, because the plaintiff had not sought compensation through state law procedures in state courts as required by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1983). The plaintiff argued that Williamson County had been overruled by *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

The court declined to find that *College of Surgeons* overruled *Williamson County*, even though *College of Surgeons* allowed a defendant municipality to transfer a state court compensation claim under the Fifth Amendment into federal court. The Eighth Circuit was aware of the anomaly of allowing defendants, but not plaintiffs, to use the federal court system in determining takings claims, but added that this was a matter for the federal Supreme Court to reconcile.

The court also noted that, if the plaintiff had used the state court system and failed on his claim, the plaintiff might be denied a federal forum through the principles of *res judicata* and collateral estoppel. But that is the same result that might occur if a federal court abstains from an action involving federal claims. At least at this point, the court declined to take up the plaintiff's suggestion that the federal claims may be reviewed even if the plaintiff loses in the state courts. The court affirmed the district court's decision based on *Williamson County*.

This case attracted amicus briefs from most of the usual suspects in takings cases. Only time will tell whether the Supreme Court wishes to overrule *Williamson County*.

Edward J. Sullivan

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003).

WASHINGTON COURT OF APPEALS FUMBLES AT THE LINE BETWEEN A SURFACE AND SUBSURFACE ESTATE

In two recent appellate decisions, Division III of the Washington Court of Appeals has embarked upon the journey of navigating between surface estates and reserved mineral rights. The first case, *Harrison v. County of Stevens*, 115 Wn. App. 126, 61 P.3d 1202, was summarized in the last issue of the *RELU Digest*. In *Harrison*, owners of a surface estate obtained short plat approval to divide 20 acres of vacant land into four buildable lots. The owner of the subsurface mineral rights challenged the approval on the grounds that he had not consented to the short plat, pointing to Stevens County regulations requiring signatures of all property owners on the land use application. In rejecting the subsurface owner's contention, the appellate court found that the subsurface estate would not be impaired by the future development of the surface estate: title to the surface estate passes subject to subsurface rights, and the surface estate owner may not unreasonably interfere with the subsurface estate owner's use of the property. Hence, where mineral rights are reserved, the estates are severed: "[t]he right to remove minerals from the land is distinct from ownership of the land, even when the minerals lie on the surface." *Harrison*, 61 P.3d at 1206.

Two months later, in *Saddle Mountain Minerals, L.L.C. v. Joshi*, ___ Wn. App. ___, 65 P.3d 366 (2003), Division III faced a different type of conflict between surface and subsurface estates. The *Saddle Mountain* case raises, without answering, a question about whether the market value of the subsurface estate affects the surface owner's title.

In *Saddle Mountain*, developers of a severed surface estate obtained subdivision approval and began making infrastructure improvements, including excavations and grading of sand, soil, and gravel for on-site and (allegedly) off-site roads. The mineral right owners subsequently initiated suit against the surface owners, arguing that the relocation and removal of sand, gravel, and topsoil interfered with their subsurface rights. In response, the surface estate owners pointed to the city zoning code, which does not permit mining in the subject zone. The trial court dismissed the complaint in its entirety on grounds that the subsurface owner had not been injured, the mineral rights were essentially worthless due to zoning restrictions, and the subsurface estate had not suffered any damages.

Premised upon the finding that, under Washington law, "construing mineral grants and reservations is embryonic at best," the *Saddle Mountain* majority reversed the dismissal. 2003 Wash.App. 65 P.3d at 368. The majority held, without citing any support, that the surface estate owner is entitled to move minerals around the property without restriction. However, the court balked at the question of whether the existence of a subsurface right restricts the surface owner from moving minerals off of the property. In facing this issue, the appellate court was intrigued by the zoning code's prohibition on mining at this site. The court contended that the prohibition may have altered "the status of the legal title to the mineral rights to the co-owned land and whether Saddle Mountain is entitled to remuneration for fill (the sand and gravel to which it still retained legal title) that was allegedly improperly removed from the co-owned property." *Id*. at 369. The case was remanded for factual development on this issue.

It is arguable that the court's holding is novel, insofar as the court considered reallocating subsurface rights to the surface owner based on a zoning restriction. The court found that resolution of the controversy depended on "whether the mineral rights were actually destroyed through the rezone or whether they were merely restricted." *Id*. at 368. Presumably, if the mineral rights are "destroyed" by the zoning, the surface owner's removal of minerals from the property is within her rights. The mineral rights would be rejoined with the surface estate and the surface owner would be entitled to make any use of the subsurface estate. At least to this author's knowledge, no judicial decision has ever been sustained in finding that a zoning restriction could reallocate an interest in the title to real property.

It is difficult to determine from the majority opinion whether a subsequent rezone permitting mining at the site would present a factual or legal issue, or whether under such circumstances subsurface minerals removed during the pendency of a zoning restriction would be compensable. The dissent did not neglect to point out this inconsistency, contending that the Saddle Mountain decision will blur the line between the surface and subsurface estate that was drawn only two months prior in the *Harrison* decision. The dissent warned that otherwise worthless mineral rights, made so by zoning restrictions, would be revived to interfere with and capitalize on any use of the surface estate. The dissent found such a result absurd:

> Saddle Mountain invites us to hold that, in Washington, the acquisition of imaginary rights to virtual assets derived from make-believe interests in land can produce real dollars squeezed from the pockets of legitimate entrepreneurs undertaking genuine risks of actual development of the land for a useful purpose, as well as from the ultimate financial underwriters of the project-the home-buying public.

Id. at 370. The dissent concluded that allowing an action for damages to a reserved mineral right, where the subsurface owners would be unable to mine the property themselves, "thwarts the orderly development of property." *Id*.

Harrison and *Saddle Mountain* are notable for the court's divergence from a history of abstinence and its newfound willingness to establish law on mineral rights.

Keith Hirokawa

Saddle Mountain Minerals, L.L.C. v. Joshi, ___ Wn. App. ___, 65 P.3d 366 (2003).

NEW RULINGS EXPAND THE SCOPE OF LIABILITY FOR HAZARDOUS SUBSTANCES IN WASHINGTON STATE

In a pair of cases from the Washington Court of Appeals and Supreme Court, the Washington courts determined that ordinary non-hazardous wastes can become hazardous substances through decomposition and create liabilities for landowners, operators, and generators.

In *Faust Trust v. Pierce County*, 2003 Wash. App. LEXIS 222 (Feb. 14, 2003), an unreported case from Division II of the state court of appeals, Pierce County was found to be liable under the state Model Toxics Control Act (MTCA), RCW Chapter 70.105D, as the owner/operator of a facility where hazardous substances had been released. The facility was a former landfill site where "routine household garbage" was deposited and buried for thirteen years beginning in 1953. In 1969, Pierce County sold the facility to private parties, who intended to redevelop the site for residential uses. Eventually, it was discovered that explosive level methane gas pockets had been created by the decomposition of the garbage buried at the site. The facility was listed as a potential EPA Superfund site, but the state Department of Ecology recommended that the site be classified for "no further action" under MTCA because there was no evidence that hazardous or dangerous wastes had ever been deposited at the site.

The landfill site eventually was transferred to Faust Trust, who sued the county for remediation costs pursuant to the private right of action under MTCA. RCW 70.105D.080. In a summary judgment ruling, the trial court found the county liable, and the county appealed. The primary issue on appeal was whether the county had caused a "release of a hazardous substance" at the facility, a required element of liability under MTCA. RCW 105D.040(1). The county argued that (1) it had not deposited "hazardous substances" on the site, (2) the methane gas did not exist at the time it sold the property and therefore could not have been released during county ownership and operation, and (3) methane gas is not a listed "hazardous substance" under MTCA or CERCLA.

The appellate court concluded that methane gas, at least at explosive levels, constitutes a hazardous substance for purposes of MTCA. Specifically, the court reasoned that because methane gas "pose[s] a substantial present or potential hazard to human health, wildlife, or the environment" it falls within the express definition of a "dangerous waste" under the State Hazardous Waste Management Act (HWMA). RCW Chapter 70.105.010(5). All dangerous wastes are included within the definition of "hazardous wastes" under the HWMA. *Id.* 70.105.010(15). Additionally, any hazardous waste in turn constitutes a "hazardous substance." *Id.* 70.105.010(14).

To support its conclusion that methane gas produced by the decomposition of ordinary household rubbish constitutes a hazardous substance, the appellate court cited a pair of rulings from Delaware that held methane gas resulting from buried "organic construction debris" is a "hazardous substance" for purposes of Delaware's Hazardous Waste Management Act. *See T.V. Spano Bldg. Corp. v. Dep't Natural Res. & Envtl. Control*, 628 A.2d 53 (Del. 1993); *T.V. Spano Bldg. Corp. v. Wilson*, 584 A.2d 523 (Del. Super. Ct. 1990).

As to the issue of whether there had been a "release" of a hazardous substance during the county's ownership or operation of the landfill, the appellate court relied upon the "transporter" liability provision in MTCA, which imposes liability on "[a]ny person . . . who accepts or accepted any hazardous substance for transport to . . . a facility . . . from which there is a release or threatened release for which remedial action is required." RCW 70.105D.040(d)(i). The court reasoned that because decomposition of ordinary household garbage was destined to result in the future "release" of methane gas, the county had caused a threatened release when it accepted, transported, and disposed of ordinary household garbage at the facility. However, the court ultimately found the county liable as a former owner of a "facility at the time of disposal or release of the hazardous substances." RCW 70.105D.040(1)(b).

The court's rationale appears to be strained with respect to the issue of transporter liability. The county did not transport "hazardous substances" to the landfill; rather, it transported non-hazardous household waste that had the potential to produce hazardous substances at some point in the future. Moreover, the transporter liability provision in MTCA provides an exception where the transporter transports a hazardous substance to a facility which "at the time of disposal or treatment, could legally receive such substance." RCW 70.105D.040(1)(d). The court did not address this provision.

Though unreported, the case is noteworthy for its rationale and expansive determinations of what constitutes a "hazardous substance" and "release" under MTCA.

One month later, the Washington Supreme Court, in a 5-4 split decision, addressed the issue of when organic non-toxic wastes become "hazardous substances" in *Hickle v. Whitney Farms*, 148 Wn.2d 911, 64 P.3d 1244. Joseph Hickle, the plaintiff, went hunting on property owned by defendant Whitney Farms (Whitney). Whitney had previously contracted with Seneca Foods and Milne Foods, fruit juice producers, to haul away their fruit pomace and diatomaceous earth (DE) organic wastes and dispose of them on Whitney's property. Whitney dug large pits, deposited the fruit pomace and DE, and then covered the pits with soil. As the fruit pomace decomposed, it would spontaneously ignite and reach temperatures of up to 507 degrees Fahrenheit. Hickle stepped onto one of these pits, and was severely burned and injured.

Hickle sued Whitney, Seneca, and Milne under a variety of theories, including the private cause of action afforded under the state's HWMA. The HWMA allows private plaintiffs to recover damages caused by violations of the act and its regulations. RCW 70.105.097. Whitney settled, but

Seneca and Milne proceeded to trial. While Seneca and Milne conceded that their wastes were "industrial organic wastes" regulated under the state Solid Waste Management Act (SWMA, RCW Chapter 70.95) and had been improperly disposed upon the Whitney property, they argued that fruit pomace and DE were not "dangerous wastes" as defined by the HWMA, pointing out that Ecology regulations had not designated fruit pomace or DE as dangerous wastes. The trial court granted summary judgment in favor of Seneca and Milne. The appellate court reversed that ruling, 107 Wn.App. 934, 29 P.2d 50 (2001), and Seneca and Milne appealed to the state supreme court.

The supreme court affirmed the appellate court, noting that "large quantities of decomposing organic material, if not carefully regulated and tended, can spontaneously ignite. This has been known since at least the first century A.D." 64 P.3d at 1246. The court went on to find that "'[d]esignated' is a term of art" under the HWMA, and that given the flammability and ignitability characteristics of fruit pomace and DE, these substances, in the manner disposed upon the Whitney property, were, as the Faust Trust court ruled with respect to methane gas, a "potential hazard to human health" and therefore a regulated "dangerous waste" under the HWMA. Id. at 1249–50.

Seneca argued that if organic fruit pomace was a "dangerous waste," then the ordinary agricultural practice of storage of hay or corn would also be regulated by the HWMA. The Court rejected this argument, reasoning that "if hay or corn are being stored then they are not 'discarded, useless, unwanted, or abandoned substances . . . which are disposed of in such quantity or concentration as to pose a substantial present or potential hazard to human health.'" *Id.* at 1250.

The court concluded that it wished to make clear that nothing in its opinion implied that all wastes, organic or otherwise, are covered by the HWMA, but that "[g]enerators of industrial quantities of organic wastes have a duty to comply with the HWMA." *Id.* The Court therefore found that "the producers of industrial quantities of organic wastes, which are a potential hazard to human health when accumulated in a manner as to exhibit the dangerous characteristic of ignitability, have a duty to comply with the HWMA ." *Id.*

A four-justice dissent contended that the definition of "dangerous waste" in the HWMA was simply not broad enough to encompass organic non-toxic wastes, despite their propensity to take on dangerous and hazardous characteristics upon decomposition.

These cases signal that the Washington courts will now find liability under MTCA and the HWMA for the release, threatened release, or improper disposal of organic and non-toxic wastes that are destined to decompose into wastes with hazardous or dangerous characteristics. These cases suggest that special care should be taken in making arrangements for the manner of disposal of organic and agricultural wastes, even if the wastes do not have "hazardous" or "dangerous" characteristics at the time of disposal.

Michael R. Karber

Faust Trust v. Pierce County, 2003 Wash. App. LEXIS 222 (Feb. 14, 2003) (unpublished opinion).

Hickle v. Whitney Farms, 148 Wn.2d 911, 64 P.3d 1244 (2003).

LUBA Cases

■ *GOAL 5*

In *Eugene Sand & Gravel, Inc. v. Lane County*, 44 Or LUBA ___ (LUBA No. 2002-068, Feb. 25, 2003), LUBA focused on OAR 660-023-0180(4)(c), a relatively obscure provision of the state mineral and aggregate resources rules under Goal 5.

OAR chapter 660, division 23 was adopted in 1996 and replaced the old Goal 5 Rule at OAR chapter 660, division 16. The new rules establish a new analytical framework for resolving conflicts between mineral and aggregate resources and surrounding uses. Significantly, the rules define "minimize a conflict" as to "reduce an identified conflict to a level that is no longer significant. For those types of conflicts addressed by local, state, or federal standards (such as the Department of Environmental Quality standards for noise and dust levels) to minimize a conflict means to ensure conformance to the applicable standard." OAR 660-023-0180(1)(f). Tying the resolution of conflicts to objective standards reduces the discretion local governments have in deciding whether significant conflicts exist. However, when a determination must be made as to whether proposed precautionary measures would minimize conflicts with agricultural practices, the requirements of ORS 215.296 must be followed, rather than the requirements of the rule itself, thereby allowing for subjective review. OAR 660-023-0180(4)(c).

ORS 215.213(2) and 215.283(2) state that mining, crushing, and stockpiling of aggregate and other minerals may be permitted conditionally in Exclusive Farm Use zones. OAR 215.296(1) states that a use allowed under ORS 215.213(2) or 215.283(2) may be approved only when the local government finds that the use will not force a significant change in accepted farm or forest practices or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use. In *Eugene Sand & Gravel*, the county and then LUBA found that in making this determination, the local government is not restricted to objective standards. As a result, the county can rely on a subjective review of facts and studies to determine whether impacts to agricultural practices are significant.

In *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991), LUBA established a three-part test to demonstrate compliance with ORS 215.296(1): the county findings must (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use, (2) explain why the proposed use will not force a significant change in those practices, and (3) explain why the proposed use will not significantly increase the cost of those practices. In *Sanders v. Yamhill County*, 34 Or LUBA 69, *aff'd* 154 Or App 448, 963 P2d 755 (1998), LUBA discussed *Schellenberg* and other cases addressing ORS 215.296(1) and concluded that the county decision maker must identify farm uses on properties in the surrounding area and examine the farm practices necessary to continue those uses. Interestingly, the opinion in *Eugene Sand & Gravel* does not mention *Schellenberg or Sanders*. While there is some discussion of the farm uses on neighboring properties, it is quite general. Except with respect to dust impacts, it is unclear just which farm practices would be affected by the proposed mining activity.

LUBA did clarify in *Eugene Sand & Gravel* that farm stands are not a "farm use." LUBA notes that along with many other nonfarm uses, farm stands are listed in ORS 215.213(1) and 215.283(1). Therefore, the traffic impacts of mining on farm stands cannot be reviewed as impacts on agricultural practices under ORS 215.296(1).

In addition to some provocative issues in the application of legal standards, *Eugene Sand & Gravel* required LUBA, once again, to decide how active a role it will play in deciding whether evidence is sufficiently reliable to be deemed substantial. When a battery of experts reaches a conclusion that is contradicted by apparently less-expert, less-informed testimony, should a county be able to reject the more authoritative testimony?

LUBA is clearly aware that it treads a thin line when overturning the decision of a local decision maker on substantial evidence grounds. In another case decided on the same day as *Eugene Sand & Gravel*, *Tipperman v. Union County*, 44 Or LUBA ___ (LUBA No. 2002-140, Feb. 25, 2003), LUBA was faced with a substantial evidence challenge to the qualifications of a consultant to make population projections. In *Tipperman*, LUBA stated uncompromisingly, "We reject the argument that the county's planning consultant must be shown to pass some threshold of qualification by education or experience before the testimony of that consultant may constitute substantial evidence." 44 Or LUBA at ___. Nonetheless, LUBA then discussed the population analysis of the planning consultant in question and rejected it as internally inconsistent.

In *Eugene Sand & Gravel*, without independent analysis, LUBA declined to disturb the county's decision to rely on the opponents' experts, finding that their testimony constituted substantial evidence. In *Tipperman*, LUBA seemed to play a more active role. Why the difference? It may relate to the accessibility of the data in question. Like arithmetic problems, population studies sometimes lend themselves to independent scrutiny, and logical errors can be apparent, while mistakes in scientific data generally may be more difficult to discern.

Peter Livingston

Eugene Sand & Gravel, Inc. v. Lane County, 44 Or LUBA ___ (LUBA No. 2002-068, Feb. 25, 2003).

■ LUBA PROCEDURE

LUBA's opinion in *Doob v. Josephine County*, 43 Or LUBA 473 (2003), offers a precautionary lesson about filing documents with LUBA by mail services. The petitioner encountered printer problems on November 22, 2002, the date his petition for review was due at LUBA. By the time the petition for review was printed and ready to mail later that day, the post office had closed. Instead, the petitioner delivered the petition on November 22 to Mail Boxes Etc. for delivery to LUBA via United Parcel Service (UPS). UPS delivered the petition on November 25. The county moved to dismiss the appeal for failure to timely file the petition for review, and LUBA granted the motion.

LUBA noted that under most circumstances, untimely filing of a document with LUBA is treated as a technical violation of LUBA's rules. The two exceptions are filing notices of intent to appeal and petitions for review. LUBA's rules specifically state that failure to file both documents within the specified time limits is not a technical violation.

The key question before LUBA was "whether petitioner 'filed' the petition for review with LUBA on November 22, 2002, when he delivered the petition for review to Mail Boxes Etc., which in turn delivered the petition for review on that date to the United Parcel Service for delivery to LUBA." 43 Or LUBA at 475. LUBA concluded that delivery to Mail Boxes Etc. was insufficient because its rules specifically state that filing is accomplished by either delivering a document to LUBA on or before the due date or by mailing a document by first-class mail with the United States Postal Service on or before the due date. On the facts of this case, LUBA concluded the petition was filed on November 25, the date it was delivered to LUBA. In reaching this conclusion, LUBA acknowledged the petitioner's argument that the petition wouldn't have reached LUBA any sooner if it had been mailed with the United States Postal Service on November 22. Nevertheless, LUBA rules provide little leeway, and LUBA emphasized that "[i]f the petition for review is filed . . . in any way other than by 'first class mail with the United States Postal Service,' OAR 661-010-0075(a)(A) applies and the date the petition for review is actually delivered to LUBA is the date of filing." 43 Or LUBA at 476.

Kathryn S. Beaumont

Doob v. Josephine County, 43 Or LUBA 473 (2003)

PROPERTY LINE ADJUSTMENTS

LUBA's decision in *Warf v. Coos County*, 43 Or LUBA 460 (2003), contains an extensive analysis of the statutes governing property line adjustments and concludes that the county erred in approving two property line adjustments in a single decision. LUBA described the two property line adjustments as follows:

> The first property line adjustment drops a common vertical (north-south) boundary between the two largest parcels to a horizontal (east-west) position, forming a large parcel to the north and east, a small parcel to the southwest and a smaller parcel in the middle of the tract . . . . The second property line adjustment swings the westernmost common vertical boundary between the two smaller parcels downward more than 180 degrees, making the small middle parcel larger and leaving a small parcel at the southern boundary of the tract . . . .

43 Or LUBA at 461; *see also id.* at 462 figs. 1–3. The county approved the property line adjustments as a ministerial decision on June 17, 2002 and petitioners filed their appeal with LUBA on July 3, 2002.

The first issue LUBA addressed was whether the county's decision was a land use decision. There was no dispute that the county applied a land use regulation, its zoning ordinance, in approving the property line adjustments. However, the intervenor-applicant argued that the county's decision was "made under land use standards which do not require interpretation or the exercise of policy or legal judgment" and was exempt from LUBA review under ORS 197.015(10)(b)(A). While agreeing that many of the standards the county applied require little if any legal or policy judgment, LUBA concluded the county's determination that the intervenor's application could be accepted, processed, and approved as a property line adjustment involved enough interpretation and legal judgment to preclude applying the statutory exception to LUBA's review jurisdiction.

Before turning to the substantive issue, LUBA reviewed the statutory definitions of "subdivide land" and "partition land" in ORS 92.010 and observed that these definitions allow a property owner some choice over how to divide and reconfigure property lines. In contrast, the choices for reconfiguring property lines through a single property line adjustment are more limited, although an owner can realign existing parcels through an almost unlimited sequence of serial property line adjustments with no statutory limit on the number of adjustments that may be approved in a single year.

LUBA phrased the key question in this appeal as "whether the county approved a property line adjustment, or whether the county approved something else." 43 Or LUBA at 465. LUBA characterized a property line adjustment as "a rather limited tool" and summarized the limitations governing these adjustments. *Id.* First, a property line adjustment involves relocating "a common property line between two abutting properties"(ORS 92.010(11) (emphasis added)), which means "one property line may be relocated and it must be a common property line between two abutting properties." 43 Or LUBA at 466. Second, the properties that share a property line that is being adjusted must be existing units of land, which means "the subdivision or partition plat or the deed or other legal instrument that created the existing lots or parcels must be recorded before the boundary lines that those lots or parcels create can be further adjusted." *Id.*

Applying these principles to the county's decision, LUBA found no fault with the first adjustment the county approved because it appeared to relocate a single common boundary between two parcels. The flaws in the county's decision were attributable to the second property line adjustment. The fact that the county purported to approve two property line adjustments in the same decision is inconsistent with the statute, which limits the county to approving only one property line adjustment at a time. Additionally, the second property line adjustment did not adjust the boundary between two existing parcels. While one of the parcels had been approved in the first property line adjustment, it did not yet exist because no property line adjustment deed had been recorded for the parcel at the time the second property line adjustment was approved. In short, LUBA concluded that the county had approved a three-lot partition, rather than a property line adjustment, and therefore reversed the county's decision.

Both parties cited LUBA's decision in *Goddard v. Jackson County*, 34 Or LUBA 402 (1998) in support of their arguments. The petitioner argued that *Goddard* means that an otherwise proper property line adjustment becomes improper if it is too complex. The intervenor argued that the property line adjustments approved by the county in this case withstand scrutiny because they are much simpler than the adjustments reviewed in *Goddard*. LUBA rejected both propositions, noting that it overturned the property line adjustment approval in *Goddard* because it did more than relocate a common property line and not because it was too complex. In *Goddard*, the "approved reconfiguration was a replat in all but name." 43 Or LUBA at 470.

LUBA summarized its conclusions as (1) serial property line adjustments can be used to accomplish a complex reconfiguration of existing parcels and (2) multiple property line adjustments may not be submitted and approved in a single application. Among the solutions available to the intervenor here is the option of seeking serial approval of the two partitions the county approved in the challenged decision. Since the county essentially approved a de facto partition without giving notice to surrounding property owners or following other applicable procedures under the county's ordinance, LUBA held that the county had failed to follow its procedures.

Kathryn S. Beaumont

Warf v. Coos County, 43 Or LUBA 460 (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.*

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