OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

2003 Oregon Legislation

Editors' Note: *Below are summaries of real estate, landlord/tenant, and land use legislation passed in 2003 by the Oregon Legislative Assembly. The summaries were written by Laurie E. Craghead, Assistant Deschutes County Counsel, and Christopher D. Crean, Assistant Multnomah County Counsel, (Land Use); and Gregory L. Nelson, Regional Counsel for Chicago Title Insurance Company, Portland (Real Estate).*

The Real Estate and Land Use Section thanks the Oregon State Bar and the authors for granting permission to reprint the summaries, most of which were also published in ***2003 Oregon Legislation Highlights*** *(OSB CLE 2003). If you are interested in purchasing this book, which contains a review of important 2003 legislation covering a wide range of topics, please call the Bar at (503) 684-7413 or visit </www.osbcle.org/pub/>.*

Unless otherwise noted, all legislation will be effective on January 1, 2004. For copies of the bills, visit <www.leg.state.or.us/billsset.htm>.

2003 REAL ESTATE AND LANDLORD/TENANT LEGISLATION

I. Real Estate Technical Law: Nuts and Bolts Issues

A. HB 2727 (Oregon Laws 2003, ch. 527): Notice of Entry to Drug Property

B. SB 34 (ch. 347): Power of Attorney Exemption from Real Estate Licensing

Exempts specified persons who may be engaged in professional real estate activity from requirement to obtain real estate license. Exempts parties acting as attorney in fact under a power of attorney executed prior to July 1, 2002; or parties acting as attorney in fact where the agent is the spouse, child, grandchild, parent, grandparent, sibling, aunt, uncle, niece, or nephew of the principal or of the spouse of the principal; or a financial institution or trust company acting as attorney in fact. It clarifies those allowed to act under court order and cleans up the prior language. Effective 06/13/2003

C. SB 43 (ch. 260): Title Company Document Preparation

Exempts certain activities of title insurers, title insurance agents, and escrow agents from prohibitions on unauthorized practice of law. Allows preparation of releases, acting as a scrivener on documents selected by the principal (and prepared by a licensed attorney) of mortgage, trust deed, promissory note, assignment, power of attorney, subordination agreement, or memorandum. It requires a disclosure clause and prohibits giving of legal advice. Where seller is financing seller must receive copies of all related documents. There is also an amendment to ORS 9.241 allowing the Supreme Court to adopt rules for attorneys who are not admitted to the Oregon Bar to practice law in Oregon on a temporary basis.

D. SB 136 (ch. 267): UCC Filing Denial

Allows Secretary of State to reject filings inadequate on their face.

E. SB 515 (ch. 328): Seller Disclosure

Creates new provisions for residential real estate disclosure. It eliminates the category of sellers who have never occupied the property as exempt from requiring a disclosure. It eliminates the seller's choice of a disclaimer in order to prevent a revocation. A new claim of exemption section is added so that in every case a form will be used. The questions are rephrased to make the seller's answers more definite and an answer choice of "unknown" is added. Words such as "to your knowledge" and "are you aware" are deleted. New questions relating to special tax assessments or treatments, water from a well or spring, mildew odors, materials subject to recall or class action suit, homeowners association pending litigation, and CC&R or Bylaw violations are added. A new buyer's acknowledgement is added relieving financial institutions and real estate licensees from liability for the disclosure statement.

II. Title Transfers; Estates

A. HB 2150 (ch. 196): Small Estate Affidavit

Specifies that copy of small estate affidavit must be mailed or delivered to Estate Administration Unit of Department of Human Resources.

B. HB 2156 (ch. 628): Notice of Transfer – Public Assistance

Authorizes the Department of Human Services to record in the county real property records a request that it be notified by a title insurance company or agent of any transfer

of or encumbrance on real property in which a recipient of public assistance has an ownership interest so that DHS can determine whether the transaction is fraudulent and evaluate the recipient's continued eligibility for public assistance.

III. Manufactured Dwellings; Houseboats

A. SB 328 (ch. 189): Exempting Manufactured Dwelling Title on Leasehold

Effective 06/04/2003

B. SB 468 (ch. 655): Regulatory Transfer of Manufactured Dwellings to Commerce Dept.

Transfers Department of Transportation (ODOT) duties, functions, and powers relating to titling and registration of manufactured structures intended for residential use to Department of Consumer and Business Services (DCBS). Replaces manufactured structure title and registration system. Requires issuance of "ownership document" for manufactured structures. Allows cancellation of ownership document and recording of manufactured structure in county real property records for structures assessed as real property. Transfers ODOT authority over vehicle dealers dealing in manufactured structures to DCBS. Becomes operative July 1, 2004. Declares emergency, effective on passage. This takes manufactured dwellings intended for residential use out of the Motor Vehicles Department. They must be over 8 ½ feet wide and not considered a "mobile modular unit" to qualify. It involves the Building Codes Division more directly with the county in qualifying manufactured structures. While there is an emergency clause in the bill, the operative sections, including transfer of administration from DMV to DCBA, take place May 1, 2005.

C. SB 908 (ch. 658): Manufactured Dwelling/Floating Home Deposits, Removal

Covers deposits on abandoned manufactured dwellings and floating homes. Shortens period for accepting or rejecting application to remain in current location after sale.

IV. Condominiums and Planned Communities

A. HB 3385 (ch. 569): Revision of Planned Community/ Condominium Law

Revises planned unit development law. Clarifies powers and guidelines for homeowners associations in PUDs and condominiums. Contains rules for voting and record retention. Provides that recording of the declaration constitutes record notice and perfection of assessment liens. Effective 07/14/2003.

V. Real Estate Brokerage

A. HB 2639 (ch. 224): Interest on Trust Deposits

B. SB 206 (ch. 398): Licensing Revision

Changes date from effective date of 300 Oregon Laws 2001 to June 30, 2002 for person holding real estate license under former licensing system to qualify for conversion of license to current licensing system and to meet certain educational requirements. It adds the requirement that branch offices have a sign with the name of the licensed broker. It changes the reason for suspending or revoking a license for bad faith to "Committed an act or conduct substantially related to the applicant or licensee's fitness to conduct professional real estate activity, whether of the same or of a different character and whether or not in the course of professional real estate activity, that constitutes or demonstrates bad faith or dishonest or fraudulent dealing." This is in response to the *Dearborn* case, where a realtor was convicted of a crime but could have his license revoked because it was not related to the practice of real estate.

C. SB 207 (ch. 427): Escrow Licensing

Modifies provisions relating to licensing, record keeping, bonding, and civil penalties for escrow agents.

D. SB 910 (ch. 759): Electronic Mail

Prohibits a person, in the course of offering real estate, goods, or services for sale, rent, or other disposition, from transmitting electronic mail messages that use an Internet domain name without permission or misrepresenting the subject or origin of the message. The bill specifically defines various terms. The bill regulates and allows certain unsolicited commercial electronic mail messages and exempts messages from the requirements if the subject line contains "ADV:" or if the sender has an established business relationship with the recipient.

VI. Real Estate Taxation and Assessment; Real Estate Investment Taxation; Subsidized Housing

A. HB 2283 (ch. 771): Tax Exemption Expansion for Golf Course/Wastewater

Extends the property tax exemption offered to a nonprofit corporation that leases from a municipality land that is used both as a golf course and for the discharge of wastewater or sewage effluent to cover related improvements. Effective 11/26/2003.

B. HB 3616 (ch. 539): Wildlife Habitat Tax Exemption

Establishes property tax special assessment program for wildlife habitat. Allows State Fish and Wildlife Commission to designate certain land as eligible for wildlife habitat special assessment upon request by governing body of county or city. Requires commission to give significant weight to demonstration of economic burden when governing body of city or county requests commission to remove designation. Permits homesite assessment of land under dwelling, if associated with wildlife habitat special assessment. Applies to tax years beginning on or after July 1, 2004. Permits location of dwelling on property subject to wildlife habitat special assessment, upon compliance with certain requirements. Authorizes State Department of Agriculture and State Board of Forestry to enter into stewardship agreements with landowners to create incentives for conservation, expedited permitting, regulatory certainty, and other stated benefits. This changes the evaluation of wildlife habitat special assessments from the open space requirements to those of timber or farm deferral. Cities and counties are given the ability to request that farm, forest, or mixed farm and forest land within their jurisdictions be treated as a wildlife special assessment.

C. SB 232 (ch. 704): Property Tax Revisions

Provides that property taxes deferred under certain deferral programs (senior and disabled persons homestead deferral and disaster area tax deferral) may not be canceled by county governing body upon donation of property to state or local government or nonprofit corporation. Provides definition of independent contractor for income tax purposes. Establishes application dates for property taxes collected from property involved in bankruptcy. Permits waiver of interest on delinquent property taxes arising from certain error corrections. Effective 11/26/2003.

VII. Liens, Mortgages, Trust Deeds

A. HB 2060 (ch. 251): Trustee Statement of Information

Allows interested person to request trustee to provide written statement of specified information concerning sale. Not later than 15 days before the date of the sale, the grantor, occupant, junior lien holder, or person interested in bidding may send written request to trustee asking for written statement of information as

described in the act. It must contain a response address, fax number, or email address. Trustee must respond at least seven days before the date of the sale. The statement includes the amount needed to cure, a description of performance needed to cure, or if not calculable then the maximum amount needed to cure the default. The trustee may postpone the sale in order to comply. A person requesting such a statement has the rights of an omitted person if they sent a timely request and the trustee cannot prove that the response was sent at least seven days before the sale. There is no provision to protect the purchaser if trustee did not respond properly.

B. HB 2332 (ch. 210): Child Support Paid Through Collection Escrow

Allows obligor and obligee to elect to have support payments electronically transferred to licensed escrow agent. Child support payments may now be made through a collection escrow if approved by the court.

C. HB 2646 (ch. 576): Judgments Revision

Enacts a general revision of the laws governing judgments. Eliminates decrees and replaces them with judgment orders. Eliminates the judgment docket and replaces it with noting the judgment in a register. Section 9a allows the clerk to continue entry in the record using the old terminology until funding is available to update the system. The clerk must keep a separate record of information for these judgments for the purpose of title checks.

Judgments are either general, limited, or supplemental.

- Limited judgment: judgment rendered before entry of a general judgment that disposes of at least one but not all claims
- General judgment: a judgment entered that decides all claims other than prior limited judgments
- Supplemental judgment: a judgment that is entered after a general judgment and that affects a substantial right of a party (*e.g.*, attorneys fees, modifications)

Without a caption to this effect judgments will be treated as general. The entry of a general judgment will automatically dismiss any claim that was not decided. Any document entered as a judgment is appealable. Instead of making a motion for renewal of a judgment, a judgment creditor must now file a certificate of extension.

The existence of a separate money award in the judgment document determines whether a judgment creates a judgment lien. If a judgment document does not contain the separate money award section, the judgment can still be enforced by judgment remedies but the judgment does not create a judgment lien. The same is true for criminal judgments, however judgments entered on uniform citation forms are not subject to the requirements.

Subsection 4 of section 14 makes a clear statement about the ability of a judgment debtor under the support-award portion of a judgment to convey or encumber real property free of the judgment lien, but not free of individual support arrearage liens that have attached to the property.

Filing of a supersedeas bond will no longer automatically remove the lien of a judgment on appeal. The new law authorizes the appellant to make a motion for elimination of the lien on filing the bond.

The new law applies only to judgments entered on or after January 1, 2004, although certain provisions such as certificates of extension apply to earlier judgments.

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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.

VIII. Construction

A. HB 3218 (ch. 285): Accommodator Not a Contractor

Exempts qualified intermediary in tax-free exchange of property from licensure as construction contractor if qualified intermediary does not perform construction activities. This facilitates construction 1031 exchanges.

B. HB 3539 (ch. 778): Seller Notice of Possible Construction Liens

Requires seller of new residence (one to four units) or residence with $50,000 or more in improvements during the past 90 days to give a notice to the purchaser disclosing any unpaid or disputed bills, notices of right to lien, or other information that might lead to perfection of a construction lien after the date of sale. Seller has six choices of ways to protect the buyer:

- Extended coverage owner's title insurance
- Escrow holding deposit of 25% of the sales price
- Escrow holding of bond or letter of credit
- Waivers from suppliers and subcontractors with cost of $5,000 or more
- Close sale after lien period has expired
- Waiver from purchaser

Failure to comply is a Class A violation. Injured parties may recover up to twice the amount of the injury. Contractors could have their license suspended and/or be assessed a civil penalty. Certain portions of this bill are effective 09/17/2003, but the above notice requirements are effective 01/01/2004.

C. SB 906 (ch. 675): Residential Dwelling Code

Establishes a Residential Structures Board. Transfers Building Codes Structures Board functions relating to one- and two-family dwelling programs to Residential Structures Board. Replaces One- and Two-Family Dwelling Code with Low-Rise Residential Dwelling Code. Establishes Mechanical Board. Transfers Tri-County Building Industry Service Board functions to Department of Consumer and Business Services effective January 1, 2004. Modifies investigative and enforcement procedures for municipal building inspection programs. Requires certain building code professionals to wear visible identification when providing professional services. Limits electrical permit exception for persons making installation on property of person or family member. Creates new construction contractor license class for property owners who are developers, operative October 1, 2003.

Temporarily allows developer claims regarding unlicensed work. Provides guidelines for payment to contractors and subcontractors on construction contracts, including billing cycles, objections, payments, time between receipt of payment, and disbursement to subcontractors. Prescribes interest penalty for unpaid amounts. Provides that construction contract may not be subject to law of another state. Exempts contracts for construction, alteration, repair, maintenance, moving, or demolition of residential structure from payment guidelines. Applies to contracts negotiated or advertised on or after January 1, 2004. Effective 08/21/2003.

D. SB 909 (ch. 660): Owner Notice of Defect

Requires owner of a home that has a construction defect or contains a defective system to file notice of the defect with the contractor or supplier of the defective system. Requires contractor or supplier who receives owner's notice to send secondary notice to any other contractor or supplier who may be responsible for the defect. Allows contractor or supplier, in coordination with any secondary contractor or supplier, to request a visual examination or inspection of the home. Requires owner to allow visual examination or inspection. Requires contractors or suppliers notified of defect to give written response to owner within 90 days. The written response to the owner must either

- deny responsibility for the defect,
- contain an offer to pay for the defect, or
- contain an offer to remediate the defect.

If an offer to pay for or remediate the defect is contained in the written response, and the owner accepts that offer, completion of the remediation satisfies owner's claim. Provides that owner's notice of defect tolls any statute of limitations governing the owner's commencement of legal action. Provides form of notice that contractor must deliver to owner, notifying owner of the procedure provided in this measure. Provides 14 days to send secondary notice. Allows 14 days from receipt of notice to request inspection. Allows 30 days for an owner to accept an offer. The notice is admissible but a rejected offer is not in subsequent arbitration or court action. There is no limitation on the number of secondary notices allowed. The law does not change the statute of limitations for bringing an action by the seller. It does extend the time seller can act to 120 days after receiving a written response rejecting the claim, 120 days after the owner rejects the offer, or 30 days after the date specified to complete remediation or payment.

IX. Government Property; Condemnation; Forfeiture

A. HB 3370 (ch. 534): Eminent Domain

Consolidates laws governing eminent domain. Language is changed from "municipal corporation" to "condemner." Mostly a cleanup bill.

B. HB 3371 (ch. 476): Eminent Domain Offer

Changes eminent domain proceedings. Written offer changed from 20 to 40 days before filing an action unless there is a threat to persons or property that requires immediate possession.

C. HB 3372 (ch. 477): Eminent Domain Inspection

Provides standard procedure for entry upon and examination, survey, testing, and sampling of real property before commencement of condemnation action. Provides for a court order if the owner objects to entry. Provides for compensation to owner for damage.

X. Landlord/Tenant

A. HB 2765 (ch. 378): Landlord/Tenant Revision

Modifies certain rights and responsibilities of landlords and tenants. Contains provisions relating to domestic violence and tenancy, drug- and alcohol-free housing, and discrimination under facially neutral housing policy.

B. HB 3276 (ch. 734): State Loan Guarantee

Expands state housing and loan guarantee programs to include financing the purchase of a lot in a subdivided manufactured dwelling park by a tenant.

C. HB 3601 (ch. 387): Absence on Military Leave

Establishes rights of persons called into active state service and persons absent on military leave. This brings state law in compliance with federal law. It allows a person called into active duty for 90 days or more to terminate a lease without penalty. It also allows for a stay of eviction for up to 90 days under certain circumstances for persons called to active duty for 30 or more consecutive days. Effective 06/16/2003.

XI. Miscellaneous

A. SB 923 (ch. 676): State Retention of Mineral Rights

Prohibits the Division of State Lands from retaining mineral or geothermal resource rights when offering real property for sale when that property is located within an urban growth boundary or within an area zoned for residential use on a lot or parcel that is three acres or smaller. Authorizes the division to charge up to $150 to process a release or transfer of rights application. Authorizes the division to adopt appropriate rules. Applies to sale of property closing on or after the effective date of the legislation.

B. HB 3014 (ch. 139): Port of Portland Sales

Provides that sale of real property by Port of Portland be governed by federal law and sections 777 and 778 of Oregon law.

C. HB 3061 (ch. 381): Subdivision Plat Approval

Authorizes governing body of county to designate person to approve subdivision plat in lieu of the chairperson or vice chairperson of the governing body.

D. HB 3259 (ch. 559): Notice of Drug House

Encourages local governments to provide written notice to citizens regarding the existence of former illegal drug manufacturing facilities (most commonly former methamphetamine laboratories in residential areas) in the area that has been located and shut down by law enforcement officials. Sets forth information that must be contained in such written notice. Declares that the receipt of such notice is not a material fact to a real property transaction.

E. HB 3344 (ch. 580): Escheat

Decreases the holding time for unclaimed property from five years to two years before escheating to the State.

F. SB 216 (ch. 272): Disposal of Escheated Property

Establishes contested case proceedings as method to resolve disputes in unclaimed property examinations. Provides for Division of State Lands to conduct hearing. Adds guidelines for sale of escheated property. Limits response time to claims to 120 days.

G. SB 801 (ch. 414): Domestic Suit Financial Restraining Order

Creates an automatic financial restraining order upon filing a petition and delivering service in a marital annulment, separation, or dissolution. Includes restraint on transferring, encumbering, concealing, or disposing of property without written consent of the other party or an order of the court except in the usual course of business.

■ *2003 LAND USE LEGISLATION*

I. Local Procedure and Authority

A. HB 3061 (Oregon Laws 2003, ch. 381): Approval of Subdivison Plats

Amends ORS 92.100 to allow the county governing body to enact an ordinance allowing a designee to approve subdivision plats in lieu of the governing body. The current statute only allows an ordinance designating the chair and vice-chair of the governing body to approve subdivision plats in lieu of the governing body.

B. HB 3245 (ch. 474): Trailer Park Subdivisions

The bill is intended to refine the trailer park subdivision law passed in 2001 (ORS 92.830 to 92.845). Under both the current and amended law, the conversion of a trailer park to a subdivision requires the creation of a planned community under ORS 94.550 to 94.783.

The bill limits the right to subdivide a manufactured dwelling park or mobile home park to those parks that were approved prior to July 2, 2001. The bill then limits the type of permitted dwellings to the original manufactured dwelling or a replacement manufactured dwelling. Consequently, "stick-built" houses are prohibited. In addition, all local land use regulations applicable to manufactured dwelling parks or mobile home parks continue to apply to the park until all of the lots in the subdivision are sold, or ten years after the park is converted to a subdivision.

If public facilities such as sewer and water are needed to serve the subdivision, the property owner who is applying to convert the park must execute and record a waiver of the right to remonstrate against the formation of a local improvement district to provide needed services. Similarly, the owner of a lot who places or replaces a manufactured dwelling on the lot is required to record a waiver of the right to remonstrate against the formation of the local improvement district.

A local government may not approve a tentative plat to subdivide a manufactured dwelling or mobile home park if the plat contains any changes to the park boundary or setback requirements, increases the number of lots, or contains any approval conditions or development agreements that were not part of the original park approval. The local government may approve a plat that reduces the number of lots but only if the reduction involves vacant lots.

In addition, the planned community declarant must provide potential purchasers with information about the homeowners association and any rights retained in the declaration, and a statement of any approval conditions imposed on the subdivision must be contained in the declaration. Open space in the park must be designated as a common element or as public property.

Finally, a declaration may not be recorded with the county until all taxes on the property have been paid, including any fees, interest, penalties, and any amounts resulting from disqualification for special assessment.

Effective 06/24/2003.

C. HB 3375 (ch. 141): Permits in Landslide Areas

Addresses local government authority to condition or deny land use applications regarding structures for human habitation located in landslide hazard areas. The bill repeals ORS 195.263, 195.266, 195.270, and 195.275, which deal with local approval process and transferable development credits for construction and limitations on construction in landslide hazard areas. The bill amends ORS 195.260 to direct local governments to adopt standards to regulate the siting of dwellings and other structures in rapidly moving landslide areas. The amendment also states that restrictions on forest practices that normally apply to situations where risk to habitable structures are involved do not apply to areas where a dwelling was sited after October 23, 1999.

D. SB 94 (ch. 150): 120-Day Rule

Amends ORS 227.178, which requires cities to approve or deny an application for a permit, limited land use decision, or zone change within 120 days. As amended, if an application is deemed incomplete by the city and notice is sent to the applicant, an application is deemed complete if 1) the applicant submits all the missing information, 2) the applicant submits some of the missing information and states in writing that no more information will be provided, or 3) the applicant states in writing that no more information will be submitted. If the application remains incomplete after 180 days and the applicant has not responded to the incomplete notice, the application becomes void.

In addition, the 120-day deadline may be extended for a "specified period of time" rather than a "reasonable" period of time and the total number of days for an extension is limited to 245.

E. SB 310 (ch. 181): National Scenic Area Permits

Amends ORS 196.110 to require counties in the Columbia River Gorge National Scenic Area to approve or deny an application for a permit, limited land use decision, or zone change within the time limits provided in ORS 215.427.

F. SB 765 (ch. 371): Access to Public Roads

Amends ORS 374.310, which deals with ODOT and county authority to limit access to public roads. The statute provides that ODOT and the counties may not exercise their discretion to deny "reasonable access" to property adjoining the roadway. When determining what constitutes "reasonable access," the statute, as amended, requires ODOT and the counties to allow sufficient access for all uses identified for the property in the local comprehensive plan and to allow sufficient vehicle trips of the size and type necessary for all planned uses of the property.

Secondly, the bill repeals the "sunset clause" on the statute that provides a contested case process for objecting to action by ODOT to close a permitted or deeded access to a public right of way. Consequently, this process is now permanent law. The current statute is found in the notes following ORS 374.312.

G. SB 939 (ch. 765): System Development Charges

Makes changes to the statutes governing system development charges (SDCs). ORS 223.297 to 223.314.

Section 2 amends ORS 223.299 to require an existing capital improvement system to have available capacity before a local government may charge a reimbursement fee for the cost of the facility. Section 3 would amend ORS 223.302 to require a local government that misspends SDC revenue to repay the SDC account from non-SDC sources.

Section 4 amends ORS 223.304 to require local governments to include cost-of-service ratemaking principles among the factors the government must consider when establishing the methodology it uses to calculate reimbursement fees. For improvement fees, this section requires the improvement to be on a local capital improvement plan and be based on the need for additional capacity for future users. Reimbursement fees and improvement fees cannot be based on the same system capacity. In addition, this section specifically provides that a local government may deny a request for a credit against SDCs submitted by a person who constructs a local improvement if the improvement is not on the local capital improvement plan. Finally, this section clarifies how a cost index may be used to increase an improvement or reimbursement fee.

Section 5 amends ORS 223.307 to clarify that SDCs may be used only to fund increased capacity and may not be used for operations or administration. Section 6 would amend ORS 223.309 to require prior notice to persons who request such notice before a local government may increase an SDC, and must hold a public hearing on the increase if one is requested.

II. DLCD and LCDC Procedure and Authority

A. SB 251 (ch. 177): Buildable Lands Inventories

Corrects a typographical error in ORS 197.296(1)(b) to eliminate the reference to ORS 197.295 through 197.314. The purpose of the paragraph is to allow the Land Conservation and Development Commission to identify additional cities that must conduct the buildable lands inventory for needed housing. As written, LCDC arguably gets to determine which cities under 25,000 are subject to ORS 197.295 to 197.314. Eliminating this reference clarifies that the requirements of ORS 197.296 apply only to metropolitan service districts and those additional cities identified by LCDC.

B. SB 516 (ch. 158): Notice of Rule Changes

Amends the "Measure 56" notice requirements. The bill first amends ORS 197.047 to require the Department of Land Conservation and Development to provide notice to local governments when the Land Conservation and Development Commission is considering a rule that, if adopted, may require a local government to limit or prohibit permissible uses of property. The local government then is required to provide a corresponding notice of the rulemaking to property owners who may be affected.

Also requires DLCD to notify local governments of any new or amended statute or rule that may require the local government to limit permissible uses of property at least 90 days prior to the effective date of the statute or rule. The local government then is required to provide notice of the new or amended statute or rule to property owners who may be affected. If the statute or rule takes effect within 90 days of enactment, the local government is required to send notice to affected property owners within 30 days of receiving notice from DLCD.

Significantly, the bill changes the current text of the notice. The notice of proposed rulemaking that is sent to local governments is currently required to state that the rule "will affect permissible uses of property in your jurisdiction." This is changed to state that the rule "may change the zoning classification of properties in your jurisdiction and may limit or prohibit land uses previously allowed." The current reference to the effect of the rule on property values was dropped entirely.

Similarly, the text of the form notice from local government to property owners was amended to state that local zoning ordinance "may" affect permissible uses of the property and "may" change the value of the property. ORS 215.503, 227.186, 268.393.

Finally, the bill retains the current requirement that LCDC reimburse a local governments for costs incurred by the local government when providing notice to landowners as a result of changes to the land use laws initiated by the commission or the legislature.

C. SB 920 (ch. 793): Periodic Review

Modifies the periodic review process for existing periodic review work tasks. Prohibits new periodic review work tasks entirely for the next two years and for an additional two years unless the Department of Land Conservation and Development provides funding to the local government to perform the work task. Directs the Land Conservation and Development Commission and local governments to attempt to compete periodic reviews within two years of new work program. Effective 09/22/2003.

III. Farm and Forest Zones

A. HB 2674 (ch. 147): Guest Ranches

Amends Chapter 728, Oregon Laws 1997 (codified as a note following ORS 215.808) to allow guest ranches on EFU land within 10 air miles of an urban growth boundary with a population of 50,000, instead of the current 5,000.

B. SB 667 (ch. 247): Fireworks Display Businesses

Amends ORS 215.213 and 215.283 to allow an aerial fireworks display business as a conditional use on property zoned EFU. The fireworks business must have "been in continuous operation since December 31, 1986" and have a "wholesaler's permit to sell or provide fireworks." Effective 06/06/2003.

IV. Economic and Industrial Development

A. HB 2011 (ch. 800): Economic Recovery Team and State Economic Development Strategy

Section 13 creates the Economic Recovery Team ("ERT") (formerly the Office of Community Solutions) in the Governor's office for the purpose of coordinating and streamlining state development activities. Section 12 directs the ERT and the Oregon Economic and Community Development Department ("OECDD") to identify and prioritize up to 25 sites for industrial development by December 15, 2003 and establishes site selection criteria. Sections 15 to 20 direct DSL, DEQ, LCDC, and ODOT to take such action as necessary to facilitate and expedite industrial development of the sites. Section 21 directs OECDD to establish a "site certification" process for industrial sites in general.

Section 25 establishes a process for creating a "state economic development strategy" under the direction of the OECDD. The process includes most of the same state agencies with jurisdiction over development activities (LCDC, DSL, and ODOT) as well as local governments. Specifies actions to be taken by each.

Finally, sections 32, 33, and 34 allocate a total of $1.43 million to OECDD, DLCD, and DSL to implement the bill.

Effective 09/24/2003.

B. HB 2298 (ch. 374): Small City Business Development

Amends ORS Chapter 285B to increase the city size from 10,000 to 15,000 for a business firm to qualify for the tax exemptions for small city business development. Also expands the exemption to include business firms within counties with high unemployment rates and low per capita personal income. Adds "reconstruction" and "modification" of property improvements as the type of activities for which a business firm can qualify for the exemption. Effective 11/26/2003.

C. HB 2614 (ch. 688): Industrial Development Outside Willamette Valley

Removes size limits for industrial buildings outside UGBs on land currently zoned for industrial use. Applies outside Willamette Valley. Sunsets 01/02/2006.

D. HB 2691 (ch. 252): Industrial Development of Abandoned Mill Sites

Designed to allow industrial development of abandoned and diminished mill sites that were used for processing and manufacturing wood products. The bill establishes two classes of sites: those that were abandoned after January 1, 1980, and those that have been operating at less than 25 percent capacity since January 1, 2003. In either case, the site must be located outside of urban growth boundaries.

Once an eligible site is identified, the county with jurisdiction over the site is granted an automatic "exception" to Goal 3 (farmland), Goal 4 (forestland), and Goal 14 (urbanization), and is authorized to amend its comprehensive plan and land use regulations to allow industrial development of the site. Significantly, section 2 authorizes "any level" of industrial use. This is designed to supersede the limitations on the size of industrial uses in unincorporated communities found in OAR 660-022-0030.

The bill also grants an exception to Goal 11 (public facilities) and allows a county to approve either the extension of existing public facilities (generally sewer and water) to serve the mill site or the construction of on-site facilities. If the mill site is in an area that is already zoned for industrial use, the entire industrial zone may be served by the facilities. Otherwise, if the mill site must be rezoned to an industrial base zone, only the improved area of the site may be served. The county is prohibited from allowing hookups to a sewer facility that is located between a UGB and the mill site, and any sewer extension must be limited in size to meet only the needs of authorized industrial uses.

Finally, the county may approve only industrial development on an eligible mill site. Retail, commercial, and residential uses are expressly prohibited. A mill site that is rezoned under the bill to an industrial base zone may not later be rezoned for other purposes unless all applicable goal exceptions are taken.

Effective 06/10/2003.

E. HB 3645 (ch. 649): Solid Waste Facility

Authorizes expansion of a non-putrescible solid waste facility in Lane and Washington Counties. Effective 08/12/2003. Sunsets 01/01/2006.

V. Miscellaneous

A. HB 2219 (ch. 145): Railroad Crossings

Requires the applicant for a land use decision, limited land use decision, or expedited land division to indicate in the application whether development of the subject property will require a railroad crossing. A local government that receives the application is then required to notify the Oregon Department of Transportation (ODOT) and the affected railroad company. The purpose of the measure is to facilitate the participation of ODOT and the railroad company in designing the crossing.

B. SB 291 (ch. 616): Hunting Preserves

Amends ORS 497.248, the licensing statute for hunting preserves, to allow hunting preserves within one-half mile of each other instead of the previous three miles. More significantly, the bill amends the same statute to allow a hunting preserve that existed and is licensed as of the effective date of the act, to continue to operate, notwithstanding that it may not have been approved by the local government. Also, during the hunting season, the hunting preserve is allowed to "include one clay sport station" for shooting practice if it is "subordinate to the use of the land as a hunting preserve." Additionally, the bill allows a person engaged in farm or forest practices to file a complaint alleging that the person is adversely affected by the preserve and that the preserve forced a significant change in or significantly impacted the cost of an accepted farm or forest practice on surrounding lands devoted to such practices. The complaints are to be processed by the local government in the same manner as a complaint under ORS 215.296.

Finally, ORS 215.296 is amended to include a reference to the new changes in ORS 497.248.

Effective 07/28/2003.

C. SB 911 (ch. 812): Destination Resorts

Modifies the definition of overnight lodging included in destination resorts. Also modifies the ratio of overnight lodging to single-family dwellings and other phase-in criteria. Applies only to eastern Oregon. (The bill was introduced as House Bill 3213.)

Appellate Cases—Takings

REGULATORY TAKINGS MADE EASY

In *Coast Range Conifers, LLP v. State ex rel. Board of Forestry*, 189 Or App 531, 76 P3d 1148 (2003), the Oregon Court of Appeals broadened protection against regulatory takings under Article I, section 18 of the state constitution. The court ruled that the Oregon State Board of Forestry's denial of a permit to log nine of 40 acres of forest land was an uncompensated taking of that segment of the parcel, rejecting the reading of the federal "whole parcel" into Article I, section 18.

The dispute involved a 40-acre parcel of forest land that contained a nest for bald eagles, a "threatened" species entitled to protection under federal and state law. The state forester permitted 31 acres to be logged, setting aside 9 acres as a buffer for the nesting site. The nest remained unoccupied during the next nesting season. Coast Range Conifers (CRC) applied for a new permit to log the remaining 9 acres, which the Board of Forestry denied. CRC then sued for inverse condemnation in circuit court under the state and federal constitutions. The parties filed cross-motions for summary judgment, and the trial court granted the state's motion and dismissed CRC's claims.

There were five issues on appeal: (1) whether the circuit court lacked subject matter jurisdiction because CRC had failed to exhaust administrative remedies, (2) whether the inverse condemnation claim was precluded by the board of forestry's final order, (3) whether CRC had waived its right to assert a takings claim or was estopped from re-applying to log the 9-acre buffer area, (4) whether the "whole parcel" rule could be read into the state constitution, and (5) whether the "whole parcel" rule under the federal constitution prevented a partial taking. The court of appeals answered the first four issues in the negative, and did not reach the fifth. The appellate court reversed the trial court's decision and remanded for entry of summary judgment in CRC's favor.

1. Subject Matter Jurisdiction. The state conceded and the court accepted that the inverse condemnation claims were properly before the circuit court because the circuit court and the board of forestry share concurrent jurisdiction.

2. Issue and Claim Preclusion. The state conceded and the court accepted that the inverse condemnation claims were not subject to issue or claim preclusion.

3. Waiver and Estoppel. The state argued that CRC had waived its right to log the buffer area by obtaining and "agreeing" to the first permit. The court held that there was no waiver, because the second application was based on new facts and the record contained no evidence that CRC intended to relinquish the right to assert a takings claim. The court also found no estoppel, because CRC could not have challenged the imposition of the buffer area in the first application, given that it was not then known that the nest would be unoccupied during the subsequent nesting season.

4. State Constitution. The court acknowledged but did not decide apparent inconsistencies in Oregon cases about whether state constitutional issues must be decided under a "first-things-first" approach before reaching a federal constitutional claim, and whether state constitutional issues may be ignored if not preserved.

The court then named the methods to be used in interpreting an Oregon constitutional provision: examination of the specific wording, surrounding case law, and historical circumstances, with a view toward ascertaining and giving effect to the intent of the framers and the people. The court noted the likelihood of discrepancies between the case law surrounding Article I, section 18 and historical circumstances, given that twentieth century zoning and environmental regulations may not have been in the minds of the framers in the early nineteenth century. The court chose to defer to established case law rather than historical analyses, apparently inviting the Oregon Supreme Court to take review and examine how the state constitution is to be interpreted.

The established case law standard for evaluating regulatory takings under Article I, section 18 is whether the regulation deprives the owner of "all economically viable use of the property." *Boise Cascade Corp. v. State ex rel. Bd. of Forestry*, 325 Or 185, 198, 935 P2d 411 (1997). Here, the parties did not dispute that the denial of a logging permit for the nine acres rendered that segment of the forest land valueless. However, the state contended that the "whole parcel" of 40 acres must be considered, and argued that the owner was not deprived of all economic viable use of the property because three-quarters of the parcel was permitted to be logged.

Bound by the precedent of *Boise Cascade*, the court narrowed the issue to whether the "whole parcel" rule attributable to the parallel provision of the federal Fifth Amendment is required under Article I, section 18. The court rejected the notion that federal case law must be applied to interpret an identical state provision. The court reasoned that Oregon courts have for many years construed Article I, section 18 to afford different protections to property owners than its federal counterpart, thereby preserving the libertarian spirit of Oregonians.

5. Federal Constitution. The court did not address the federal takings claims because it determined the case on the state takings claims.

Unless this case is reviewed and reversed by the Oregon Supreme Court, it will be much easier for landowners to prevail on inverse condemnation claims where the government imposes regulations that deprive all economically viable use of a segment of a parcel of land. The use of just compensation cases to attack environmental overlays, interference with access, and other restrictive zoning issues can be expected. The saving grace for government lawyers, however, is that the government has the right to change conditions of approval at any time before permits become final, in order to avoid the need to pay compensation and landowners' attorney fees and costs.

Mary W. Johnson

Coast Range Conifers, LLP v. State ex rel. Bd. of Forestry, 189 Or App 531, 76 P3d 1148 (2003).

■ ADA REQUIRES THEATRES TO CONSIDER LINE OF SIGHT IN ESTABLISHING WHEELCHAIR SEATING

In *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), the Ninth Circuit held that the stadium seating plans in six Oregon movie theatres violated Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12182, and the regulations promulgated thereunder. Disagreeing with the Fifth Circuit, a split Ninth Circuit panel reversed the district court and held that the Department of Justice's interpretation of the ADA Accessibility Guidelines (28 C.F.R. pt. 36, app. A, § 4.33.3) was entitled to deference.

Stadium seating theatres typically include wheelchair seating only in the first five rows of the theatre, with over half of the seats in the first row. The plaintiffs' experts testified that vertical lines of sight for wheelchair seating locations ranged from 24 to 60 degrees, with an average of 42 degrees. The average median line of sight in the non-wheelchair seating was 20 degrees. A viewer typically experiences physical discomfort when the vertical viewing angle exceeds 35 degrees.

The guidelines require that wheelchair areas "be an integral part of any fixed seating plan" and provide people with physical disabilities a choice of "lines of sight comparable to those for members of the general public." *Id.* The court concluded that it was not unreasonable for the Department of Justice to interpret "'comparable line of sight' to encompass factors in addition to physical obstructions, such as viewing angle." 339 F.3d at 1132. Accordingly, the judgment of the district court was reversed with instructions to enter summary judgment in favor of the plaintiffs on their ADA claims.

Tod Northman

Or. Paralyzed Veterans of America v. Regal Cinemas, Inc., 339 F.3d 1126 (9th Cir. 2003).

■ FROM ON HIGH: DON'T FIGHT CITY HALL ON AN L.I.D. ASSESSMENT

In *Martin v. City of Tigard*, 335 Or 444, 72 P3d 619 (2003), the Oregon Supreme Court ended the Martin family's 20-year struggle against the City of Tigard over a $1.9 million assessment for a local street improvement. The court affirmed the Oregon Tax Court's decision that the local improvement district (LID) assessment was not a property tax subject to the Measure 5 dollar limits of the Oregon constitution.

This opinion was issued two days after the court denied review of a companion case, *Martin v. City of Tigard*, 183 Or App 408, 52 P3d 1074 (2002), *rev den* 335 Or 479, 72 P3d 76 (2003), which upheld the city's final assessment as a new assessment rather than a reassessment. There had also been prior challenges to the LID by the Martins, namely, *Martin v. ODOT*, 122 Or App 271, 857 P2d 225 (1993); *Martin v. City of Tigard*, 101 Or App 676, 792 P2d 117 (1990), *rev den* 311 Or 60, 803 P2d 732 (1991); and *Martin v. City of Tigard*, 78 Or App 181, 714 P2d 1115 (1986).

The City of Tigard formed the LID in 1984, and used funds from LID assessments to complete Dartmouth Street in 1994. During construction, the city approved land use permits for Costco and Waremart, which both took access from Dartmouth Street, although the stores themselves were largely outside the LID boundary. In 1998, the city determined the entire final assessment to be $4.5 million—more than double the initial amount—and apportioned $1.9 million to the Martins, but did not apportion any amount to the portions of the Costco or Waremart parcels outside the LID. The city did assess Costco and Waremart for the portions of their parcels inside the LID. The final assessment also included the city's attorney fees and litigation costs as an actual cost of the local improvement. The city declined to allow the Martins to pay their portion in installments over ten years unless they waived all objections to the LID.

The questions on appeal were (1) whether the LID assessment was exempt from the dollar limitation on a property tax imposed by the state constitution, (2) whether the city could include its attorney fees as an actual cost of an LID, (3) whether the city could exclude from assessment some of the specific properties that were specially benefited by the improvement, and (4) whether the city could condition the ten-year installment option upon waiver of all objections.

The Oregon Supreme Court answered all issues in the affirmative, either by affirming the tax court decision, or by declining to review the companion case of the court of appeals. The bottom line was that the court upheld the city's handling of the LID assessment, and required the Martins to pay their $1.9 million portion immediately in a lump sum.

The moral of this story is that to fight city hall, you must start at the very beginning, with the trinity of jurisdiction—circuit court, tax court, and local land use proceedings—obviously an inefficient and costly undertaking. Objections to an LID should be raised before the local government not only at formation and assessment, but also at hearings on land use applications for development of nearby properties specially benefited by the local improvement. While the Martins spent decades and hundreds of thousands of dollars unsuccessfully litigating their objections to the LID in the circuit and tax courts, they apparently did not object to Costco's or Waremart's land use permits. The outcome may have been much more favorable at far less cost to the Martins if they had appeared at the land use hearings and requested that Costco and Waremart be included in the LID as a condition of land use approval, on the ground that access to Dartmouth Street was a special benefit of the LID.

The most troubling aspect of the supreme court's opinion was that the sword of the "plain meaning rule" was used to sacrifice individual constitutional rights on the altar of economic benefit to a local government. Instead of simply recognizing property owners' constitutional rights to pay an LID assessment in installments (see Article XI, section 11b of the Oregon constitution), the court contrived a complex analysis of policy and history to divine that voters intended to deprive property owners of the installment option unless they waive their rights to petition the government for redress of grievances. The supreme court affirmed the tax court's dismissal of this constitutional claim, ruling that the tax court lacked jurisdiction to address a non-tax constitutional issue, despite the fact that the tax court's jurisdiction over constitutional issues is identical to that of the circuit court. Inconsistently, the court also declined review of the same issue on appeal from the circuit court in the companion case.

Unfortunately for us all, it now appears that the supreme court

via *Martin* has restricted the litigation of constitutional issues to the circuit court. How this will affect practice in the tax court is difficult to predict. This also provokes questions about whether land use hearings officers, local commissions, and LUBA lack jurisdiction to address non-land use constitutional issues, and whether property owners must challenge each instance of overreaching by a local government in multiple forums.

Mary W. Johnson

Martin v. City of Tigard, 335 Or 444, 72 P3d 619 (2003).

BEWARE OF APPURTENANT SERVITUDES

Ploplys v. Bryson, 188 Or App 49, 69 P3d 1237 (2003), provides an example of how the grantor of an easement can effectively reserve appurtenant rights of use in the easement and subsequently transfer this reservation or "servitude" to successors in interest, even if those successors take less than the whole of the grantor's parcel.

Ploplys involved a dispute between neighbors over the use of an access road. The property at issue was originally owned by Louis Rodakowski as a single parcel. Rodakowski's land had three roads across it: a western road, an eastern road, and a highway access spur. Rodakowski partitioned the property and then sold one-third of the land to the Ploplyses (the plaintiffs), another one-third to Bryson (the defendant), and retained the remaining one-third for himself and his family. Each of the three resulting parcels contained portions of both the western and eastern road.

Before partitioning the property, Rodakowski had conveyed several express easements allowing use of the three roads to other adjacent landowners. Rodakowski had expressly reserved a right to use the eastern road easement when he originally granted it to adjacent landowners Barlow and Lynch prior to the partition. The original Rodakowski/Barlow/Lynch agreement provides,

> Grantor reserves the right to use, construct, reconstruct and maintain the road located upon the easement strip for personal purposes and for purposes of access for forest management and heavy hauling of timber or equipment. Grantor may grant, upon prior notice to Grantees, use rights for such use to third parties, but only with respect to forest management and heavy hauling of timber or equipment for Grantor's servient property . . . .

The conveyance also explicitly established that the "easement is appurtenant to the real properties owned by each party," and "[i]n the event of any subdivision or sale of any portion of such properties by any party, this easement shall remain appurtenant to all such resulting parcels."

After granting the easement, Rodakowski sold the Ploplyses their parcel by deed, which stated that the property was "free and clear of encumbrances except as specifically set forth in Exhibit B." Exhibit B identifies the Barlow/Lynch easement as an encumbrance. A later deed conveying Bryson his parcel made a grant of "certain real property with the tenements, hereditaments and appurtenances thereunto belonging or appertaining."

Shortly after obtaining his parcel, Bryson began logging it, using the eastern road—partially on the plaintiffs' property—to transport logs from his land to the highway. The Ploplyses brought an action for trespass and to quiet title in themselves as to the eastern road. The trial court granted summary judgment in favor of Bryson. The appeals court affirmed, determining that Bryson had an express easement over the eastern road.

In analyzing the easement, the court first determined whether an effective reservation was created for the benefit of Rodakowski's property, then considered whether the rights of use were retained by Rodakowski after conveying the land to the Ploplyses, and finally, whether Rodakowski's reserved rights, if any, were subsequently conveyed to Bryson.

First, the court found the language of the original Barlow/Lynch easement to be "clear on its face" in reserving Rodakowski's right to use the eastern road for the benefit of his property. 188 Or App at 54. The easement language quoted above clearly reserved an appurtenant right of use. The reservation was further supported by the language contemplating partition of the Rodakowski property and reaffirming the right to use the eastern road.

Secondly, the court held that Rodakowski retained the reserved rights to use the eastern road when he conveyed the Ploplyses' parcel. The court noted that the conveyance referenced Exhibit B, which identifies the Barlow/Lynch easement, and held that this reference "expressly excepts from the conveyance the interests held by Rodakowski as the result of the Barlow/Lynch easement." *Id.* at 55. Therefore, when Rodakowski conveyed a parcel to the Ploplyses, he retained his reserved rights to use the eastern road.

Finally, the court held that Bryson received the rights reserved by Rodakowski when Bryson purchased his parcel. The court noted that the deed conveyed "all appurtenances attaching to the Bryson property." In sum, the court found that the clear language of the easement reserved Rodakowski's right to use the eastern road as an appurtenant servitude attaching to the land, and this right was subsequently transferred to Bryson.

The Ploplyses contended that Bryson's parcel is only burdened by the easement without being able to benefit from the easement and that Rodakowski could not have created an easement in his own land before transferring the land to Bryson. The court disagreed, noting that these arguments "ignore[d] the words of 'reservation' in the Rodakowski/Barlow/Lynch agreement." *Id.* at 56. Rodakowski granted an easement to Barlow and Lynch on Rodakowski's property, but reserved the right to use the easement as well, thereby creating a servitude appurtenant to the dominant estate. The servitude was the right to use the easement held by Barlow and Lynch. Finally, the Rodakowski/Barlow/Lynch agreement states that the reservation runs with the land and is not merely personal to Rodakowski; thus, Bryson received the rights to use the easement when he purchased his parcel.

This case is a reminder that prospective purchasers must carefully examine any deed language of exception, reservation, and encumbrance. Otherwise they may end up, like the Ploplyses, without recourse against logging trucks suddenly traversing their property.

Christopher Schwindt

Ploplys v. Bryson, 188 Or App 49, 69 P3d 1237 (2003).

A TENTATIVE DECISION IS "FINAL" AFTER A HEARING IS CANCELED

In *Dead Indian Memorial Road Neighbors v. Jackson County*, 188 Or App 503, 72 P3d 648 (2003), the Oregon Court of Appeals agreed with the Land Use Board of Appeals that when a hearings officer cancels a hearing on appeal of a tentative decision, the decision becomes "final" on the date the hearing is canceled. The court also determined that the petitioners below had satisfied the requirement to exhaust remedies by appealing the tentative decision once it became final.

The dispute involved an April 30, 2002 administrative decision by Jackson County Roads, Parks and Planning Services Department to tentatively approve a permit for a quarry. Under the county code, persons entitled to notice have the right to request a public hearing on the tentative decision. If a request for hearing is timely filed, the county does not issue a permit until the hearing is concluded. If there is no request for a hearing or the request does not meet code requirements, the department's decision is final.

In response to a neighbor's request, the county scheduled a public hearing before a hearing officer. At the hearing on June 17, 2002, the applicant challenged the petitioners' standing; the hearing officer then continued the hearing to July 15, 2002 to allow for briefing on the issue. However, on June 18, 2002, the neighbor withdrew her request for a hearing. Accordingly, on July 1, 2002, the hearing officer cancelled the hearing and ruled that he lacked jurisdiction to proceed on the appeal. Two days later, other neighbors filed a notice of intent to appeal to LUBA the county's April 30 tentative decision the county made on April 30, 2002. The county moved to dismiss on the ground that because the site plan approval was issued without a hearing, the deadline for LUBA review of the decision is governed by ORS 194.830(4) (time period for appealing where no hearing occurs). The county also argued that the neighbors had not exhausted available local administrative remedies. LUBA denied the motion to dismiss.

Under ORS 197.825(2), LUBA jurisdiction is limited to cases in which a petitioner has exhausted all remedies available by right. The county argued that all of the neighbors had a right to request a hearing before a hearing officer, and because none of the neighbors involved in the LUBA petition had requested a hearing, they had failed to exhaust available remedies. LUBA acknowledged that there was little authority on how to resolve the unusual circumstances, but concluded,

> We see no reason to interpret ORS 197.825(2)(a) to require, in these rare circumstances, that a petitioner must file its own local appeal in order to satisfy the exhaustion requirement, when the result of announcing such a requirement would be that many parties in more ordinary circumstances will file multiple, and probably unnecessary and redundant, local appeals. A local appeal was filed in the present case . . . , which resulted in a decision by the county's highest decision maker. That decision effectively adopts the tentative decision as the county's final decision. Under these circumstances, we do not interpret ORS 197.825(2)(a) to require more.

43 Or LUBA at 611.

The court agreed with LUBA that the county could not, in effect, add exhaustion requirements to ORS 197.825(2) by requiring "a local review process that concludes with a decision on the merits." 188 Or App at 512.

The court also agreed with LUBA that in the absence of an ordinance provision governing the question, the county's decision became final and appealable on the date the hearing officer issued the order canceling the public hearing. LUBA noted that the county did not offer any legal authority to support its view that when the hearing was cancelled, the prior status quo was resurrected, making the decision retroactively final on May 13, 2002, or 12 days after the date of the notice of the tentative decision.

LUBA concluded that the appropriate statute governing its authority to accept a petition for review under these circumstances was ORS 197.830(9), which provides that a notice of intent to appeal a land use decision must be filed "not later than 21 days after the date the decision sought to be reviewed becomes final." Based on that analysis, LUBA held—and the court agreed—that the neighbors' notice of intent to appeal was timely. The court cited the county ordinance, which prohibited the county from issuing a permit once a timely request for hearing, accompanied by the fee, is received. The county could not nullify a process by aborting a hearing and retroactively revive a tentative decision as a final decision, thereby precluding an appeal of the local decision by the participants in the local hearing. In dicta, the court explained that nothing in ORS 197.830 or the county ordinance limited the meaning of "hearing" to a hearing that results in a decision on the merits of a land use issue. The court concluded that LUBA had correctly denied the county's motion to dismiss.

Joan Kelsey

Dead Indian Mem'l Rd. Neighbors v. Jackson County, 188 Or App 503, 72 P3d 648 (2003).

FARM STANDS ARE "AGRICULTURAL PRACTICES" UNDER STATE MINING RULES

The Oregon Court of Appeals determined in *Eugene Sand & Gravel v. Lane County*, 189 Or App 21, 74 P3d 1085 (2003), that the term "agricultural practices," as it is used in OAR 660-023-0180(4)(b)(E), may include farm stands. OAR 660-023-0180(4)(b) lists the conflicts that a local government may consider in determining possible conflicts from the proposed mining of a significant aggregate site. These include conflicts due to noise, dust, or other discharges; potential conflicts to local roads used for access and egress to the mining site; safety conflicts with existing public airports; conflicts with other Goal 5 resource sites; conflicts for which consideration is necessary in counties that have not adopted the regulations of the Oregon Department of Geology and Mineral Industries; and, as important here, conflicts with agricultural practices.

After Lane County considered conflicts between a proposed surface mine expansion and farm stands, among other agricultural practices, the petitioners argued to LUBA that farm stands are not agricultural practices. LUBA agreed, based on its reading of *Collins v. Klamath County*, 148 Or App 515, 521, 941 P2d 559 (1997), as holding that the uses listed under ORS 215.213(1) and 215.283(1) are nonfarm uses. LUBA then concluded that uses identified as nonfarm uses in ORS 215.213(1) are not farm uses or agricultural practices that must be evaluated under OAR 660-023-0180(4)(b)(E).

The court of appeals first summarized the three major propositions behind LUBA's reasoning. First, according to LUBA, an activity cannot constitute an "agricultural practice" for purposes of OAR 660-023-0180(4) unless it meets the definition of "farm use" in ORS 215.203(2)(a). Second, ORS 215.213(1) and 215.283(1), which include farm stands in their list of permitted uses, list only nonfarm uses. Finally, because farm stands are listed in ORS 215.213(1) and 215.283(1) and are therefore nonfarm uses, then farm stands, as a matter of law, also cannot be "agricultural practices" for purposes of OAR 660-023-0180(4).

The court of appeals rejected the first proposition, noting that OAR 660-023-0180(4) requires a local government to follow the requirements of ORS 215.296 in determining whether proposed measures to minimize conflicts between mining operations and agricultural practices are satisfactory. ORS 215.296 speaks of impacts on "accepted farm . . . practices." The court observed that the statute speaks of "accepted farm . . . practices" and the rule speaks of "agricultural practices," but concluded that these terms have essentially the same meaning. The court then noted that ORS 215.203(2)(c) defines "accepted farming practice" as "a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and *customarily utilized in conjunction with farm use*" (emphasis added). ORS 215.203(2)(b) contains a separate definition of "farm use." The court commented that while the definitions of "farm use" and "accepted farming practice" are limited to their use in ORS 215.203 (notwithstanding that "accepted farming practice" is actually never found again in that statute), the two terms express "substantively distinct, albeit related, concepts." 189 Or App at 34.

The court then rejected LUBA's second proposition, concluding that *Collins* does not say that ORS 215.213 and 215.283 list only nonfarm uses, but instead acknowledges they may also list ancillary uses. *Collins* relies on *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), which characterizes ORS 215.213 and 215.283 as statutes "pertaining to *permissible farm related* and nonfarm uses in EFU zones." 321 Or at 485 (emphasis added). Among the nonfarm uses listed in ORS 215.213(1) and 215.283(1) are buildings customarily provided in conjunction with farm use, wineries, *farm stands*, and certain facilities for the processing of farm crops. The court concluded that the inclusion of farm stands as a permitted use in ORS 215.213(1) and 215.283(1) does not mean that the operation of farm stands cannot be an "agricultural practice" for purposes of the conflicts analysis prescribed by OAR 660-023-0180(4). The court remanded to LUBA for reconsideration of whether the county correctly applied the rule in evaluating the alleged mining-related impact on the operation of farm stands.

Although *Eugene Sand & Gravel* is limited to a discussion of the term "agricultural practice" in OAR 660-023-0180(4) and the application of the term to farm stands, the discussion of the interplay between the definitions in ORS 215.203 and the list of uses in ORS 215.213 and 215.283 has wider significance. As *Eugene Sand & Gravel* and *Brentmar* recognize, these important statutes are not models of clarity. Any light shed by the court of appeals on their interpretation can only be helpful.

Peter Livingston

Eugene Sand & Gravel v. Lane County, 189 Or App 21, 74 P3d 1085 (2003).

COURT UPHOLDS "HOURS OF OPERATION" RESTRICTIONS ON SEXUALLY ORIENTED BUSINESSES

In *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), the Ninth Circuit Court of Appeals upheld an Arizona statute restricting the hours during which a sexually oriented business may operate. The statute, challenged on First Amendment grounds, requires such businesses to close between the hours of 1:00 and 8:00 a.m., Monday through Saturday, and between 1:00 a.m and noon on Sunday. The constitutionality of hours-of-operation restrictions on sexually oriented businesses was an issue of first impression for the Ninth Circuit.

In upholding the statute, the court applied the "secondary effects" test first enunciated by the Supreme Court in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a case that reviewed and upheld the constitutionality of a zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of any residential zone. The test had already been applied in similar cases in six other circuits.

The *Renton* "secondary effects" test is a three-part test specifically intended to evaluate the constitutionality of regulations for sexually oriented businesses. When applying the test, a court first asks whether the regulation is a complete ban on the business. If not, it is properly analyzed as a time, place, and manner regulation. Second, a court must consider whether the regulation is content-neutral or content-based. So long as a regulation is aimed at the secondary effects that the business has on the surrounding community, it is properly classified as content-neutral and should be subjected to intermediate scrutiny, a lesser level of scrutiny than a content-based regulation would receive. Third, a court must determine whether the regulation is "designed to serve a substantial government interest" and whether "reasonable alternative avenues of communication remain available." 336 F.3d at 1159 (citing *Renton*, 475 U.S. at 50). The Supreme Court held in *Renton* that, at this third stage of the analysis, the First Amendment "does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." 475 U.S. at 51–52. This (rather light) burden of proof was reaffirmed in *City of Los Angeles v. Alameda Books*, Inc., 535 U.S. 425 (2002), when the Supreme Court reversed a Ninth Circuit determination and found constitutional a Los Angeles ordinance prohibiting multiple adult entertainment businesses from operating in the same building.

In *Center for Fair Public Policy*, the plaintiffs (owners and operators of sexually oriented businesses in Arizona) relied heavily on Justice Kennedy's concurrence from the Supreme Court's plurality opinion in *Alameda Books*. The plaintiffs argued that, because the Arizona statute effectively closes the businesses during what would otherwise be their busiest hours, it should be subjected to the strictest scrutiny because the hours of operation restrictions cause a burden on free speech that is disproportionate to the benefit of the restrictions. The Ninth Circuit disagreed with the plaintiffs' characterization of Justice Kennedy's concurrence, holding that Justice Kennedy had not intended to invalidate a central holding in *Renton*—that laws "'designed to decrease secondary effects . . . should be subject to intermediate rather than strict scrutiny'"—and holding that Justice Kennedy's proportionality analysis (applied to a "place" restriction in *Alameda Books*) does not apply to a "time" regulation. 336 F.3d at 1162 (quoting Alameda Books, 535 U.S. at

449). The court held that the proper analysis for this case was the "secondary effects" test set out in *Renton*, without the refinements to that test that were arguably added by the plurality in *Alameda Books*.

In applying the *Renton* test, the court easily found that the "hours of operation" statute, which allows a business to remain open 115 hours out of a 168-hour week, is not a complete ban on speech. Therefore, the court found that it was proper to analyze the statute as a time, place, and manner regulation.

To determine the appropriate level of scrutiny, the court first examined the intent of the statute and found that, on its face, it is content-based "because whether an establishment falls within its parameters . . . can only be determined by reference to the content of the expression inside it." *Id.* at 1164 (citing *Schultz v. City of Cumberland*, 228 F.3d 831, 843–44 (7th Cir. 2000)). However, the court found that the speech and expressive activity that is the subject of Arizona's statute (sexual and pornographic speech) falls squarely within an exception to the Supreme Court's general rule that a content-based regulation should be reviewed under the strictest scrutiny. That exception allows reasonable regulations designed to ameliorate secondary effects—such as crime, decreased property values, and blight on neighborhoods—associated with sexually oriented businesses.

The court determined that Arizona's statute was, in fact, designed to ameliorate secondary effects and not the speech itself, noting that the regulation applies to "both establishments protected by the First Amendment—adult bookstores, video stores, cabarets, motion picture theaters and theaters—and businesses that have no such protection—escort agencies, for example, suggesting that the state's purpose in enacting the statute was unrelated to the suppression of expression." *Id.* at 1165 (footnote omitted). The court also identified as an "'objective indicator of intent'" that the statute was enacted as a part of a larger piece of legislation that was intended to promote harmonious development, not to stifle speech. *Id.* at 1165 (quoting *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984)).

Having established that an intermediate level of scrutiny was appropriate, the court was required to uphold the statute if it found the statute was "designed to serve a substantial government interest, is narrowly tailored to serve that interest, and does not unreasonably limit alternative avenues of communication." *Id.* at 1166 (citing *Renton*, 475 U.S. at 50). On the first prong, the court's analysis is summed up in its statement that "[i]t is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial." *Id.* at 1167 (citing *Young v. American Mini Theatres*, Inc., 427 U.S. 50, 71 (1976)). Relying on what the court characterized as a "slim" record, it nonetheless found that the state had adequately shown the connection between the regulated speech and the secondary effects that the statute intended to curb. In doing so, the court cited letters from the National Family Legal Foundation that generally documented the problems associated with sexually oriented businesses, a fact sheet that had been distributed to legislators during the enactment of the statute, and testimony provided at a legislative hearing. No actual studies regarding secondary effects were provided, though many such studies were referenced in the record materials.

With respect to narrow tailoring, the court held that the requirement is met "so long as the government's asserted interest 'would be achieved less effectively absent the regulation.'" *Id.* at 1169 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The state's satisfaction of this requirement was "self-evident" because, without the statute, there would be no impact on the secondary effects. *Id.* The court rejected the plaintiffs' argument that the "narrowly tailored" test required a determination of whether the specific hours of operation were reasonable. Noting little more than the fact that the statute allows the businesses to operate seventeen hours a day (and thirteen on Sundays) the court held that the statute meets the "ample opportunity" prong of the intermediate scrutiny analysis. The court also rejected the plaintiffs' argument that the statute is unconstitutionally underinclusive due to its failure to address the negative secondary effects of other types of night-operated businesses. In so ruling, the court relied on *Renton's* holding that simply because the government "chose first to address the potential problems created by one particular kind of adult business in no way suggests that [it] has 'singled out' adult theaters for discriminatory treatment." *Renton*, 475 U.S. at 53 (*quoted in Ctr. for Fair Public Policy*, 336 F.3d at 1170).

Based on this analysis, the majority of the court affirmed the district court's determination that the Arizona statute is consistent with the First Amendment. The Oregon practitioner, however, should pay close attention to Judge Canby's dissent, which finds the "slim" record in *Center for Fair Public Policy* inadequate and not sufficiently specific to the secondary effects the Arizona legislature was intending to ameliorate. This view appears to be more in line with the Oregon courts' treatment of similar ordinances based on Art. 1, sec. 8 of the Oregon constitution. *See, e.g., City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988).

Emily N. Jerome

Ctr. for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003).

NINTH CIRCUIT REVERSES DISMISSAL OF CONSTITUTIONAL CLAIMS BY APPLICANT FOR RESIDENTIAL USE AND PRIVATE POLO FIELD

In *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003), the plaintiff sought approval of a residential structure and private polo field. The defendant county approved the application with many conditions, and the plaintiff filed a civil rights suit under 42 U.S.C. § 1983, alleging violations of his free speech and free association rights, as well as equal protection and due process violations. The trial court granted the defendant's motion to dismiss, finding some claims time-barred and others unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). On appeal, the Ninth Circuit upheld the dismissal of those claims found by the trial court to be time-barred, but found the remaining claims not to be as-applied taking claims and reversed their dismissal.

The plaintiff alleged seven specific instances in which the defendant had allegedly unlawfully interfered with his development plans. The two incidents that were not time-barred were the defendant's requirement for plaintiff to apply for a major conditional use permit for his private polo field, and the allegedly discriminatory conditions imposed on the single-family residential permit, including requirements that he withdraw his appeal of a denial of his original building permit application and that he apply for a smaller house. The trial court characterized these claims to be "as-applied" takings claims and used the *Williamson County* analysis to dismiss them because there was no final decision on either the polo field conditional use permit or the single-family residential permit. The

plaintiff asserted that these claims were not takings claims and that the statute of limitations had not run on them.

On appeal, the court found that the plaintiff could not use time-barred claims in a section 1983 case, even as part of a "continuing violation" claim, but could use them to establish motive for other timely filed claims. As to the claims based on the two incidents not found time-barred, the plaintiff claimed that the defendant required him to withdraw his appeal involving a larger house upon the grant of the smaller house permit and threatened to reject any house plan if that approach were not undertaken. On the polo field issue, the plaintiff was told that a major conditional use permit would be required (even though permits had not been required for 16 similarly situated polo fields throughout the county) and that there would be restrictions on the use of the field. The defendant also allegedly delayed, fined, and imposed unlawful conditions in a retaliatory manner on the approvals. The plaintiff had been vocal about the treatment accorded him and, even though the defendant granted some permits, the plaintiff had been prevented the use of the polo field since 1994. The court cited *Olech v. Village of Willowbrook*, 528 U.S. 562, 565 (2000), to suggest that the plaintiff had stated an equal protection cause of action. The fact that the plaintiff's claims arose in the context of the county's development process did not make them regulatory takings claim, and they were therefore not subject to a ripeness analysis.

The court thus affirmed the dismissal of the time-barred claims (which had occurred more than one year before the section 1983 actions were filed) but reversed on the equal protection and due process claims.

The court's original decision was published in June 2003. 334 F.3d 796. Three months later, the court amended and superseded its opinion. The bulk of the opinion remained unchanged, but the court also acknowledged that there are "limited and appropriate" circumstances under which section 1983 claims concerning land use may proceed even when related takings claims are not ripe for review. 344 F.3d at 825. The plaintiffs' potential First Amendment procedural due process and equal protection claims, stemming from the county's alleged retaliation against him, are injuries that did not depend on his takings claim nor on the finality of the County's decision-making process. The court ruled that these claims are not subject to the *Williamson* finality requirements.

This is not a surprising case. Even though the equal protection and due process claims occurred within the context of the development process, they still serve as the basis of independent constitutional claims and are thus not the subject of a Williamson County analysis. Local governments would do well to note the distinction.

Edward J. Sullivan

Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822 (9th Cir. 2003).

EVEN PLANNERS CAN MAKE MISTAKES

In *SFG Income Fund, LP v. May*, 189 Or App 269, 75 P3d 269 (2003), the Oregon Court of Appeals significantly limited the possibility of local governments being liable for providing inaccurate land use information.

SFG, a mortgage lender, hired May & Associates to appraise a piece of property. One of May's employees called the Multnomah County Planning Department to ascertain zoning information for the property, and was allegedly told by an unidentified county employee that, among other things, an existing building was legal and that the property could be built on in the future. In reliance on May's appraisal, which was based in part on that zoning information, SFG made a substantial loan on the property.

When SFG ended up foreclosing on the property, it discovered that the zoning information that had been provided was incorrect, and the property had minimal value. SFG sued May, which ultimately settled for $160,000. May, in turn, filed this third-party action against the county. The trial court granted a directed verdict in favor of the county, and May appealed.

May's first claim alleged that the county was negligent in providing the information, and should indemnify them for the amount paid to SFG. In a negligence action seeking recovery for economic harm only, "a plaintiff must establish a duty independent of the general obligation to prevent foreseeable harm." 189 Or App at 274 (citing *Hale v. Groce*, 304 Or 281, 284, 744 P2d 1289 (1987)). May argued that the planning department owed it a duty to provide accurate information on the basis of ORS 215.050 and a provision of the county code that lists the duties of the county planning director. The court held that while the statute requires counties to adopt land use regulations and provide copies of them to the public, it does not indicate an intent to impose any remedy for provision of inaccurate information about the land use status of property. Similarly, the county code section relied on by May evidences no intent to create tort liability for such errors.

May also alleged county liability for negligent misrepresentation in providing incorrect information. A claim for economic damages for negligent misrepresentation requires the plaintiff to establish that the negligent party had a "special responsibility" toward the party damaged by the misrepresentation. Often, this would involve payment to the negligent party for the provision of the information in question. May's theory was that because county planners are paid a salary by the taxpayers for providing zoning information, the county has a special duty to provide them accurate information. The court held that this relationship was not special enough to create the requisite duty. The trial court's decision was affirmed.

Michael E. Judd

SFG Income Fund, LP v. May, 189 Or App 269, 75 P3d 269 (2003).

NINTH CIRCUIT UPHOLDS SIGN REGULATIONS

In *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111 (9th Cir. 2003), the Ninth Circuit Court of Appeals affirmed a lower court ruling that the newer of two sign ordinances adopted by Riverside County, California is constitutional.

The old sign ordinance distinguished between on-site and off-site advertising structures and signs. Off-site signs were allowed subject to certain standards regarding location (zone), height (25 feet), and sign face area (300 square feet).

The new sign ordinance—which was in effect when the plaintiffs filed suit—maintains the same on-site versus off-site distinction as well as location, size, and area standards. The new ordinance declares all preexisting signs, whether on- or off-site, to be illegal unless, *inter alia*, they were erected in compliance with "all applicable county ordinances and regulations in effect at the time of [their] construction, erection or use" (*e.g.*, location, size and area standards).

The plaintiffs were two sign companies who together have

interests in four existing billboards and two as-yet-unbuilt billboards along a state highway. They sued, alleging that both sign ordinances, on their face and as-applied, violate the First, Fifth, and Fourteenth Amendments to the U.S. Constitution and Article I of the California constitution, and seeking damages.

In response to cross-motions for summary judgment, the district court found that the new sign ordinance was unconstitutional on its face to the extent that it required a sign to comply with the old sign ordinance. Beyond that, the court found the new ordinance was constitutional, because the location, height, and area standards were content-neutral, and the constitutionally infirmed references to the old ordinance could be severed from the new one.

The court of appeals noted that the district court had not explained what was unconstitutional about the old ordinance. But that did not pose a problem for the court, because after a discussion, it agreed that references to the old ordinance could be severed under state law. The court agreed that the time, place, and manner restrictions in both ordinances were content-neutral and served significant governmental interests, quoting the following passage from the purpose of the ordinance:

> to provide for the preservation and protection of open space and scenic areas, the many natural and man-made resources, and the established rural communities within Riverside County [and] to adequately identify businesses and other sign users, by prohibiting, regulating and controlling the design, location and maintenance of signs, and by providing for the removal and limitation of sign use.

Accordingly, the court upheld the new ordinance and its application to the plaintiffs' signs, because the signs did not comply with the location, height, or size standards. No damages were warranted for any unconstitutional aspects of the old ordinance, because the signs in question "were 'independently' illegal under that ordinance's content-neutral zoning, size, and height provisions." 337 F.3d at 1115.

Larry Epstein

Valley Outdoor, Inc. v. County of Riverside, 337 F.3d 1111 (9th Cir. 2003).

■ *FIRST-AMENDMENT INJUNCTION AGAINST LOS ANGELES SIGN REGULATION REVERSED BY NINTH CIRCUIT*

In *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003), three outdoor advertising companies challenged two Los Angeles ordinances that required annual inspections of all "off-site" signs and imposed an annual fee for the inspection. The new inspection and fee requirements were set against a backdrop of a preexisting regulatory scheme that distinguished between "off-site" and "on-site" signs. A later, third ordinance, apparently passed in response to this litigation, allowed all types of noncommercial messages to be considered "on-site" signs, and thereby avoid triggering the new inspection and fee requirements.

The district court granted a preliminary injunction against the ordinances on First Amendment grounds, finding that the ordinances favored commercial speech over noncommercial speech, impermissibly differentiated between types of noncommercial speech, impermissibly differentiated between types of commercial speech, and were unconstitutionally vague.

To obtain a preliminary injunction in federal court, a party must demonstrate either (1) a likelihood of success on the merits and the possibility of irreparable injury or (2) that serious questions involving the merits are raised and the balance of hardships tips sharply in the moving party's favor. The Ninth Circuit noted that these two alternatives represent "'extremes of a single continuum,'" rather than two separate tests, and that the greater the relative hardship to the party seeking the preliminary injunction, the lesser the probability of success must be shown. 340 F.3d at 813 (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999)).

Relying on its own precedent and on the U.S. Supreme Court's decision in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 511–14 (1981), the Ninth Circuit held that, because the inspection and fee requirements did not apply to noncommercial messages, the plaintiff advertising companies had not shown a high likelihood that these requirements would impinge on First Amendment rights. The court's conclusion was based in part on the ordinances' "substitution clause" and on the exemption from the inspection and fee requirements for all noncommercial signs allowed by the third ordinance.

The Ninth Circuit found that the inspection and fee requirements were not unconstitutionally vague, in large part because of the preexisting regulatory scheme and the fact that the plaintiffs had not provided evidence that the regulatory distinction between "off-site" and "on-site" signs was in any way unworkable.

Finally, the Ninth Court analyzed the inspection and fee requirements under the *Central Hudson* test. *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63, (1980). Under the *Central Hudson* test, in order to fall within the protection of the First Amendment, speech must concern lawful activity and not be misleading. A restriction on such speech is only valid if it seeks to implement a substantial government interest, it directly advances that interest, and it reaches no further than necessary to accomplish the given objective. Although the *Central Hudson* test requires the restriction on speech to "directly" advance a "substantial" government interest, the Ninth Circuit held that there need be only a "reasonable fit" between the ordinance and its goals and that the goal of the ordinance only need be "legitimate." Applying what can only be described as a watered-down version of the *Central Hudson* test, the Ninth Circuit found that the plaintiffs had not shown a high likelihood of prevailing on their claim that the restrictions on commercial speech imposed by the inspection and fee requirements violated the First Amendment. Thus, the Ninth Circuit vacated the preliminary injunction.

The Ninth Circuit limited its holding in several respects. First, it noted in footnote 2 that the case might also be analyzed under the equal protection doctrine, but that the district court had not done so. The Ninth Circuit reviewed only what was placed before it and did not perform an equal protection analysis. Second, the Ninth Circuit noted in footnote 5 that the permitting process itself was not subject to this action; only the inspection and fee requirements were at issue.

Interestingly, the Ninth Circuit did not cite any of the U.S. Supreme Court's decisions since *Metromedia*. Over the past ten years the distinction in the First Amendment jurisprudence that affords different levels of protection to commercial and non-commercial speech has been steadily eroded by a series of Supreme Court decisions. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n v. United States,* 527 U.S. 173 (1999); *44 Liquormart v. Rhode Island,* 517 U.S. 484

(1996); *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

The importance of being able to capture drive-by traffic was recognized by the Supreme Court in its *Cincinnati* decision, which recognizes the *Metromedia* plurality determination that an on-site/off-site distinction that discriminates solely against certain types of commercial speech may be permissible: "Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations." *Cincinnati*, 507 U.S. at 425 n.20. Thus, regardless of where the sign is *located*, a sign that guides visitors to their intended destinations is an on-site sign under the *Metromedia* analysis as interpreted by *Cincinnati*, and such signs should be entitled to greater protection.

Anyone who has traveled far on our interstate highway system knows that many outdoor signs advertise businesses located further down the highway, perhaps at the next exit or perhaps several exits down the highway. Many of these signs would serve both the "commercial and public interest in guiding potential visitors to their intended destinations" and would thus be on-site signs for the purposes of the *Central Hudson/Metromedia* analysis, but they would be "off-site" under the Los Angeles ordinance unless located on the site of the visitor's intended destination. The Ninth Circuit did not address whether any such signs deemed "off-site signs" under the ordinance may have been entitled to full protection as on-site signs under a *Central Hudson/Metromedia* analysis.

It is somewhat disappointing that the Ninth Circuit did not discuss any of the U.S. Supreme Court's decisions interpreting *Metromedia* and *Central Hudson* over the past decade. Instead, the Ninth Circuit issued a decision that is rather narrowly focused on a few issues and limited in scope.

This case discusses the First Amendment and not state constitutional issues. However, a practice tip for Oregon practitioners is that Article I, section 8 of Oregon's constitution is more protective of speech than the First Amendment. Similarly, in Washington, it is "well settled" that the constitutional protection under Article 1, section 5 of Washington's constitution is broader than that provided by the First Amendment. *JJR Inc. v. City of Seattle*, 126 Wn. 2d 1, 8, 891 P.2d 720, 723 (1995).

Steve Morasch

Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810 (9th Cir. 2003).

COURT OF APPEALS UPHOLDS LEGALITY OF REIMBURSEMENT DISTRICTS

In *Baker v. City of Woodburn*, ___Or App ___, ___ P3d ___ (Nov. 13, 2003), the Oregon Court of Appeals issued the first Oregon appellate opinion affirming the use of reimbursement districts as a means of allocating costs of public street improvements among private developers.

In 1998, Craig Realty Group obtained city approvals for development of Woodburn Company Stores, and approval was conditioned on the provision of significant improvements to local streets serving the development. The required improvements to Arney Road and Woodland Avenue ended up costing more than $800,000.

The street improvements also benefited other nearby properties along the streets, and in order to help Craig Realty recoup some of its expenses, the city of Woodburn passed a reimbursement district ordinance, which required that owners of undeveloped property adjacent to the improved streets must pay a percentage of those costs when they developed their properties. The amount of the reimbursement was established by a separate resolution that imposed an allocation methodology based on a blend of frontage (40%) and lot area (60%). The resolution also identified which specific properties would be included in the reimbursement district.

One of the nearby landowners whose property was assessed (Baker) challenged the city ordinance and resolution in an appeal to LUBA that was ultimately dismissed as a non-land use decision and transferred to Marion County Circuit Court. *Baker v. City of Woodburn*, 37 Or LUBA 563 (2000). At the circuit court on writ of review, Baker convinced the circuit court judge that the city's decision was not supported by substantial evidence in the record. Specifically, the court held that the city's decision to exclude certain publicly owned properties from the district, as well as the city's allocation methodology (40% frontage and 60% area), were not supported by substantial evidence. However, the court upheld the city's ordinance and resolution against a takings claim and against challenges that the reimbursement district approach was preempted by state LID and SDC statutes.

Craig Realty appealed on the substantial evidence issue, and Baker cross-appealed, challenging the legality of the reimbursement district in light of the statutes governing LIDs and SDCs. In its decision, the court first rejected Baker's challenges in the cross-appeal, and affirmed the reimbursement district as a valid cost allocation mechanism. The court concluded that the city's reimbursement district was not preempted by the procedural mechanisms in ORS Chapter 223 that apply to LIDs and SDCs. The Court held that the fee imposed by the reimbursement district was specifically excluded from the SDC statutes because it was "a charge in lieu of a local improvement district assessment" under ORS 223.299(4)(b).

The court of appeals sustained Craig Realty's appeal, agreeing that the city's decision was supported by substantial evidence in the record and that the trial court's decision to the contrary was incorrect. Applying the familiar standard of review for substantial evidence, the court concluded that a report submitted to the city council by the city public works director amounted to substantial evidence in support of the city's decision regarding the properties to be included in the district and the 40-60 allocation methodolgy. However, the court identified one discrepancy in the record: a map prepared by the public works director did not correctly identify the specific location of the reimburseable portion of the street improvements. The map did not identify all of Baker's frontage around the corner of Old Arney Road as reimburseable frontage, whereas the city's final decision did include that frontage when it assessed the amount of Baker's reimbursement fee. Therefore, the court remanded to the city to reconsider whether that portion of the frontage should be allocated improvement costs.

Editors' Note: The author represented Craig Realty Group in the litigation.

Roger Alfred

Baker v. City of Woodburn, ___Or App ___, ___ P3d ___ (Nov. 13, 2003).

Cases from Other Jurisdictions

FEDERAL DISTRICT COURT HOLDS RLUIPA VIOLATES 14TH AMENDMENT

In *Elsinore Christian Ctr. v. City of Lake Elsinore*, 270 F. Supp. 2d 1163 (C.D. Cal. 2003), the Central District of California found the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, unconstitutional under section 5 of the Fourteenth Amendment.

RLUIPA provides that a government may not apply a land use regulation in a manner that imposes a "substantial burden on the religious exercise" of a person or institution unless the government sustains the burden of proof that application of the regulation furthers a compelling public purpose and is the least restrictive means of furthering that purpose. *Id.* § 2000cc(a)(1). The rule applies where the "burden is imposed in . . . a land use regulation or system of land use regulations, under which a government . . . makes individualized assessments of the proposed uses for the property involved." *Id.* § 2000cc(a)(2). RLUIPA defines "religious exercise" to include the "use, building or conversion of real property for the purpose of religious exercise." *Id.* § 2000cc-5(7)(B).

Elsinore Christian Center sought to relocate from its existing downtown church building to a building about three blocks away and then housing a grocery store and recycling center. The existing church site did not have off-street parking, causing its members to park far away. There was parking at the new site, although witnesses disputed its adequacy.

The church applied for a conditional use permit (CUP) to redevelop the grocery for a church. Public testimony for and against the CUP was evenly divided. The planning commission denied the CUP, and the city council affirmed, for four reasons: loss of a needed service (the grocery and recycling center), loss of tax revenue, inadequate parking, and the ability of the church to continue to operate at its present location.

The church filed suit, claiming that the zoning ordinance, the subject zone, and the city's denial of the CUP violated RLUIPA, as well as the U.S. and California constitutions. The United States intervened to support RLUIPA. The city moved for summary judgment.

Based on RLUIPA's definition of "religious exercise," the court found that denial of the CUP was a substantial burden on the religious exercise of the church. That shifted the burden of persuasion to the city to show that the denial furthered a compelling public purpose and was the least restrictive means of furthering that purpose. The court found that the purposes that the city sought to further by the denial were not compelling. The record showed that the grocery store that the city sought to preserve was a tenant on a month-to-month lease, and that the owner would terminate the lease if it could sell the property. Therefore, denying the CUP did not ensure that the store and recycling center would remain. Neither was the loss of tax revenue a compelling purpose, for that could be the basis for any decision denying a religious use or other use exempt from property taxes. Lastly, although the court recognized that curbing urban blight is an important public purpose and could be compelling in theory, the city's decision in this case did not show that denial would further that interest.

The court went on to hold that, even if the denial did further a compelling public purpose, the city had failed to show that denial was the least restrictive means of furthering that purpose. To carry its burden, the city must show "that approval of the CUP would necessarily entail dislocation of the assertedly vital use from the area, and thus that denial of the CUP is the least restrictive means of preventing that dislocation." 270 F. Supp. 2d at 1175. The city had failed to do so in this case.

Throughout its discussion of the foregoing issues, the court laid the groundwork for its ultimate holding that section 2(a) of RLUIPA is unconstitutional. For instance, the court noted that a "substantial burden on religious exercise" historically required a person to violate or waiver from a central religious belief or practice: "Because zoning regulations and decisions rarely bear upon central tenets of religious belief, those regulations and decisions have not generally been held under these standards to impose a substantial burden on religious exercise. . . . Clearly, RLUIPA was intended to and does upset this test." *Id.* at 1170 (citations omitted).

The court noted repeated statements by Congress of its intention to codify in RLUIPA the "individualized assessment" doctrine of *Sherbert v. Verner,* 374 U.S. 398 (1963). The court concluded that RLUIPA does not codify this doctrine, because the U.S. Supreme Court has never invalidated a governmental action on the basis of *Sherbert* outside its context: denial of unemployment compensation. Thus, there is no controlling Supreme Court authority that establishes what RLUIPA purports to codify, and Sherbert is inapposite to RLUIPA challenges.

According to the court, if there is a general rule derivable from Sherbert, it is that "in circumstances in which individual *exemptions* from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Church of Lukumi v. City of Hialeah*, 508 U.S. 520, 537 (1993) (decision to deny unemployment benefits to a Seventh Day Adventist, without allowing an exception like that allowed for other secular reasons, placed "unmistakable" pressure on her to forego her Sabbath beliefs) (quoting *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872).

Even if a CUP is treated as an individualized exemption from general zoning rules, the court continued, the city did not refuse to extend that system to the church or to deny the CUP merely because the applicant was a church. The city accepted the application from the church and denied it for secular reasons.

The United States argued that, to the extent RLUIPA does not amount to a mere codification of current precedent, it "is a valid prophylactic enactment under Section 5 of the Fourteenth Amendment." 270 F. Supp. 2d at 1179. The court acknowledged the wide authority of Congress under that section, but observed that it is not absolute. The court noted the distinction the U.S. Supreme Court made in *City of Boerne v. Flores*, 521 U.S. 507 (1997), between remedying and defining constitutional rights. Congress can do the former, but cannot do the latter. For a statute to be a constitutional exercise of authority under section 5, the court held that Congress must show a "'widespread and persisting deprivation of constitutional rights' which it is acting to remedy or deter," and "there must be 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" 270 F. Supp. 2d at 1180 (quoting *City of Boerne*, 521 U.S. at 519–520 (1997)).

The court was not impressed by the "relatively small number of anecdotal instances in which religious assemblies were dissatisfied with zoning decisions or regulations, few of which constitute state or municipal action of clearly unconstitutional character." 270 F. Supp. 2d at 1180. It found the record was insufficient to show that

RLUIPA is proportionate to and congruent with the harm to be prevented or remedied. The breadth of RLUIPA and the significance of the strict scrutiny it imposes on local government actions that traditionally have not been subject to such scrutiny is not proportionate to the harm. The court concluded its discussion of section 5 as follows:

> By vastly expanding the types of exercise protected by the most exacting standard of review, Congress has effectively redefined the First Amendment rights it is purporting to enforce. . . . [T]he landscape is not so pervaded by religious bigotry that this blunderbuss of a remedy can be described as "congruent and proportional" to the perceived injury.

270 F. Supp. 2d at 1181–82.

The court did not consider whether Congress could have enacted RLUIPA under the Commerce Clause, because the plaintiffs did not allege that the city action had an effect on commerce. The court also did not consider whether RLUIPA violates the Establishment Clause, which it said is a colorable issue, although it noted that the Ninth Circuit has held that RLUIPA provisions governing institutionalized persons do not violate the Establishment Clause. *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002).

This decision swings the pendulum back toward the *Employment Division v. Smith* holding by the U.S. Supreme Court. *See Smith*, 49 U.S. at 879 (1990) (rights under the Free Exercise Clause do not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'") (quoting *United States v. Lee,* 455 U.S. 252, 263 n.3 (1982)). *Smith* spurred Congress to adopt the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4 (1994), RLUIPA's predecessor. In *City of Boerne*, the Supreme Court struck down RFRA, as applied to the states, as exceeding Congress's power under section 5 of the Fourteenth Amendment. No doubt the decision in *Elsinore* will help keep the pendulum swinging until the inevitable day that the U.S. Supreme Court rules on RLUIPA's constitutionality.

Larry Epstein

Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163 (C.D. Cal. 2003).

■ CITY CAN'T USE ZONING TO DEPRESS PROPERTY VALUES FOR LATER TAKING, SAYS CALIFORNIA APPELLATE COURT

In *City of San Diego v. Rancho Penasquitos Partnership*, 130 Cal. Rptr. 2d 108 (2003), the plaintiff city appealed from a condemnation award by the trial court after it took 11 acres of a 109-acre property owned by the defendant and zoned for agricultural use. The subject land was desired by the city for a portion of a freeway. The city also placed zoning restrictions on all land in the potential path of the freeway corridor (including all of the defendant's property) that prohibited higher-density development until the freeway project was approved. When it condemned the subject land, the city claimed the value to be $1,285,200. The defendant contended that, because the zoning authority and condemning authority were the same, the zoning restriction could not be used in valuing the property, that the value was $3,830,000, and that there were severance damages in the amount of $4,620,000. The trial court awarded $2,870,280 in general damages and $1,035,930 in severance damages.

The city sought to exclude the defendant's expert testimony on values of comparable sales made after the freeway project was approved because they were "project-enhanced" values. The defendant contended that the values were correct, regardless of the project's presence. The trial court allowed evidence of the value before the project, but without considering the zoning restriction, and also allowed the comparable values, considering it a matter of proof for the jury as to whether they were project-enhanced.

The city's appraiser said that the land should be valued for agricultural use because the zoning restriction prevented any reasonable probability of a rezoning to higher intensity levels. The city's planning expert admitted at trial that there were some areas under the city's plan where some higher-intensity activities had been approved or could have been approved before the freeway or corridor were chosen if defendants made the right "deal" with the city (*e.g.*, by providing transportation facilities). The defendant's planner, on the other hand, suggested that the city was obliged to upzone the area, even without the freeway, and pointed to a nearby site that had been upzoned because of a severe housing shortage of residential land.

The appeals court characterized the trial court's ruling as follows:

> The [trial court] in making this ruling found that California law provided that "the agency which is condemning cannot… purport to exercise a police power by enacting a zoning ordinance which in reality discriminates against a group of parcels of land, in order to freeze their value with a view to future takings in eminent domain." However, the court allowed the City's experts to testify on valuation if they could render opinions with sufficient foundation while ignoring the zoning restrictions tied to [the freeway's] construction.

130 Cal. Rptr. 2d. at 116.

The city objected to the defendant's expert's testimony that there was no legitimate planning basis for denying an upzoning of the subject land, calling this testimony perjury. The trial court overruled the objection based on its previous ruling and used a curing instruction in dealing with the basis for the city's original valuations, instructing the jury that it must exclude any change in value caused by the freeway, expect for increases in value prior to June 16, 1998, the date the city approved the final alignment of the highway's path.

In reviewing the trial court's rulings and jury instructions, the appellate court applied an "abuse of discretion" standard. The appellate court also said the notion of highest and best use included the reasonable probability of a zone change and did not include value attributable to the project for which the property was taken. Finally, the court said that where a portion of a parcel is taken, a trial court must consider whether there are severance damages to the remainder as a result of the partial acquisition.

The appellate court pointed to several California cases in which local governments had consciously taken future public works efforts into consideration and applied use designations that would lower the cost of the acquisitions. The court summarized California case law on the subject as follows:

> Thus, the city cannot enact restrictions on property it seeks to

> condemn for the express purpose of preventing development and thereby freeze or depress property values, and then attempt to show that that same zoning restriction prevents a highest and best use inconsistent with its terms. Such a position is contrary to established eminent domain law.

Id. at 123. The defendant need not show that the regulation was adopted in bad faith or is not good planning, because it has a right to recover for both the actual condemnation damages and the "'disguised taking in the form of zoning.'" *Id.* (quoting *People ex rel. Dept. of Pub. Wks. v. Southern Pac. Trans. Co.*, 33 Cal. App. 3d 960, 966 (1973)). In this case, the only properties denied development under the zoning regulations were those within the potential freeway corridor. The court also cited cases from other jurisdictions to the same effect. The court also noted Cal. Evid. Code § 1263.330, which prohibits parties in an eminent domain case from relying on evidence of increases or decreases in property value attributable to the project or decreases in value attributable to preliminary actions taken by the condemner relating to the property at issue. The court said that this statutory prohibition applies in this case.

The city also objected to the defendant's evidence of comparable property values where the properties were not subject to the freeway corridor restrictions but were "enhanced" by the corridor itself. The defendant's expert testified that the presence of the freeway was less important than the demand for housing and the changing land-use patterns in the area. The trial court had found that these comparables were relevant and that the question of value was a matter of fact for the jury to determine, including what effect, if any, the freeway project had on value. The appeals court agreed with the trial court.

This case is a remarkable exposition of the interplay between the eminent domain and regulatory powers and exhibits the use of a "sense of smell" when courts believe that the regulatory powers have been abused to depress property values for later condemnation by the same hands that controlled the regulatory levers.

Edward J. Sullivan

City of San Diego v. Rancho Penasquitos P'ship, 130 Cal. Rptr. 2d 108 (2003).

DIGEST SEEKS ADDITIONAL AUTHORS

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