OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 25, No. 5 • October 2003

Highlights

Appellate Cases—Takings

OREGON COURT OF APPEALS UPHOLDS COUNTY'S DECISION NOT TO APPLY CODE PROVISION TO AVOID TAKING UNDER DOLAN

In May, in *Dudek v. Umatilla County*, 187 Or App 504, 69 P3d 751 (2003), the Oregon Court of Appeals upheld a county's decision *not* to apply a portion of its development code to avoid a taking under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The applicant proposed partitioning 20 acres near Pendleton into three lots for rural residential use. Access to the property is over a private road easement—Jerico Lane. The same road easement already serves 18 other properties. Under Umatilla County's development code, partitions relying on private road easements serving four or more lots must be improved to county road standards as a condition of approving the partition request. Jerico Lane is graveled and varies from 14 to 20 feet in surfaced width. If improved to county road standards, the applicant would have had to acquire additional right-of-way easements to widen Jerico Lane to 60 feet and would also have had to meet other heightened construction requirements. This was a significant financial issue because approximately 3,500 feet of Jerico Lane between the applicant's property and the nearest connecting public road would have had to be improved.

Umatilla County approved the partition request. However, it did not apply the development code provision that would have required the acquisition of additional right-of-way easements and the other improvements to Jerico Lane. Umatilla County did not cite directly to *Dolan* in its order approving the partition. But, it relied on *Dolan*'s "rough proportionality" standard to conclude, in essence, that application of its development code provision would have been an unconstitutional taking because it would have required the dedication of property (in the form of the easements and related improvements) to public use beyond what was necessary to mitigate the impact caused by the partition.

The petitioners, who live nearby on Jerico Lane, appealed the county's order to LUBA. They did not challenge the county's findings that the exactions involved would fail the *Dolan* test. Rather, they argued that *Dolan* did not apply at all, and, therefore, the requirements of the ordinance should be enforced. The petitioners relied on *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, 45 P3d 966, *rev den*, 334 Or 492 (2002), in contending that *Dolan* does not apply when a local ordinance adopts a standard applicable to a broad class of property and not subject to interpretation on a case-by-case basis. LUBA rejected their appeal and the court of appeals affirmed.

The court of appeals acknowledged *Rogers* and then distinguished it. In *Rogers*, the court of appeals held that a countywide traffic impact fee ordinance was not subject to *Dolan* because it applied to a broad class of property and did not involve individual discretionary determinations. The court of appeals noted that the Umatilla County ordinance, too, applied to a broad class of property. But, the court of appeals found that, unlike the traffic impact fee ordinance in *Rogers*, the Umatilla County ordinance "requires an assessment of the particular circumstances and an exercise of discretion by the county." 187 Or App at 512. Therefore, the court of appeals held that *Dolan* did apply. Because the petitioners did not dispute the notion that if *Dolan* applied it would have been violated, the court of appeals then affirmed LUBA's decision.

Mark J. Fucile

Dudek v. Umatilla County, 187 Or App 504, 69 P3d 751 (2003).

Appellate Cases—Real Estate

FEDERAL SUPREME COURT ALLOWS LOCAL GOVERNMENT TO BAR PERSONS FROM PUBLIC HOUSING SITES

In *Virginia v. Hicks*, 123 S. Ct. 2191 (2003), the Richmond (Virginia) Redevelopment and Housing Authority (RRHA) owned and operated a housing development for low-income residents. At one time, the streets within the development were public; however, in 1997, the City of Richmond "privatized" these streets to combat rampant crime and drug dealing in the area. The streets were thus closed to public use and travel and were conveyed to the RRHA, which posted signs prohibiting trespass. RRHA adopted a policy under which a non-resident who was not working at the site and who could not demonstrate a "legitimate business or social purpose" for being on the site could be served with a notice prohibiting that person from returning to the site. Persons disobeying the notice would be subject to prosecution for criminal trespass.

The defendant is a non-resident of the area who had been twice convicted of trespassing on the site and once of destroying property thereon. While the latter charge was pending, RRHA served the defendant with a notice barring him from the site, which the defendant signed. After being denied permission to enter, the defendant trespassed again and was arrested and convicted for criminal trespass.

The defendant contended that the policy fell within the First Amendment's "overbreadth doctrine" and was void for vagueness. The defendant presented only a facial challenge to RRHA's policy; he did not challenge the Virginia criminal trespass statute nor the policy or statute as applied to the facts of his case.

The Virginia appellate courts overturned the conviction on overbreadth grounds, finding that the policy vested too much discretion in the local manager to determine whether the defendant was authorized to be on the site and allowed the manager to determine whether the defendant's speech was personally distasteful as a ground for barring the defendant, even though that speech might be protected by the First Amendment. The Virginia Supreme Court rejected the trespass conviction because the RRHA had an unwritten rule requiring the property manager's permission to hand out leaflets. The defendant was not engaged in leafleting, but violated a written rule barring him from the premises.

The federal Supreme Court, speaking through Justice Scalia, noted that overbreadth is an exception to normal rules for facial challenges, so that if a law punishes a substantial amount of free speech, all enforcement of that rule may be invalidated unless and until a limited construction occurs or a partial invalidation limits its sweep or otherwise removes the threat to constitutionally protected expression. This rule prevents the chilling of expression by broadly worded laws that might cause a potential defendant to abandon constitutionally protected rights in the marketplace of ideas. However, the Court said that there comes a point at which it may be proper to allow enforcement of a law that protects legitimate state interests in maintaining comprehensive controls over harmful, though constitutionally protected speech. In such cases, the application of the overbreadth doctrine to protect speech must involve "substantial" impingement before the law may be invalidated.

The Court said the overbreadth claimant bears the burden of showing that the text of the law and the facts demonstrate overbreadth. The Court determined that the defendant had not done so because he failed to show that a notice barring entry would be given to anyone because of the exercise of First Amendment rights. Nor had the defendant shown that his entry was for the purpose of exercising First Amendment speech. The Court characterized the defendant's actions as nonexpressive conduct, rather than speech. The notice and barment rule and the "legitimate business or social purpose" policy applies to all, not just those who wish to engage in speech. Finally, the Court said that the defendant had not shown that the RRHA policy prohibits a "substantial" amount of protected speech, because the policy is not addressed to speech at all, but rather to conduct. The Court remarked that rarely, if ever, would an overbreadth challenge be successful if the challenged rule is not addressed to speech or to conduct associated with speech (such as picketing or demonstrating), and that claims that application of such a rule violates the First Amendment may still be dealt with in an "as applied" context. However, the Court said that the Virginia Supreme Court should not have used the "'strong medicine'" of overbreadth to invalidate the entire policy at issue. 123 S. Ct. at 2197 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

Justice Souter, with whom Justice Breyer joined, concurred and said that the number of possible invalid applications of the law was too small for use of the overbreadth doctrine in this case.

This is a troubling case in which Justice Scalia wrote for a unanimous court and dealt with thorny issues distinguishing speech from conduct and overbreadth from "substantial" overbreadth. This case involved a clearly unsympathetic claimant and resulted in a narrowing of free expression rights. The Court ducked the issues of whether the vacated streets still constituted a public forum (*see, e.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946)), and whether the RRHA's requirement to demonstrate a "legitimate business or social purpose" for being on the site was a valid constitutional basis on which to predicate the challenged "barment order." One should expect Justice Scalia to continue building, as he has in the takings field, on such bad facts to limit free expression still further.

Edward J. Sullivan

Virginia v. Hicks, 123 S. Ct. 2191 (2003).

NEGLIGENCE CLAIM FOR PROPERTY DAMAGE FROM LANDSLIDE TIME-BARRED

In *Rutter v. Neuman*, 188 Or App 128, 71 P3d 76 (2003), the Oregon Court of Appeals reversed the trial court and held that a negligence claim against the City of Ashland arising out of a landslide was time-barred.

The parties did not dispute the following facts. The plaintiffs purchased a house in Ashland in 1980. The house was at the base of a hill, on debris deposits from a series of past landslides. In 1983, a developer began constructing a residential development directly uphill of the plaintiffs' house. The developer built a private road by cutting and filling the slopes in the hillside. The developer installed a culvert to channel the natural drainage under the fill.

Later in 1983, some of the hillside began to erode into the plaintiffs' backyard. The plaintiffs believed the erosion occurred because the developer used the wrong type of fill material, and they complained to the City of Ashland. The city hired an engineering geologist to examine the site. The geologist concluded that there was a risk of landslides, particularly if the culvert became clogged and water runoff began to flow over the face of the fill. He recommended several methods that could be employed to minimize the risk. The plaintiffs subsequently learned the contents of the geologist's report. They hired an attorney, who wrote a letter to the city requesting that it take some action to remedy the hazardous condition created by the developer's improper road construction.

In September 1984, the plaintiffs' attorney wrote a second letter to the city urging it to remedy the "dangerous situation" caused by the road construction. That same month the attorney prepared a notice of tort claim regarding the fill, the alleged hazard created by the fill, and the developer's intention not to finish the project. The attorney later prepared a third letter to the city declaring that the plaintiffs intended to hold the city liable for "past and future erosion and land slide problems." But the plaintiffs never filed an action against the city. They moved out of the house and converted it to a rental.

Meanwhile, the city initiated an action to enjoin the developer from completing the project. The city obtained a court order in November 1984 that required the developer to comply with the recommendations in the engineering geologist's report and to allow the city to inspect the remedial work. The city made annual inspections to ensure compliance with the court order.

Finally, in January 1997 an extraordinary rainstorm occurred, and mud and debris broke loose from the hillside and flowed into the plaintiffs' backyard, causing extensive damage to the house and backyard. On December 31, 1997, the plaintiffs filed a complaint for negligence against the city and the developer. After several amendments, the plaintiffs' sole allegation of negligence was that the city was negligent in failing to abate the condition of the fill under the road. The plaintiffs alleged that existing ordinances authorized the city to remedy the

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.

Editor
Kathryn S. Beaumont

Associate Editors
Alan K. Brickley
Sharon Smith
Edward J. Sullivan

Assistant Editor
Nathan Baker

Contributors

David Doughman	William Kabeiseman
Larry Epstein	Michael R. Karber
Mark J. Fucile	Joan Kelsey
Glenn Fullilove	Jeff Litwak
Christopher A. Gilmore	Peter Livingston
Susan C. Glen	Steve Morasch
Rene Gonzalez	Tod Northman
Raymond W. Greycloud	John Pinkstaff
Peggy Hennessy	Carrie Richter
Keith Hirokawa	Susan N. Safford
Jack D. Hoffman	Steven R. Schell
Emily N. Jerome	Christopher Schwindt
Mary W. Johnson	Ruth Spetter
William R. Joseph	Ty K. Wyman
Michael E. Judd	A. Richard Vial

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.

unsafe conditions and that it was negligent in failing to do so.

The city moved for summary judgment, arguing that the plaintiffs' claim was barred by the ten-year statutes of ultimate repose at ORS 12.115(1) and 12.135(1). The trial court denied the city's motion for summary judgment and subsequent motion for a directed verdict, and the jury returned a verdict for the plaintiffs.

On appeal, the city asserted that the trial court "erred in not ruling that plaintiffs' claim was barred by the statutes of ultimate repose." 188 Or App at 132. The city argued that the plaintiffs' claim was time-barred under ORS 12.115(1) because the plaintiffs had been aware of the act or omission—the city's alleged failure to abate the condition—for more than 13 years before they filed their complaint. ORS 12.135(1) provides, in part, "An action against a person, whether in contract, tort or otherwise, arising from such person having performed the construction, alteration or repair or any improvement to real property or the supervision or inspection thereof . . . shall be commenced within 10 years from substantial completion or abandonment of such construction, alteration or repair of the improvement to real property."

The city further argued that the claim was time-barred by ORS 12.135(1) because the allegedly defective road was completed more than 13 years before the filing of the complaint. ORS 12.115(1) provides, "In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of." The plaintiffs responded that neither statute of ultimate repose applied because their claim was based on the city's continuing obligation to remedy public nuisances under Ashland Municipal Code sections 9.08.200 to 9.08.260. The city countered that there was no "active and continuous relationship" during the ten years before the plaintiffs filed their complaint, because the city had only the authority—not an obligation—to abate public nuisances.

The court of appeals analyzed *Josephs v. Burns & Bear*, 260 Or 493, 491 P2d 203 (1971), *Cavan v. General Motors*, 280 Or 455, 571 P2d 1249 (1977), and *Little v. Wimmer*, 303 Or 580, 739 P2d 564 (1987), in determining whether an "active and continuous relationship" existed between the plaintiffs and the city. It concluded that the Oregon Supreme Court had recognized a "special rule" predicated on the existence of a relationship that puts a plaintiff in a position in which he or she is not able to recognize the existence of a cause of action until the relationship is terminated. 188 Or App at 136. The court also noted such a special rule might not "pass muster" under current standards of statutory construction. *Id.* The "classic" active and continuous relationship is the doctor-patient relationship. *Cavan*, 280 Or at 458 (citing *Hutchinson v. Semler*, 227 Or 437, 443–44, 361 P2d 803, 362 P2d 704 (1961)). According to the court, there was no evidence of an active, continuous relationship between the plaintiffs and the city, and thus no basis for applying the "special rule." The plaintiffs had failed to provide evidence of any conversations, correspondence, or other communications between them and the city from 1984 to 1997.

The court of appeals rejected the plaintiffs' assertion that the city's continuing duty to abate public nuisances created an active, continuous relationship. In rejecting the plaintiffs' assertion, the court distinguished this case from *Little v. Wimmer*. In *Little*, the state had a mandatory duty to maintain the state's highways, and that duty was the source of the continuing obligation that was dispositive in the case. However, the court of appeals found no such duty under the Ashland city ordinances cited by the plaintiffs. According to the court, Ashland Municipal Code sections 9.08.020 to 9.08.180 describe certain categories of activities that are public nuisances and authorize the city to declare additional activities public nuisances. They also authorize the city to abate an activity after it has been declared a public nuisance. *Id.* The improperly constructed road was not a categorical public nuisance under the city ordinance and the city had not declared the road a public nuisance. Thus, the court of appeals concluded, there was no public nuisance to trigger the alleged duty of abatement.

Accordingly, the court concluded that the trial court erred in denying the city's motion for a directed verdict on the ground that the plaintiffs' action was time-barred. Because of the disposition of the appeal, the plantiffs' cross-appeal of limitations imposed by the trial court on the city's liability in accordance with the Oregon Tort Claims Act, ORS 30.270, was moot.

Susan N. Safford

Rutter v. Neuman, 188 Or App 128, 71 P3d 76 (2003).

Appellate Cases—Land Use

■ CALIFORNIA TRANSPORTATION DEPARTMENT CAN'T LIMIT ALLOWED SIGNS TO FLAGS, SAYS NINTH CIRCUIT

In *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003), the defendant state transportation department allowed individuals to display the American flag on highway overpasses in the wake of the September 2001 attacks. However, the department did not allow any other type of expressive banner. The plaintiffs, dissenters in the march to war in Afghanistan, hung a responsive banner stating "At What Cost?" A local police officer removed the banner for posing a safety risk. A second similar banner was anonymously removed, though the defendant said it would have removed that banner in any event.

The plaintiffs brought this 42 U.S.C. § 1983 civil rights suit. The trial court deemed the overpass a non-public forum, but found that the defendant's policy of allowing only American flags was neither viewpoint-neutral nor a

reasonable regulation of free speech, and entered a preliminary injunction against the policy. The defendant appealed, contending that alternative fora for expression for the plaintiffs to express their message were available, that the plaintiffs did not demonstrate irreparable injury, and that the plaintiffs were unlikely to succeed on the merits.

The Ninth Circuit affirmed the trial court's determination that overpasses are not public fora, as they have not traditionally been available for public expression, nor are they "designated public fora," because they have not been made available for public discourse. Restrictions on free speech are constitutional only if they are (1) reasonable in light of the purposes served by the forum and (2) viewpoint-neutral. In this context, "reasonable" focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated. In this case, that purpose is for public transportation and safety. Consistent with these interests, the defendant removed the signs because they may fall or distract motorists. However, these interests apply also to flags, and the defendant offered no evidence that flags are safer or less distracting than banners. Thus, the defendant's policy was patently unreasonable.

As to viewpoint neutrality, constitutional free expression provisions prohibit favoring one view over another. The court rejected the defendant's contention that the flag represents no particular point of view, noting that its proliferation was clearly a reaction to the September 11 attacks. The court added,

> After the events of September 11, what the flag's powerful message does not encompass, for many, is exactly that which Courtney and Brown voice: dissent. When "nations . . . knit the loyalty of their followings to a flag," [quoting a famous flag-burning case, *Texas v. Johnson*, 491 U.S. 397, 405 (1989)], those who seek not to follow but to chart a different course are unable to express their message through the flag. In a nation founded on the tolerance of dissent, "the way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* at 419. Honoring the principles for which the flag stands extends beyond waving it in tribute. Those principles can survive only by allowing the voice of dissent to be heard.

321 F.3d at 1224.

The court also rejected the defendant's alternative argument that the state was entitled to endorse the pro-war viewpoint. In this case, the state did not hang the flag—private citizens did—and even if publicly funded displays of patriotism were allowed to occur, they must occur through the actions of elected public officials, rather than transportation department employees who permit some signs and not others.

As for irreparable injury, the court said that the plaintiffs need only supply a colorable First Amendment claim, and the plaintiffs had done more than this—they had shown they were likely to prevail. The court rejected the defendant's suggestion that the plaintiffs apply for a permit; no permit for a sign of this nature was even available and there was no equivalent requirement that a person desiring to hang an American flag obtain a permit. Finally, while the plaintiffs may pay for a billboard to express their views, the financial burdens and delays associated with this option would similarly constitute irreparable injury.

The court concluded by expressing its own opinion about the symbolic importance of this case: "In the wake of terror, the message expressed by the flags flying on California's highways has never held more meaning. America, shielded by her very freedom, can stand strong against regimes that dictate their citizenry's expression only by embracing her own sustaining liberty." *Id.* at 1226.

Edward J. Sullivan

Brown v. Cal. Dep't of Transp., 321 F.3d 1217 (9th Cir. 2003).

SETTLEMENT AGREEMENT INFORMALLY APPROVED IN EXECUTIVE SESSION IS VOID

In *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003), the Ninth Circuit Court of Appeals confirmed that under Washington's Open Public Meetings Act (OPMA), RCW Chapter 42.30, a city cannot informally approve a settlement agreement in executive session.

This case had a long and complex history. In 1995, Feature Realty brought suit against the City of Spokane and its city council members individually, alleging wrongful refusal to issue a grading permit. In 1998, the parties negotiated a settlement. The city attorney drafted a confidential memorandum to the city council reciting the terms of the agreement, and distributed it to the members of the council in an executive session. At the executive session, the city attorney asked the council members if they wished to approve the settlement. "While no actual vote took place, an informal consensus was achieved by 'going around the table," whereupon each of the council members indicated their approval of the settlement." 331 F.3d at 1085.

Subsequently, a dispute over the settlement agreement occurred and the parties agreed to arbitrate. However, the parties could not agree on an arbitrator and Feature Realty petitioned the superior court to appoint an arbitrator. The city removed the case to federal court on the basis of diversity of citizenship. The city also claimed that it had discovered for the first time in the proceedings before the federal district court that its action approving the settlement agreement during executive session violated the OPMA, and sought summary judgment on the basis that the settlement agreement was null and void under the OPMA. The district court granted the city's motion for summary judgment. Feature Realty appealed.

To begin, the Ninth Circuit was confronted with a dispute over Washington case law concerning the validity of the city's approval of the settlement. The city relied on *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999), in support of its argument that the settlement agreement was null and void. The *Miller* test requires an

analysis of whether (1) the executive session falls within the definition of "meeting" under the OPMA and (2) if so, then whether one of the OPMA exceptions applies. Feature Realty relied on *Slaughter v. Snohomish Co. Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656 (1988). Feature Realty claimed that, under *Slaughter*, the OPMA had not been violated, because the decision whether to settle the claim was not a matter of "public import or 'general applicability.'" *Slaughter*, 50 Wn. App. at 738 (quoting RCW § 34.04.010(2)). The Ninth Circuit decided that *Miller*, rather than *Slaughter*, applied.

The Ninth Circuit then determined that the executive session was a "meeting" because the council had been asked to approve the proposed settlement agreement and had done so. Under the OPMA, action can be an informal proposal resulting in a decision. The court then concluded that while the council was entitled to "discuss" the terms of the settlement with its attorney and receive legal advice regarding it, the council could not approve the settlement in a closed session. The court specifically noted that the council had settled claims made against both the city and the individual members of the council using several hundred thousand dollars of the public fisc and had abandoned certain publicly owned lands to the developers—all behind closed doors with no opportunity for public comment. The court concluded that the statutory procedures essential to protect the public interest were ignored, and thus, under RCW 42.30.060(1), the settlement agreement is null and void.

Feature Realty made other arguments, which the Ninth Circuit rejected. Feature Realty claimed that actions taken by the city in open meetings subsequent to the settlement agreement (payment of money and adoption of two ordinances abandoning land to the developers) constituted ratification. The Ninth Circuit noted that while Washington law allows a governing body to retrace its steps and remedy the defects, these particular actions had not done so.

Feature Realty next argued that the city should be equitably estopped. The Ninth Circuit, citing *Nelson v. Pacific County*, 36 Wash. App. 17, 671 P.2d 785 (1983), concluded that equitable estoppel does not apply where the public's right to have government deliberate in public is violated.

Finally, the court stated "[a]t this point, the concerned reader might well ask what has happened to the ancient equitable principle that no one should profit from one's own wrong." 331 F.3d at 1092. In answer to this issue, the court noted that Feature Realty's claims must take a back seat to the public's right to open government, and that Feature Realty is not foreclosed from seeking other forms of equitable relief. The court tersely finished its analysis by noting that "it is the rights of the *public* with which we are concerned; we cannot and do not condone the actions of the city here." *Id.* at 1093.

Jeff Litwak

Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082 (9th Cir. 2003).

NINTH CIRCUIT SAYS NO CIVIL RIGHTS VIOLATION CAUSED BY TRANSGRESSION OF FEDERAL LAND USE REGULATION

In *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003), the plaintiff citizens group challenged a transit agency's plan to build a light-rail line south of Seattle to connect the Northgate area of Seattle with SeaTac Airport. The principal issues were whether choosing the route had a racially discriminatory effect and, if that were so, whether a U.S. Department of Transportation (USDOT) rule barring such actions created an independent federal right that could be enforced under 42 U.S.C. § 1983. The USDOT regulation prohibits location of routes in a way that has a disparate impact on racial minorities. There is no *statute* prohibiting such disparate impact, however.

Plaintiff filed a civil rights action, alleging that 42 U.S.C. § 1983, which prohibits state or local officials from violating the constitution "or laws" of the United States, provided a remedy for violation of the USDOT regulation. The trial court found no federal civil right created and dismissed the case, assessing costs against the plaintiff, who appealed.

The United States Supreme Court in *Gonzaga University v. Doe*, 573 U.S. 273, 285 (2002), and in *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), held that section 1983 protects rights, but does not ensure against violations of laws. The rights must be secured elsewhere under the Constitution or laws of the United States.

The Third, Fourth, and Eleventh Circuits have held that a violation of an agency regulation, by itself, is not sufficient for a section 1983 cause of action. According to these circuits, administrative regulations may be the source of section 1983 violations only if they flesh out a right otherwise created by the Constitution or statutory laws of the United States. The D.C. and Sixth Circuits, on the other hand, have found such rights to be created by administrative rules standing alone. There has been no dispositive United States Supreme Court case directly on point.

The Ninth Circuit concluded that no right enforceable under section 1983 can be created solely by an administrative regulation. The court stated that violations of rights, rather than laws, are prohibited by section 1983, and that violation of administrative regulations can only be the source of section 1983 liability if the regulations are directed by and embellish upon a statute. The court also used a three-pronged test from *Blessing* in its analysis: that Congress must have intended the provision to benefit the plaintiff, that the plaintiff can demonstrate that the rights alleged to be protected are not so vague and amorphous so as to strain judicial competence, and that the statute must unambiguously impose a binding obligation on the states. In this case, the USDOT regulation was adopted under Title VI of the federal Civil Rights Act of 1964. However, Title VI applies only to *intentional* discrimination, rather than disparate effects. While federal agencies were authorized to adopt administrative rules to carry out the Civil Rights Act, the Act did not authorize agencies to create

new rights.

The plaintiff also disputed the trial court decision to tax costs against it, suggesting that, in the case of small civil rights organizations, the trial court must justify such an imposition. The plaintiff pointed to its limited financial resources and the chilling effect of such costs on further civil rights actions. The court held that, while a trial court must specify its reasons for *refusal* to tax costs against the losing party, it need not do so when it chooses to tax costs. The court concluded that the trial court had not abused its discretion in this case.

Judge Berzon dissented in part but concluded that the majority's decision that the disparate impact regulation does not create a "right" under section 1983 was correct. However, she believed that the majority had failed to see the distinction between rights and causes of action. She also disagreed with the notion that administrative regulations could *never* serve to create rights protected by section 1983.

This case arose in a land use context, but it is important to all practitioners in the public law arena. The majority rule around the circuits appears to be that an administrative regulation, standing alone, cannot create a right enforceable under section 1983. Time will tell whether the Supreme Court will resolve the apparent conflict between the circuits.

Edward J. Sullivan

Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003).

■ LOGGING ON PRIVATE LAND REQUIRES STRICT ADHERENCE TO NOTIFICATION RULES, SAYS COURT OF APPEALS

In *Thomas Creek Lumber & Log Co. v. Board of Forestry*, 188 Or App 10, 69 P3d 1238 (2003), the Oregon Court of Appeals upheld civil penalties assessed against two timber companies for failure to obey state forest practices notification rules. ORS 527.670(6) requires advance notification to the state forester of all forest practices. OAR 629-605-0150(1) prescribes a fifteen-day waiting period after notification and before commencing an operation, unless waived in writing by the state forester. The Oregon Board of Forestry determined that the petitioners had violated both of these rules, and the court of appeals agreed.

Petitioner Thomas Creek was the landowner and petitioner Nel-Log, Inc. was the operator. Thomas Creek submitted advance notifications on behalf of both petitioners to the Oregon Department of Forestry for two forest practices that would take place over a six-week period starting in November 1998. Both notifications stated that the forest practices would take place in a particular township, range, and section.

In January 1999, after finishing the two forest practices, the petitioners moved their equipment and began logging more than one-quarter mile to the northeast and in a different township and section than had been described in the two notifications. A state forest practices forester learned of this logging and determining that no notification had been given for it. The forester also determined that the logging was within 100 feet of a "Type D" stream (a type of stream with domestic water use), even though the stream was classified differently on agency maps. The forester ordered petitioners to stop all operations, and then issued six citations: three each to the two petitioners for failing to (1) notify the state forester, (2) obey the required fifteen-day waiting period, and (3) obtain prior written approval before logging within 100 feet of a Type D stream.

The petitioners requested hearings on the six citations. The department of forestry later withdrew the two Type D stream citations, because it determined that the forester had not followed the required procedures for reclassifying the stream from Type N to Type D. Of the four remaining citations, the hearings officer determined that only one of them, the citation against Thomas Creek for failure to notify the state forester, was meritorious. The hearing officer also determined that the petitioners were entitled to attorney fees for having to defend against the Type D stream citations prior to their withdrawal. The hearing officer submitted appropriate proposed orders to the board of forestry.

The department filed exceptions to the hearing officer's proposed orders. In its final order, the board agreed with the department, upholding all four outstanding citations and assessing civil penalties of $400 each against both of the petitioners. The board also denied attorney fees to the petitioners.

On appeal, the petitioners first argued that they had not violated the notification rule. The petitioners reminded the court that that they *had* given notice for two prior forest practices, and argued that the contested operations were merely a continuation of these two forest practices. The court rejected this argument, holding that substantial evidence in the record showed that this forest practice was in a different section than the others and was far enough away to be considered a separate forest practice.

The petitioners also argued that only Thomas Creek should be liable for violating the notification rule, because Thomas Creek had provided the original two notices on behalf of both petitioners, and ORS 527.670(6) requires only one of three different entities (operator, timber owner, or landowner) to give notice. The court disagreed, finding that while the statute does require only one entity to give notice, both of the two petitioners had equally failed to comply with that requirement, and nothing in the statute allowed Nel-Log to rely on past practices to escape liability.

Next, the court held that the fifteen-day waiting period had been triggered and had been violated. The petitioners argued that the forester's sole reason for not waiving the fifteen-day period related to the Type D stream classification, which the department later withdrew. Therefore, according to the petitioners, the department lacked any reason not to waive the waiting period. The court rejected this argument, stating that the reasons behind the department's declination were irrelevant; indeed, the statute allows the department to decline waiver without providing *any* reason.

The petitioners also pointed to the fact that the forester had at first instructed that only timber cutting within 100 feet of the stream be stopped, and not until thirteen days later did she stop *all* work. They therefore argued that the first stop-work instructions implicitly waived the fifteen-day period for any portion of the operation not within 100 feet of the stream. The court rejected this argument, stating that under the plain language of the statute, any waiver of the waiting period must be in writing, and the department never waived the requirement here.

The petitioners also argued that the department had deviated from its "long-standing" and "established" practice of routinely waiving the fifteen-day requirement, and had failed to explain this deviation. Therefore, the petitioners argued, a remand was required under ORS 183.482(8)(b)(B). The court assumed for the sake of argument that the department typically grants waivers, but held that the department had adequately explained its reason for not granting a waiver here: the department was concerned about possible impacts to a Type D stream. The department had discretionary authority to decline waiver on that basis; it mattered not that the department later withdrew its Type D stream citations.

Finally, the petitioners argued that they were entitled to attorney fees and expenses because the department had issued, without probable cause, the Type D citations, and had later conceded its mistake. ORS 527.700(7) authorizes awards "to each of the prevailing parties against any other party who the board finds presented a position without probable cause to believe the position was well-founded, or made a request primarily for a purpose other than to secure appropriate action by the board."

The court sidestepped many of the arguments on this issue, holding simply that the department is not a "party" under ORS 527.700(7), and therefore fees could not be awarded against the state. While the statute does not define "party," the court held that the context of ORS 527.700 shows that there are only four classes of persons who can constitute a "party": (1) interested persons who have submitted comments and are adversely affected by a forest practice, (2) forest practices operators, (3) timber owners, and (4) landowners. Furthermore, ORS 527.700(9) contains an explicit reference to fee awards against the state in a different context, and therefore, according to the court, "when the legislature wants to include a provision for an award of attorney fees against a state agency, it knows how to do so." 188 Or App at 28. Finally, the court examined Oregon's Administrative Procedures Act (APA), which the Oregon Forest Practices Act incorporates by reference. The APA defines "party" as a person who is "entitled as of right to a hearing before the agency." ORS 183.310(6). Here, while the department was allowed to present evidence at the hearing, it was apparently not entitled as of right to the hearing itself as the petitioners were, and was therefore not a "party."

Nathan Baker

Thomas Creek Lumber & Log Co. v. Bd. of Forestry, 188 Or App 10, 69 P3d 1238 (2003).

Cases from Other Jurisdictions

FLORIDA APPELLATE COURT UPHOLDS MEASURE-7-TYPE STATUTE

In *Royal World Metropolitan, Inc. v. City of Miami Beach*, ___ So.2d ___ (Fla. Dist. Ct. App. July 16, 2003), the Third District Court of Appeals of Florida upheld The Bert J. Harris, Jr., Private Property Rights Protection Act. The plaintiff claimed that the Act was violated by the city's regulations, which allegedly deprived it of all economically viable use of its property. The trial court granted the defendant's motion for summary judgment on the grounds that the Act violated the city's sovereign immunity.

In evaluating this sovereign immunity defense, the appellate court looked to the legislative intent of the Act, in addition to the usual presumptions that an act of the legislature is constitutional. In this case, the legislature enacted the Act to create a new cause of action to deal with "inordinately burdensome" governmental regulations that do not amount to a taking. Fla. Stat. § 70.001(1). To allow a sovereign immunity defense to the use of the Act in this case would defeat its very purpose. As a result, the court found the city's sovereign immunity waived with respect to claims made under the Act, and thus reversed the trial court's grant of summary judgment.

Like the statute at issue in this case, Oregon's Measure 7 would have created a new cause of action to require governmental funds to be paid for actions that do not constitute "takings" under state or federal constitutional law. Measure 7 would likely have been found to predominate in the face of a sovereign immunity defense, especially in light of the Oregon Tort Claims Act. It may be idle to speculate as to how Measure 7 would have fared; nevertheless, this case gives one interpretation.

Edward J. Sullivan

Royal World Metro., Inc. v. City of Miami Beach, ___ So.2d ___ (Fla. Dist. Ct. App. July 16, 2003).

NEW HAMPSHIRE COURT FINDS NO DAMAGES FOR PERMIT DENIALS UNDER INVALID PLAN

In *Torromeo v. Town of Freemont*, 148 N.H. 640, 813 A.2d 389 (2002), the defendant town appealed a judgment awarding damages for denial of permits under a growth-control ordinance that was subsequently found to be invalid. The plaintiff had proposed a 23-lot subdivision that was approved in 1997 and later platted. In 1999, five lots remained unsold, and the town ceased issuing building permits pursuant to its new growth control ordinance. The plaintiff and a prospective purchaser sued to require the town to issue a permit, and the trial court ruled in their favor, citing a state law that exempts recorded subdivisions from such ordinances for up to four years, unless health or safety are involved. The court enjoined enforcement of the growth control ordinance. In a different case,

later joined on appeal, another developer convinced the trial court that the ordinance itself was invalid because it was not preceded by a capital improvement program, as required by state law.

Both plaintiffs then filed damage claims based on temporary takings and used the previous decisions as a basis for those claims. One plaintiff filed a motion asking the court to find the ordinance "unconstitutional *per se*" so that it need not be required to prove that the ordinance was arbitrary or unreasonable. The trial court found the ordinances invalid and determined that this finding was a sufficient basis to award damages. Another trial court conducted a trial on damages and found that the plaintiffs were entitled to their carrying costs and fair rental values on the unsold lots.

The town appealed, contending that the plaintiffs could not receive damages for takings unless the ordinance was found to be unconstitutional, and that the procedural error in adopting the ordinance was not a basis for granting damages. The appellate court agreed with the town, ruling that in neither case was the ordinance unconstitutional, and in both cases, the fault arose out of erroneous adoption or application of the ordinance, which is not a basis for damages.

The court concluded,

> Absent a determination that the ordinance is unconstitutional and constitutes a taking, this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy. "Judicial, quasi-judicial, legislative or quasi-legislative acts of a town ordinarily do not subject it to claims for damages." *Marino v. Goss*, 120 N.H. 511, 514, 418 A.2d 1271 (1980). Accordingly, we hold that the plaintiffs are not entitled to damages, and that their only remedy is issuance of the erroneously-denied building permits.

148 N.H. at 644 (footnote omitted).

This is a garden-variety case of improper adoption and application of an ordinance. New Hampshire courts, like most courts around the country, do not find this type of error to be the basis for damages.

Edward J. Sullivan

Torromeo v. Town of Freemont, 148 N.H. 640, 813 A.2d 389 (2002).

■ MICHIGAN APPELLATE COURT REJECTS EFFORTS TO DEPOSE PLANNING COMMISSIONERS

In *Pythagorean, Inc. v. Grand Rapids Township*, 253 Mich. App. 525, 656 N.W.2d 212 (Mich. Ct. App. 2002), the defendant township's board denied in 1996, upon the recommendation of its planning commission, plaintiff's application for a zone change from single-family residential (R-1) to suburban neighborhood commercial (C-1) in order to facilitate the construction of retail and office space. In 1996, the same board, also upon the recommendation of its planning commission, approved a rezoning of the same property to suburban office use (C-2). Apparently still desiring a C-1 classification, the plaintiff sued over the first decision, claiming that it was arbitrary and capricious. The plaintiff also sought damages for inverse condemnation.

During discovery, the plaintiff sought to take the deposition of members of the planning commission and the township board to determine their individual reasons for denial on the first application. The trial court denied the request as to board members, but allowed it as to planning commission members. The defendant appealed this order, contending that the privilege against discovery of governing body members extends to planning commission members, and further, that the desired discovery was irrelevant and unduly harassing.

The court declined to reach the constitutional issue because it found for defendant on the other issue—that the discovery was irrelevant and unduly harassing. The court noted the constitutional precedent to the effect that courts are not concerned with individual motives behind the enactment of laws and that, in Michigan, rezoning is seen as a legislative act. The court said it could not see why the recommendation of a planning commission should be subject to a different test from that of the governing body. The court noted dicta from an earlier case that might have allowed such testimony if fraud, personal interest, or corruption were alleged, but said that no such allegation appeared in the complaint in this case. The court also cast doubt on whether such allegations could, in fact, support a deposition, and concluded,

> Plaintiff has simply come forward with no argument by which we could conclude that the motivation or thought processes of the planning commission members in making their recommendation to the board might be relevant or might reasonably be calculated to lead to the discovery of any relevant evidence. Further, we note that the planning commission members are volunteers who willingly give of their time and efforts for the good of the community. Justice requires that they be protected from the annoyance and undue burden and expense of deposition discovery that has no relevance to the issues involved in plaintiff complaint.

656 N.W.2d at 215 (citation omitted).

This case follows the usual rule that the motives of decision makers are not subject to examination and deposition. The rule is less clear in a case in which corruption or personal interest is alleged. The reasons for the basic rule (the prevention of harassment of decision makers and the irrelevance of the reasons for individual votes) are sound, however, and explain the nearly universal application of the general rule.

Edward J. Sullivan

Pythagorean, Inc. v. Grand Rapids Township, 253 Mich. App. 525, 656 N.W.2d 212 (Mich. Ct. App. 2002).

D.C. TO GEORGE WASHINGTON UNIVERSITY: HOUSE YOUR STUDENTS

In *George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003), the D.C. Board of Zoning Adjustment (BZA) had been concerned over the encroachment into local neighborhoods caused by the university's reliance on private housing to accommodate its students. In an effort to preserve the adjacent neighborhoods, the BZA, in approving a long-term plan for university improvements, imposed conditions limiting and rolling back such encroachments. The trial court upheld some of the conditions but overturned others on substantive due process grounds. Both sides appealed.

Universities are an outright use in D.C.'s commercial zones, but are special exceptions (*i.e.*, conditional uses) in the other relevant zones. The university took advantage of a long-term plan provision under the D.C. code, under which the university committed to a 15-year program and, upon BZA approval, had its future development subject only to the plan and applicable local zoning regulations.

In approving the university's 1999 plan for 2000–2010, the BZA imposed conditions requiring the university to house freshman and sophomores on campus, provide housing for 70% of its students, and provide an enrollment cap tied to its provision of on-campus housing. The plaintiff university challenged the order and won a remand. However, the BZA substantially adhered to its original conditions. The plaintiff removed its challenge to federal court and prevailed on some issues in the trial court on substantive due process grounds. The trial court, however, rejected a challenge of facial unconstitutionality.

On appeal, the circuit court noted that substantive due process requires only slight justification by the government to uphold its actions, and requires nothing in the absence of a liberty or property interest. The plaintiff argued that its mere ownership of the subject land constituted a property interest, an approach adopted by the Third Circuit. The plaintiff also argued that it had a property interest under the "new property" standard, first advocated by Charles Reich in *The New Property*, 73 Yale L.J. 733 (1964), and subsequently adopted by the Second, Fourth, Eighth, Tenth, and Eleventh Circuits. Under the "new property" approach, new wealth may be conferred on certain citizens through the operation of complex regulatory systems. In the land use arena, the existence of a "new property" hinges largely on the degree of discretion given to government officials to deny approval of the proposed land use.

Without deciding whether the Third Circuit's approach should be applied here, the D.C. Circuit pursued a "new property" inquiry and found that a "new property had been created. The court looked at the zoning regulation to determine whether there were substantial limits placed on the government's discretion. The court determined that the special exception must issue if the criteria are met. While a denial could be predicated on objectionable features, those features must have their basis in objective facts. These "substantial limits" on the BZA's exercise of its discretion created a "new property."

However, according to the court, where a property or liberty interest is found, substantive due process prevents only egregious governmental misconduct. In the D.C. Circuit, that egregious conduct must either be based on substantial infringement of law reflecting group animus or a deliberate flaunting of the law that trammels significant property or personal rights. The plaintiff suggested that the BZA had a group animus toward students, but did not contend that students are a suspect class. The court found no serious basis for such an analysis. Similarly, the court found no equal protection basis for overturning the BZA's decision based on student characteristics.

The court also found no substantive due process violation in the BZA's requirement that plaintiff find transitional housing for 70% of its students by August 31, 2002, either on campus or outside the adjacent neighborhoods. The court noted that Harvard houses 98% of its undergraduates on campus and Columbia about 90%. The court found no unconstitutionality in the BZA's policies or its conditions to limit student use of the adjacent residential neighborhood. The court had little trouble reversing the trial court's rejection of a condition that prohibited issuance of non-residential campus building permits whenever a semi-annual university report shows that the 70% housing figure is not met. Moreover, the trial court's striking of a condition requiring freshman and sophomores to live on campus, to the extent housing is available, was also reversed, because the court found this requirement to have been proposed by the university in the first place.

The court also rejected the university's claims that the zoning restrictions impinged on its First Amendment rights to academic freedom, noting that the zoning regulations were neutral, generally applicable rules dealing with externalities. Finally, the court rejected a facial equal protection challenge because no suspect class was involved and the classification was rational.

In a concurring opinion, Judge Henderson found no substantive due process claim because there was no property interest at all. Judge Henderson would have used the analysis of *Board of Regions v. Roth*, 408 U.S. 564, 569–70 (1972), which requires a "legitimate claim of entitlement" to a benefit. In this case, Judge Henderson found discretion to issue or deny the special exception, which would preclude such an interest.

This case involved grand claims of substantive process and equal protection, but it should have been resolved through an everyday administrative law analysis regarding the sufficiency of the findings and conclusions. The university's claims of something more trivializes the Constitution.

Edward J. Sullivan

George Washington Univ. v. District of Columbia, 318 F.3d 203 (D.C. Cir. 2003).

LUBA Cases

ANNEXATION

In *Morsman v. City of Madras*, 44 Or LUBA ___ (LUBA No. 2003-040, July 7, 2003), LUBA determined that the City of Madras may have improperly obtained consents to a challenged annexation by promising favorable treatment to those who consented, and remanded the city's decision.

The petitioners challenged the city's annexation of 759 acres of adjacent land, which increased the city's size by more than fifty percent. The city used the triple majority method of annexation, which allows the annexation of contiguous territory without a vote if the city obtains the written consent of more than half of the owners of land in the territory to be annexed, who also own more than half of the land and more than half of the assessed value of all real property in the territory.

Of particular interest is the petitioners' claim that the city improperly coerced property owners to consent to the annexation by offering a seven-year phase-in of city property taxation and favorable future zoning to certain owners in exchange for their consent to the proposed annexation. The petitioners argued that this kind of practice was ruled unconstitutional in *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995). In *Hussey*, the Ninth Circuit treated a property owner's consent to annexation as a substitute for the owner's right to vote and therefore subject to constitutional protection. The court ruled that the city's offer of a subsidy for connecting to the city's sewer system in exchange for a property owner's consent to annexation was an impermissible burden on the owner's constitutionally protected right to vote.

In *Morsman*, LUBA agreed with the petitioners that *if* the city's offer of favorable property tax or zoning treatment had been limited only to those who consented to annexation, such practice was unconstitutional, stating:

> As the court in *Hussey* explained, a city may be able to offer inducements to all property owners in the annexed territory to encourage an affirmative vote for annexation or written consents to annexation. However, the city may not limit its offers of valuable to consideration to only those property owners who sign consents to annexation. Under *Hussey*, the city may not make property owners choose between a thing of value (i.e., phase-in property taxation or favorable zoning) and their right to vote against, or to refuse to consent to, annexation. In the words of the court in *Hussey*, such inducements are "designed to distort the political process by granting substantial subsidies based solely on whether a voter consents to annexation, and . . . cannot stand."

44 Or LUBA at ___ (slip op at 12-13) (omission in original) (citations omitted).

With respect to the alleged promises of favorable property tax treatment of consenting owners, LUBA refused to assume that the city could have made such blatantly unconstitutional promises. The evidence in the record cited by the petitioners consisted of meeting minutes and a newspaper article, which LUBA acknowledged lent some support to the petitioners' position, but not enough to sustain their claim of error.

LUBA reached a different conclusion concerning the alleged promises of favorable zoning. LUBA found that the evidence in the record appeared to support the petitioners' claim that some owners were promised favorable city zoning in exchange for consenting to the proposed annexation. One of the consent agreements stated that the "[c]ity agrees to leave in place the existing zoning regulations . . . unless both the Owners and the City agree to a change of regulations" and that "[t]he City agrees to place Owners in a zone which allows for its current uses." A second consent agreement contained similar language. The city did not respond to the petitioners' claims concerning one of the property owners, and argued that its promise to the other was intended to resolve a dispute unrelated to the annexation. LUBA found the city's response inadequate and remanded the decision so that the city could either explain why the two agreements did not violate *Hussey* or revise the agreements to be consistent with *Hussey*.

LOCAL ORDINANCES

Local governments often preface zoning regulations with purpose statements, which LUBA usually construes to be generally worded statements of intent that are inapplicable to quasi-judicial land use reviews. In *Freeland v. City of Bend*, 44 Or LUBA ___ (LUBA No. 2003-059, Aug. 5, 2003), however, LUBA held that a purpose statement imposed additional affirmative obligations on the city and that the city had erred by failing to address the purpose statement as part of a quasi-judicial site design review.

The petitioners in *Freeland* appealed the city's approval of site design review for the proposed remodeling of a commercial building at the corner of Franklin Avenue and Second Street. The remodeling project included adding a second story to the building and eliminating vehicular access to Franklin Avenue. The petitioners own property adjacent to the site that contains a commercial building occupied by various tenants. During the local review process the petitioners and others expressed concern that the remodeled building would block views of the petitioners' building from Franklin Avenue and thereby negatively affect retail sales.

The Bend City Code (BCC) contains a purpose statement for the site design review process. The first two sentences of this statement say that the process is intended to ensure compliance with the code's objectives and the comprehensive plan and to minimize conflicts between uses in adjacent zones to avoid creating undue burdens on public facilities and services. The last sentence of the purpose statement says, "In considering a site plan the [design review] committee shall take into account the impact of the proposed development on nearby properties, on the capacity of the street system, on land values and development potential of the area, and on the appearance of the

street and community." BCC 10-10.23(1). The criteria for site plan design review are contained in a separate section of the code, BCC 10-10.23(8).

The petitioners argued to LUBA that the purpose statement in BCC 10-10.23(1) is an additional approval criterion and that the city had erred by failing to address compliance with it and by failing to consider the petitioners' concerns about the proposal's effect on their property. The intervenor/applicant argued that the city had properly construed the code by refusing to treat the purpose statement as an approval criterion. In his decision, the city hearings officer found that the purpose statement in BCC 10-10.23(1) is implemented through the approval criteria in BCC 10-10.23(8). The hearings officer therefore addressed only the criteria and standards in BCC 10-10.23(8) and did not directly consider the impacts identified in the purpose statement.

LUBA agreed with the intervenor that the purpose statement is not an approval criterion. However, LUBA concluded that the city had erred in determining that it need not consider the impacts identified in the purpose statement. In reaching this conclusion, LUBA distinguished between purpose statements that are "generally worded expressions of the motivation" for adopting regulations and purpose statements that "impose additional affirmative duties" on local governments. 44 Or LUBA at ___ (slip op at 6). The former kind of purpose statement is not applicable to quasi-judicial land use reviews; the latter may apply to these reviews.

In this case, LUBA held that the last sentence of the site design review purpose statement "unambiguously imposes a requirement that certain specified impacts, including impacts 'on land values' be taken 'into account'" and obligates the city to consider four different kinds of impacts when it reviews a site design proposal. 44 Or LUBA at ___ (slip op at 6) (quoting BCC 10-10.23(1)). LUBA also noted that the purpose statement does not dictate any particular outcome: it is "worded as a mandate that certain impacts be *considered*, not as a standard that must be *achieved*." 44 Or LUBA at ___ (slip op at 8). LUBA ruled that the city had erred in concluding that it need not consider the impacts identified in the purpose statement and remanded the city's decision.

■ *LUBA PROCEDURE*

The timeliness of a LUBA appeal can be fertile ground for a dispute when a local government makes a decision without providing a hearing. A notice of intent to appeal such a decision is timely if it is filed within 21 days of "actual notice where notice is required" (ORS 197.830(3)(a)) or within 21 days "of the date a person know or should have known of the decision where no notice is required" (ORS 197.830(3)(b)). In *Frymark v. Tillamook County*, 44 Or LUBA ___ (LUBA No. 2003-012, Aug. 7, 2003), LUBA clarified the meaning of "actual notice" for purposes of calculating the appeal timeline.

The petitioners in *Frymark* appealed a building permit authorizing construction of a large free-standing sign advertising the intervenor's RV park and marina. The building permit was issued on July 24, 2002 and the sign was built in August 2002. After an inquiry by neighbors about the sign's lawfulness, the county counsel sent a letter to the planning department on November 27, 2002 in which he concluded that the sign was a lawful "on-site" sign under the county's code. The petitioners received telephone calls between January 12 and January 17, 2003 from Jeannette Brinker, one of the neighbors who received a copy of the county counsel's letter. The petitioners filed their notice of intent to appeal with LUBA on January 21, 2003 and their petition for review on April 24, 2003. The petitioners asserted that they are adversely affected by the building permit decision and filed their appeals within 21 days of "actual notice" of the decision under ORS 197.830(3)(a). The petitioners also submitted affidavits stating that each petitioner had learned of the building permit approval in a telephone conversation with Ms. Brinker in January 2003, that each petitioner owns property within 250 feet of the site and within sight of the sign, and that the sign's visual impact adversely affects each petitioner's use of his or her property. Although not clear from LUBA's decision, the county code apparently requires notice of a land use decision to be sent to property owners within 250 feet of the site.

LUBA's ruling addresses the intervenor's motion to take additional evidence in which the intervenor disputes the petitioners' allegations that each of them was "adversely affected" and filed a notice of intent to appeal within 21 days of receiving "actual notice." The intervenor sought LUBA's permission to depose each petitioner in order to establish that the petitioners were not adversely affected and that their appeals were not timely filed. LUBA denied the motion, ruling that the intervenor offered no reason to question that at least seven of the nine petitioners were adversely affected by the building permit approval in the manner stated in their affidavits. It is LUBA's disposition of the "actual notice" question, however, that is most noteworthy.

LUBA agreed with the intervenor that determining whether petitioners had actual notice of the county's decision depends on "whether the circumstances were 'sufficient to inform the petitioner of both the existence and substance of the decision.'" 44 Or LUBA at ___ (slip op at 6) (quoting *Willhoft v. Gold Beach*, 38 Or LUBA 375, 391 (2000)). In *Willhoft*, LUBA addressed the differences between the "actual notice" standard and the "knew or should have known" standard in ORS 197.830(3) and concluded that actual notice consists of receiving a copy of the local government decision or written notice of the decision. In dicta in *Willhoft,* LUBA also stated that receipt of information other than a copy of the decision or written notice may constitute actual notice if it is sufficient to inform a petitioner of the existence and substance of the decision.

In *Frymark*, LUBA observed that the parties had staked out very different positions on the legal question of what constitutes actual notice of the county's building permit decision. The intervenor relied on the dicta in *Willhoft* for a broad interpretation of actual notice, which LUBA characterized as "subjective knowledge in any form from any source (*e.g.*, a conversation with a neighbor at a party can constitute 'actual notice' of the decision . . . if the circumstances are sufficient to inform petitioners of the 'existence' and 'substance' of the decision." 44 Or LUBA at ___ (slip op at 10) (quoting *Willhoft*, 38 Or LUBA at 391). The petitioners argued for a more narrow interpretation of actual notice, which LUBA phrased as "'the *equivalent* of receiving a copy of the decision or written notice of the decision.'" 44 Or LUBA at ___ (slip op at 10–11) (quoting *Willhoft*, 38 Or LUBA at 391).

LUBA concluded that the dicta in *Willhoft* was incorrect because it suggests a partial overlap between the "actual notice" and "knew or should have known" standards when, in fact, the legislature intended these standards to be distinct. The actual notice standard in ORS 197.830(3)(a) applies when a local government has committed a procedural error by failing to provide timely notice of a permit decision. The "knew or should have known" standard in ORS 197.830(3)(b) applies when no notice of a decision is required and, thus, the local government has committed no procedural error by failing to provide notice. To the extent its dicta in *Willhoft* confused the two by describing a kind of "quasi-actual notice," LUBA clarified its view of the actual notice standard as follows:

> We now conclude that the "actual notice" referred to in ORS 197.830(3)(a) is provided only when the local government provides the written notice of decision that is required by law. When the local government fails to "actual[ly]" provide the legally required written notice of decision, the 21-day deadline specified in ORS 197.830(3)(a) does not begin to run until the local government provides to that person (1) the legally required written notice of decision or (2) a copy of the decision itself. Any other set of circumstances that would lead a reasonable person to know that the local government adopted a decision, or would be sufficient to impute such knowledge, will trigger the 21-day appeal period set out in ORS 197.830(3)(b) for persons who are not entitled to notice. But such circumstances will not trigger the 21-day deadline set out in ORS 197.830(3)(a) for persons who are entitled to actual notice of the decision.

44 Or LUBA at ___ (slip op at 12) (alteration in original) (footnote omitted).

LUBA acknowledged that its ruling establishes a bright line for the actual notice standard but leaves the "knew or should have known" standard ill-defined and dependent on the facts of each case. That is an unavoidable result of the statutory language and, in LUBA's view, any remedy is necessarily legislative in nature.

Because the intervenor's motion to take evidence depended almost entirely on the *Willhoft* dicta, LUBA denied the motion. Additionally, at least four of the nine petitioners' affidavits stated that they had never received copies of the building permit decision and, in the absence of evidence to the contrary, LUBA concluded that their appeals were timely.

RLUIPA

This summer, LUBA issued what appear to be the first two substantive decisions in Oregon on the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 44 Or LUBA ___ (LUBA No. 2002-155, July 17, 2003); *Cookman v. Marion County*, 44 Or LUBA at ___ (LUBA No. 2003-008, June 5, 2003). This article summarizes the *Latter-Day Saints* case, in which LUBA concluded that the City of West Linn violated RLUIPA when it denied a church's application for a conditional use permit and design review.

The church applied to West Linn for a conditional use permit and design review to build a 16,588-square-foot church and 179 parking spaces on a 3.85-acre parcel. The proposed church facilities include a chapel for worship, a large multi-purpose hall for social gatherings, several small classrooms, and administrative offices. These facilities were intended to serve two "wards" or congregations consisting of approximately 950 members. Although the wards would attend services at different times on Sundays, there would be some overlap during which the combined total attendance was expected to be approximately 540 people. Small groups would also use the church facilities for short periods during the week.

The church site is located in an R-10 residential zone and is surrounded by residential uses, a vacant field, and several streets. In the R-10 zone, a religious institution is allowed as a conditional use. Under West Linn's community development code, the appropriate lot size for a conditional use is determined as part of the review process. The site size and dimensions must provide "adequate area for aesthetic design treatment to mitigate any possible adverse effect from the use on surrounding properties and uses." Additionally, the code requires a finding that "the characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features."

The city planning staff recommended that the planning commission approve the conditional use permit and design review, subject to numerous conditions. The church agreed with the recommended conditions of approval, which included revising the landscape plan to better screen the parking lot from a nearby street. After holding three hearings, the planning commission denied the application and found that (1) no buffer could adequately screen the parking lot from surrounding residences, (2) a church of the proposed size is not appropriate in a residential zone, (3) roads are not adequate to serve the church, and (4) the church would not be compatible with adjacent residential uses.

The church appealed the planning commission's decision to the West Linn City Council, which also held three public hearings. At the conclusion of the hearings, the city council denied the appeal and, in addition to the reasons asserted by the commission, found that the proposed church did not comply with applicable design criteria governing compatibility and buffering. The church appealed the city council's decision to LUBA. The church claimed in part that West Linn's decision violates RLUIPA.

An overview of key provisions of RLUIPA is helpful to understanding LUBA's ruling. RLUIPA was adopted in 2000 to increase protections for the free exercise of religious freedoms. It targets religious exercise in two very different contexts: (1) land use and (2) persons institutionalized in jails and other correctional facilities. With respect to land use, RLUIPA is intended to protect individuals and religious institutions from zoning laws that substantially interfere with their exercise of religion, including the use of land and buildings for religious purposes.

RLUIPA establishes a general rule prohibiting local governments from imposing or implementing a land use regulation in a way that places "a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless the government shows it is furthering a "compelling governmental interest" and the land use regulation is the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc(a)(1). This general rule applies whenever a local government implements a land use regulation in a quasi-judicial decision in a way that results in a substantial burden on religious exercise.

RLUIPA defines applicable terms very broadly. A land use regulation is defined as a zoning law that "limits or restricts a claimant's use or development of land" if the claimant is the owner, lessee, easement holder or the holder of any other property interest, contract, or option regarding the affected property. *Id.* § 2000cc-5(5). The term "religious exercise" means "any exercise of religious, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7). It includes the "use, building, or conversion of real property for the purpose of religious exercise." *Id.*

A local government may avoid RLUIPA's preemptive effect by (1) changing the regulation that results in a substantial burden on religious exercise, (2) keeping the regulation but exempting persons or institutions on a case-by-case basis, or (3) adopting general exemptions for applications of the regulation that substantially burden religious exercise. Finally, RLUIPA states that it is to be construed to broadly protect religious exercise to the maximum extent permitted by its terms and the federal Constitution. However, RLUIPA does not immunize religious institutions from the application of local land use regulations.

At LUBA the parties raised many arguments concerning RLUIPA. A brief summary of the key issues and LUBA's disposition of the parties' arguments follows.

1. *Whether RLUIPA applies to West Linn's decision*: West Linn argued that RLUIPA does not apply to its decision, because the approval criteria it used are neutral and apply generally to any conditional use or design review. In the city's view, RLUIPA only applies when a local government has absolute and standardless discretion to decide whether to allow a use. It does not apply where the city has neutral, generally applicable, pre-established standards that guide its decision making.

LUBA disagreed, ruling that the regulations West Linn applied to the church are precisely the kind of regulations RLUIPA intended to address and, further, that the neutral, generally applicable nature of the approval criteria does not insulate West Linn from RLUIPA:

> [The Church] is allowed to construct a church in the R-10 zone only if [it] demonstrates compliance with extremely subjective conditional use and design review criteria that afford the local government decision maker significant discretion to approve or deny the application. That discretion is considerably augmented by the deferential review afforded the city council's evidentiary judgments and interpretations of local legislation, under applicable Oregon statutes and case law. We believe it obvious that such regulations are precisely the type of land use regulations that Congress describes in [RLUIPA].
>
> In short, the fact that the pertinent [code] regulations applied here are "neutral" and "generally applicable" in the sense that they are not directed specifically at religious exercise and apply broadly to a number of secular uses does not remove them from RLUIPA's ambit. . . . A view much more consistent with RLUIPA's apparent purpose is that it governs application of land use regulations, such as the ones at issue here, that allow a local government to approve or deny proposed uses of land under subjective, discretionary standards.

44 Or LUBA at ___ (slip op at 15–16) (citation omitted).

West Linn offered a second reason why RLUIPA does not apply to its decision. It argued that RLUIPA only applies to land use regulations that govern *uses* of property. Because the design review criteria focus on details of a use's appearance, but not on whether the use itself is allowed on a site, West Linn asserted that RLUIPA is inapplicable.

LUBA acknowledged that the city's argument is plausible, but expressed serious doubt that Congress intended to exclude design review criteria from RLUIPA's coverage. LUBA noted that the focus of both the conditional use and design review criteria is similar and that both sets of criteria allow a proposed land use only if the applicant shows that any adverse impacts can be mitigated. An application can be denied for failure to satisfy either set of criteria. In LUBA's view, there is no meaningful difference between a denial under conditional use criteria and a denial under design review criteria for RLUIPA's purposes.

2. *Whether West Linn's decision imposes a substantial burden on religious exercise*: Not surprisingly, the church and West Linn had different opinions about what burden, if any, the city's decision imposed. The church argued that it is completely unable to build the proposed church as a result of the decision and, therefore, the decision is a sub-

stantial burden on religious exercise. West Linn argued that there is no substantial burden because it decided only that the church can not build the precise church it wants exactly where it wants to build it. In the city's view, if the church is willing to reduce the building or parking lot size or obtain more land to provide bigger buffers, it could win approval of its application.

LUBA agreed with the church that the city's decision was a substantial burden on religious exercise, stating,

> We might reach a different conclusion if the city's land use regulatory scheme also included zones where petitioner's church would be allowed outright without an "individualized assessment." Similarly, denial of petitioner's application might not constitute a "substantial burden" if the record showed that larger sites were available in the city and that a new application for a larger, available site in the city would be approved. However, the city does not provide zoning districts where petitioner's church would be allowed outright, and it is not at all clear that there are other suitable and available sites for petitioner's proposed church.
>
> Further, we disagree with the city's view, expressed in its findings and brief, that no substantial burden is imposed where (1) a similar application by a non-religious institution would be denied under the same criteria, or (2) petitioner's application might have been approved if petitioner had modified the site plan to propose a larger site.

44 Or LUBA at ___ (slip op at 18).

LUBA noted that there would be no need for RLUIPA if a local government could avoid the claim of a substantial burden on religious exercise by simply showing that it treated religious and non-religious entities equally. In fact, LUBA asserted that "the apparent intent of RLUIPA is to require that local governments treat proposed land uses by religious entities more favorably, if necessary, than those proposed by non-religious entities." 44 Or LUBA at ___ (slip op at 19).

3. ***Whether West Linn's decision furthers a compelling governmental interest***: Under RLUIPA, once a petitioner establishes that a local government decision is a substantial burden on religious exercise, the burden shifts to the local government to show that its decision advances a compelling governmental interest in the least restrictive way possible. West Linn argued that its decision identified a compelling governmental interest: protecting residential neighborhoods. LUBA didn't address this issue because of the way it resolved the next issue: whether the city's decision was the least restrictive way to advance a compelling governmental issue.

4. ***Whether West Linn's decision is the least restrictive way to further a compelling governmental interest***: The church argued that the city had less restrictive means to address neighborhood protection than completely denying its application. The church pointed out that the planning staff recommended approval of its application with conditions that addressed the city's concerns regarding noise, lights, aesthetic impacts, and compatibility. The church was willing to accept the staff's conditions and was willing to pursue other mitigation measures, such as expanding the parcel size to allow the building and parking lot to be located further away from nearby streets and residences. The city's findings suggested that if the church obtained additional land, the church and parking lot could be configured to comply with the applicable criteria. West Linn argued that it can only impose reasonable conditions of approval. It argued that the church, not West Linn, had the obligation to propose an alternative site plan or show that additional conditions of approval would satisfy the applicable criteria. Because the church had failed to do so, West Linn contended it had the discretion to deny the church's application.

LUBA agreed with the church, noting that RLUIPA significantly limits the circumstances under which a local government may deny an application for a religious building under discretionary standards. In essence, the local government must show that denial is the only way to advance a compelling governmental interest. In this case, LUBA concluded that West Linn had failed to make that showing, stating,

> We have difficulty understanding how that burden is met when the applicant has indicated willingness to accept conditions of approval that the city's own findings suggest may well satisfy applicable criteria. We do not see that petitioner's failure to submit a modified site plan showing a more adequate vegetative buffer or a larger parcel or to make a formal showing of feasibility reduces the city's burden under [RLUIPA].
>
> Second, the city fails to appreciate that if it wishes to avoid the "preemptive force" of RLUIPA, it must either: (1) change the offending regulation; (2) retain the regulation but exempt substantially burdened religious activity; or (3) adopt "any other means that eliminates the substantial burden." 42 U.S.C. § 2000cc-5(c). The third option would seem to authorize the city to seek alternatives to denial, such as imposing reasonable conditions of approval, that would reduce the burden on the exercise of religion to the point where it is no longer "substantial."
>
> In short, the city's burden under [RLUIPA] in the circumstances of this case is to show, essentially, that the proposed religious structure cannot be approved consistent with applicable [code] requirements. Whether the proposed structure can be approved with imposition of reasonable conditions of approval is highly relevant to that showing. Where, as here, the record indicates that the application might satisfy applicable criteria with imposition of what appear to be reasonable conditions, that showing has not been made.

44 Or LUBA at ___ (slip op at 21).

continued on page 16

5. *Whether RLUIPA is constitutional*: West Linn argued that RLUIPA is unconstitutional for many reasons, including that RLUIPA effectively immunizes religious institutions from discretionary land use regulations that would otherwise apply and that would allow the denial of non-religious uses that are similar in character. LUBA rejected this argument. In doing so, LUBA characterized RLUIPA as requiring that local governments do more than refrain from discriminating against religious institutions: "It is reasonably clear under RLUIPA that Congress intended to place a 'statutory thumb' on the scales in favor of religious institutions." 44 Or LUBA at ___ (slip op at 33) (quoting *Freedom Baptist Church of Del. v. Township of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2003)).

LUBA acknowledged that there is a point where this "favoritism" can slip over the line from accommodating religious exercise (permissible) to advancing religion (impermissible). 44 Or LUBA at ___ (slip op at 33). In LUBA's view, RLUIPA does not cross this line. RLUIPA does not completely excuse religious institutions from complying with discretionary land use criteria. A local government may apply such criteria and deny a church's land use application if it cannot comply with applicable approval criteria. What RLUIPA changes is the level of discretion a local government has to impose or not impose reasonable conditions of approval. In the past, a local government *may*, but did not have to, approve a land use application that does not comply with applicable criteria by imposing reasonable conditions of approval. Under RLUIPA, a local government *must* try to fashion conditions of approval to make a church's land use application approvable and may only deny the application if it cannot do so.

In short, LUBA stated that "[w]here the record indicates that the proposed church can comply with applicable criteria if suitable conditions of approval are imposed, we believe that RLUIPA prohibits the city from denying the application without considering more fully whether the proposed use may be approved under such conditions." 44 Or LUBA at ___ (slip op at 35). LUBA remanded the decision to West Linn to consider whether it could fashion conditions of approval that would enable it to approve the church's application.

Editors' Note: The City of West Linn has appealed LUBA's decision to the Oregon Court of Appeals and oral argument is scheduled for October 6, 2003. The United States Department of Justice has intervened in the appeal in order to defend the constitutionality of RLUIPA.

Kathryn S. Beaumont

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

Recycled/Recyclable