OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

Appellate Cases—Landlord/Tenant

NINTH CIRCUIT FINDS WAIVER OF NO-COSIGNER POLICY IS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING AMENDMENTS ACT

In a case that is sure to be heralded by advocates for the disabled as a major victory, a Ninth Circuit panel found that a lessor's policy forbidding cosigners must be waived to allow a prospective disabled tenant to rent the lessor's apartment. *Giebeler v. M&B Assocs.*, 343 F.3d 1143 (9th Cir. 2003).

In 1996, the plaintiff-appellant, John Giebeler, became unable to work due to the disabling effects of AIDS. While employed, he had earned a salary of approximately $36,000 per year. Since 1996, Giebeler has relied on financial assistance from Social Security disability benefits and on housing assistance from the U.S. Department of Housing and Urban Development.

In 1997, Giebeler sought to rent an apartment from the Park Branham Apartments (Branham), owned by the defendant-appellee, M&B Associates. Branham was located closer to Giebeler's mother's house and was less expensive than his previous apartment. When Giebeler inquired about renting a Branham unit, he was receiving approximately $1,200 per month in financial assistance from various sources. Giebeler had a good credit history and he had consistently paid his rent on time during his six-year tenancy at his previous apartment.

When Giebeler inquired about renting a Branham unit, the apartment manager told him that he was not a qualified applicant, because his income did not meet Branham's minimum income requirement of $2,625 per month. Because Giebeler's mother's income exceeded Branham's monthly income requirement and her credit history was unmarred, she and Giebeler filled out applications for the apartment and indicated that Giebeler would be the sole resident. The office manager rejected the applications, citing Branham's no-cosigner policy.

Giebeler filed suit in federal district court under the Fair Housing Amendments Act of 1988 (FHAA), among other claims. Pub. L. No. 100-430, sec. 1, 102 Stat. 1619 (codified as amended in scattered sections of 28 & 42 U.S.C.). The FHAA makes it unlawful to discriminate "in the sale or rental [of], or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1).

Branham's principal argument was that the plaintiff was not entitled to relief under the FHAA, because Branham's policy forbidding cosigners applied equally to disabled and non-disabled people. In addition, Branham argued that Giebeler's financial status is not a condition for which the FHAA requires accommodation. If Branham were required to accommodate Mr. Geibeler's low-income status, Branham argued, it would be forced to unfairly favor low-income disabled people over non-disabled low-income individuals. As a result, Branham claimed it would be exposed to an increased risk of non-payment of rent.

The district court judge agreed with Branham that Giebeler's inability to meet the income requirement was not a condition that required accommodation. The district court relied on two out-of-circuit cases to reach this conclusion. *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437 (7th Cir. 1999); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998).

The Ninth Circuit Court of Appeals defined the central issue in Giebeler as "whether bending a landlord's usual *means* of testing a prospective tenant's likely ability to pay the rent over the course of the lease is an 'accommodation' at all within the meaning of the FHAA, let alone a reasonable one." 343 F.3d at 1148. The court outlined a two-step analysis for determining whether a disability requires accommodation under the FHAA. First, the court must determine

whether a remedy actually meets the concept of "accommodation" under the FHAA, which the court noted is often improperly eclipsed by the second part of the test. The second step is to determine whether an accommodation is reasonable.

The court began its analysis by defining the scope of the FHAA's accommodation requirement. Given the lack of guidance in the statute itself and its legislative history, the court looked to other statutes and regulations that apply similar or identical language. The court found a common connection between the FHAA, the Rehabilitation Act (RA), and the Americans with Disabilities Act (ADA): each requires that policies and practices must be adjusted to accommodate the needs of disabled individuals when it would be reasonable to do so. In prior ADA cases, the Ninth Circuit has "relied on ADA cases in applying the RA, because, as a general matter, 'there is no significant difference in the analysis or rights and obligations created by the two Acts.'" 343 F.3d at 1149 (quoting *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002)).

In applying RA and ADA cases interpreting "accommodation," the court cited *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), as its guide for determining the scope of the FHAA's accommodation requirement. According to the court, "*Barnett* holds that an accommodation may indeed result in a preference for disabled individuals over otherwise similarly situated nondisabled individuals." 343 F.3d at 1150. In addition, the court found that "Barnett indicates that accommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability." *Id.*

In *Barnett*, the plaintiff was an airline cargo handler who sought accommodation of his debilitating back injuries by requesting a transfer to a less physically demanding job. The airline denied the transfer because it would violate its seniority policy, which the airline argued applied equally to disabled and nondisabled individuals. The airline charged that modifying its seniority policy would amount to preferential treatment for disabled individuals over nondisabled individuals, something the airline (and Justice Scalia in his dissent) argued was not required by the ADA. The Supreme Court rejected the airline's narrow interpretation of "reasonable accommodation" and held that preferences will sometimes be necessary to achieve compliance with the ADA.

The Ninth Circuit court drew a parallel between the airline's seniority policy in *Barnett* and Branham's no-cosigner policy. Neither policy was discriminatory on its face. Both policies applied equally to disabled and nondisabled individuals. Following the U.S. Supreme Court's lead in Barnett, the Ninth Circuit held that "reasonable accommodation in the service of equal opportunity may require preferential treatment of the disabled." *Id.* Thus, the court concluded that Giebeler's request for a waiver of Branham's no-cosigner policy was an accommodation that he was entitled to under the FHAA if it proved reasonable.

The court then turned to the question of reasonableness. First, the court examined the causal link between Giebeler's disability and the accommodation he requested. The court highlighted an important distinction between Giebeler's situation and that of the airline cargo handler in *Barnett*. In Giebeler's case, it was undisputed that his inability to meet Branham's minimum income test was a direct result of his disability, yet the airline cargo handler's failure to comply with the airlines seniority policy was not a direct consequence of his disabling back injury. This distinction militated heavily in favor of granting Giebeler's request for a waiver of Branham's no-cosigner policy. Concluding that Giebeler had demonstrated causation, the court stated,

> Here, the causal link between Branham's failure to accommodate and Giebeler's disability is obvious. Giebeler was unemployed because of his disability and therefore had insufficient income to qualify for the apartment. Once Branham refused to allow Anne Giebeler to rent an apartment for her son to live in, Giebeler could not show financial ability to pay the rent and therefore could not live in the housing complex. Allowing Anne Giebeler to rent an apartment on her son's behalf, or in some other manner accommodating his inability to prove financial responsibility in the usual way, was necessary to enable Giebeler to live in an apartment at Branham.

343 F.3d at 1155.

Not having previously decided the issue, the court struggled to determine what burden of proof should be placed on plaintiffs in FHAA cases. While RA case law places the burden of proof on plaintiffs to show that a reasonable accommodation is possible, the ADA case law under *Barnett* requires plaintiffs to show that an accommodation is reasonable on its face. Without deciding which standard of proof should be applied in FHAA cases, the court held that Giebeler had met the burden of proof under both standards and found that in either case the accommodation requested by Giebeler was reasonable, in part because Branhamhad failed to show that the accommodations were not reasonable.

The court then reached its final analysis in its reasonableness inquiry. It stated the general rule that an accommodation is reasonable if it does not fundamentally alter the defendant's program or present unacceptable financial or administrative burdens. Although noting Branham's considerable interest in ensuring that a potential tenant is capable of meeting his obligation to pay rent, the court found that Giebeler would not present an unreasonable financial risk if his mother were allowed to cosign.

The court stressed that Branham was not required to accept any less rent than it would normally receive and that all of the other terms in Branham's lease would apply to Giebeler. The court also found that no appreciable administrative burden would result from the arrangement. Finally, the court found that many landlords would likely not object to a cosigner arrangement. Thus, the court reversed the district court's ruling that the FHAA provides no recourse when a disabled individual's financial status is a barrier to housing.

The court specifically limited its ruling to the facts in this case and refrained from deciding whether waiver of a no-cosigner policy would be a reasonable accommodation in most cases. Even though the Ninth Circuit has made it clear that its ruling should be narrowly applied, *Giebeler* greatly improves the prospects for disabled individuals who seek removal of financial barriers to housing, particularly when their low-income status is a direct result of their disability.

Glenn Fullilove

Giebeler v. M&B Assocs., 343 F.3d 1143 (9th Cir. 2003).

■ WHEN A WIN-WIN BECOMES A WIN-LOSE: PREVAILING PARTIES AND ATTORNEY FEES UNDER ORLTA

In *Barlow Trail Mobile Home Park v. Dunham*, 189 Or App 513, 75 P3d 1146 (2003), the Oregon Court of Appeals held that both the plaintiff and the defendant can be prevailing parties in an Oregon Residential Landlord and Tenant Act (ORLTA) case. The court of appeals held that the defendant tenant was not the sole prevailing party under ORS 90.255 because the trial court had found for the defendant on the plaintiff's ejectment claim and for the plaintiff on the defendant's counterclaim for retaliation. However, because on appeal the plaintiff landlord attacked only the designation of the defendant as the prevailing party and not the trial court's failure to also deem the plaintiff a prevailing party, the court held that the plaintiff had no right to demand an award of attorney fees.

At the trial level, the defendant argued that both parties were prevailing parties and that both parties should be awarded attorney fees in accordance with *Wilkes v. Zurlinden*, 328 Or 626, 984 P2d 261 (1999) (contract action where both plaintiff and defendant were prevailing parties under ORS 20.096(5)). The plaintiff took a different approach and argued that neither party was a prevailing party under ORS 90.255, because both parties' claims had been dismissed. The trial court rejected both arguments and awarded the defendant attorney fees.

Observing that "the definition of prevailing party in ORS 90.255 is essentially identical to the definition of prevailing party in ORS 20.096(5) (1999)," the Oregon Court of Appeals agreed with the defendant's argument at the trial court level. 189 Or App at 516.

However, the court did not award fees to the plaintiff because, rather than argue that it was entitled to attorney fees, the plaintiff had simply reiterated its argument that neither party was a prevailing party. The court rejected the plaintiff's last-ditch attempt to recover attorney fees by arguing in its reply brief that the case should be remanded back to the trial court if *Wilkes* applied. Finding the plaintiff's argument a case of too little, too late, the court noted that the plaintiff had not assigned error to the trial court's failure

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to designate it as a prevailing party in the first place "and thus asserted no basis for receiving attorney fees." 189 Or App at 517.

Glenn Fullilove

Barlow Trail Mobile Home Park v. Dunham, 189 Or App 513, 75 P3d 1146 (2003).

Appellate Cases—Real Estate

NINTH CIRCUIT FINDS PEDESTRIAN MALL A "PUBLIC FORUM"

In *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003), the defendant city, in an effort to revitalize its downtown, barred traffic from a several-block area and converted it to a pedestrian mall. Fearful of disruption to merchants and customers, the city placed significant restrictions on expressive activity in this area, including prohibitions on soliciting, circulating petitions, collecting signatures, leafleting, and picketing. The plaintiffs challenged these restrictions, but the trial court found the area to be a "nonpublic forum" and upheld some of the restrictions, but invalidated restrictions on leafleting and vending. Both parties appealed.

The defendant's code prohibits solicitation, unauthorized vending, and unauthorized erection of structures in the mall area. The plaintiffs alleged that First Amendment activities such as charitable solicitation, distribution of literature, circulating petitions, picketing, and giving away or selling message-bearing merchandise were also prohibited. The trial court found that because the area was created to promote economic growth and not private expression, the forum was nonpublic.

The Ninth Circuit noted a national commitment to robust public discussion of issues, which has come under fire as public areas have been increasingly privatized. To resolve such cases, the United States Supreme Court has used a "forum analysis," which delineates three types of forums—historic public forums, designated public forums, and nonpublic forums—all with a different level of scrutiny. Restrictions on expression in public places are sharply circumscribed. Content-neutral time, place, and manner restrictions, narrowly tailored to serve significant governmental interests, are valid so long as they open valid alternative channels of communication. If the restrictions are content-based, the government must demonstrate that such restrictions are necessary to serve compelling state interests and are narrowly drawn to achieve such ends.

Typical public fora include streets, sidewalks, and parks. While there is no clear-cut test to define a public forum, the Ninth Circuit has emphasized three factors in determining whether an area is a traditional public forum: (1) the actual use and purposes of the property; (2) the area's physical characteristics, including the existence of those boundaries defining the area; and (3) the traditional and historic use of the area and similar properties.

With respect to the first factor, a place is more likely to be seen as a public forum if it is given to pedestrian use or is a public thoroughfare. The court thus refused to defer to the city's statements as to the primary purpose of the forum. Notwithstanding its substantial makeover, the mall was still a public thoroughfare, even if cars can only cross the mall in two places.

Turning to the second factor, the mall's physical characteristics, the court said the area also looked like a public forum. It was located in the heart of the public downtown area, so there was an expectation that it is a public forum and serves that purpose for adjacent areas. The area is still a street under Nevada law, is open to the public, and is integrated into the downtown. Finally, the area had historically been treated as a public forum. For all of these reasons, the court found this pedestrian area a traditional public forum.

In reversing the district court, the Ninth Circuit specifically found that the community statement of intended purpose for the project was irrelevant to its public forum status; a traditional public forum is open for expressive activity regardless of any intent otherwise.

Moreover, because the area was a historic public forum, the burden is on the defendant to show it is no longer a public street and has lost its public forum status. To do so, the defendant must alter the physical characteristics or uses of the property. Here, there had been no such change.

The Ninth Circuit went on to evaluate the restrictions. First, the district court had already invalidated the leafleting restrictions, even under a nonpublic forum analysis. The Ninth Circuit also found that these restrictions could not survive the more rigorous limitations of a public forum analysis. While the leafleting law was content-neutral, it was not narrowly tailored, nor did it leave open alternative methods of communication. On that point, the district court decision was affirmed.

As to the vending and giving away of materials without permission of a governmentally designated agency, the court found that governmental abuse of this standardless discretion could lead to content or viewpoint discrimination in violation of the First Amendment. The regulations were thus found to be facially invalid.

Regarding the restrictions on solicitation, the district court found them reasonable because the forum was found to be nonpublic; however, the Ninth Circuit remanded and asked the district court to determine whether the regulations are narrowly tailored to serve a significant governmental interest and whether they burden more speech than is necessary.

As to the ability to place tables in the pedestrian mall, the court also remanded the matter for a determination of whether the ban meets the heightened standard of scrutiny

that also applied to the ban on solicitation and whether the plaintiff's challenge was facial or as-applied. However, whether the tables were even "expression" also remained an open point.

This case and the Tenth Circuit decision in *First Unitarian Church v. Salt Lake City Corporation*, 308 F.3d, 1114 (10th Cir. 2002) (summarized in the March 2003 issue of the RELU Digest), illustrate lengthy and contentious analyses of public fora for First Amendment purposes. The time may be ripe for the United States Supreme Court to weigh in on the issue.

Edward J. Sullivan

ACLU of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003).

OREGON COURT OF APPEALS DECIDES WHO MAY RECOVER AGAINST MORTGAGE BROKER BOND

The Oregon Court of Appeals in *American Bankers Insurance Co. v. State*, 188 Or App 606, 72 P3d 666 (2003), considered which parties are entitled to recover against bonds posted by mortgage brokers pursuant to ORS 59.850.

ORS 59.850(4) and (5) require all applicants for licensing as a mortgage banker or mortgage broker to file a corporate surety bond or irrevocable letter of credit of not less than $25,000 and not more than $50,000. In *American Bankers*, private lenders sought to recover on such a bond filed by Mortgage One, Inc. after the lenders allegedly suffered a loss on a bad loan brokered by Mortgage One. Several service providers that had not received payment for appraisals and credit reports provided to Mortgage One also asserted claims against the bond. The surety company brought an interpleader action to determine the validity and priority of the claims asserted against the bond. The trial court held that under ORS 59.925, the private lenders were not proper claimants against the bond, but the service providers were proper claimants. The private lenders appealed both decisions.

ORS 59.925(2) provides that "[a] mortgage banker or mortgage broker is liable as provided in subsection (3) of this section *to any person who suffers any ascertainable loss* of money or property, real or personal, *in a mortgage banker transaction or a mortgage broker transaction*" if the mortgage banker or mortgage broker transacts business in violation of ORS 59.840 to 59.980, transacts business "by means of an untrue statement," or fails to speak when necessary to avoid making other statements misleading (emphasis added). The case turned on the narrow issue of which of the parties were involved in a "mortgage banker transaction or a mortgage broker transaction."

The court of appeals concluded that ORS 59.925 was ambiguous because two different and reasonable interpretations are possible: the statute could refer only to those who are direct parties to the transaction (to the exclusion of the service providers), or to anyone who provides any service during the course of the transaction. The court also found that the relevant statutes did not help resolve the ambiguity.

Turning to applicable legislative history, the court of appeals cited testimony from a House committee meeting and concluded that "the purpose of the bond was not to cover loan defaults but rather . . . to protect those consumers who paid brokers money for certain fees in advance when the brokers failed to pay for or did not provide the services" and that the statute was not intended to protect "those who peripherally provide services that help structure the transaction." 188 Or App at 614–15. The court went on to reason that "[t]o interpret the statute in any other manner would cast a net so broad as to cancel out the obvious consumer protection that the statute provides" (presumably because less money would be available to consumers if service providers could also recover against the bond) and that the amount of the bond specified in the statute—$25,000 to $50,000—would be insufficient to cover every wronged party. *Id.* at 615.

Based on its reading of the legislative history, the court of appeals held that neither the private lenders nor the service providers were entitled to recover against the bond under ORS 59.925.

Rene Gonzalez

American Bankers Ins. Co. v. State, 188 Or App 606, 72 P3d 666 (2003).

Appellate Cases—Land Use

LAND USE APPEALS DO NOT EXTEND TIME LIMITATIONS ON PERMIT VALIDITY

In *Rest-Haven Memorial Park v. City of Eugene*, 189 Or App 150, 74 P3d 1093 (2003), the Oregon Court of Appeals affirmed LUBA's holding that an appeal does not toll the expiration date of a permit.

The petitioners applied for a tree-cutting permit. An administrative rule included as part of the city's tree ordinance provided that tree-cutting permits are only valid for one year and may be extended upon request for up to two additional 12-month periods. The petitioners appealed, challenging, among other things, the one-year limitation. While the appeal was pending before LUBA, the 12-month period expired. Because the permit had expired, the city moved to dismiss the appeal as moot. Petitioners argued (1) the 12-month expiration period should be tolled during the pendency of appeals, (2) if no tolling is permitted, the appeal is not moot, and (3) the 12-month expiration date is invalid because it is part of an administrative rule that is actually an unlawfully adopted land use regulation.

The court rejected all three arguments. First, it could not find any authority that a time limitation attached to a permit is automatically tolled once an appeal is filed. Second, the petitioners could not challenge the finding of mootness by arguing that it would be impossible to obtain judicial review before the permit expired because they had never even availed themselves of the process for requesting extensions of the deadline. The court did not consider whether the time limitation was an unacknowledged land use regulation because this argument had not been adequately raised before the local government and was therefore not preserved for the court's review.

Carrie Richter

Rest-Haven Mem'l Park v. City of Eugene, 189 Or App 150, 74 P3d 1093 (2003).

■ COURT CLARIFIES FARM ROAD "MAINTENANCE" EXEMPTION TO FILL-REMOVAL PERMIT REQUIREMENT

Owen v. Division of State Lands, 189 Or App 466, 76 P3d 158 (2003), gave the court of appeals a chance to dissect the exemption to the state's fill-removal permit regime available for the "maintenance of farm roads." ORS 196.905(4)(b) (1999) ("Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the following activities on exclusive farm use zoned lands: . . . [m]aintenance of farm roads in such a manner as to not significantly adversely affect wetlands").

Owen owned property, the upland portion of which was accessible only via an access road through a wetland. Over time, a portion of the access road became submerged until it was impassable. Owen hired a contractor to repair it. The Division of State Lands (DSL) found out about the repair work and issued a cease and desist order.

A hearing was conducted. Based upon the record, DSL's director concluded that the road work constituted reconstruction of a road that is no longer serviceable, rather than maintenance of a road that is serviceable, and thus was not exempt from the permit requirement.

Finding the term "maintenance" an "inexact" term, the court conducted a PGE analysis to ascertain the legislature's intent. 189 Or App at 471 (citing *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610–12, 859 P2d 1143 (1993)). Referring to the dictionary definition, the court concluded that maintenance is work done to keep a thing in its "functional baseline condition." 189 Or App at 472. In the case of a farm road, that condition is a "passable, above-water-level roadway." *Id.*

Relying primarily on the fact that, when Owen's contractor undertook the work, the road was no longer serviceable, DSL asserted that the work constituted reconstruction rather than maintenance. While noting that the road would, following maintenance work, be somewhat larger than it had been before, the court disagreed that it was being reconstructed.

For one thing, the court observed, the farm road maintenance exemption, unlike the general road maintenance exemption of 196.905(7), did not require that the road be serviceable. The court also noted that, unlike the exemption applying to repair of dams and levees under 196.905(6)(b), the farm road exemption did not limit adverse effects on the wetland to the area affected by the original construction. Finding nothing in the context of the statute to override these textual cues, the court reversed DSL's order.

The court noted (as should practitioners) that the legislature has substantially rewritten the farm road maintenance exemption in ORS 196.905(4)(b) in a manner that would appear to substantially narrow it. The court declined to address how that rewrite, which is not yet effective, may have affected this decision.

Ty K. Wyman

Owen v. Div. of State Lands, 189 Or App 466, 76 P3d 158 (2003).

■ ARIZONA STATUTE ALLOWING NEIGHBORING CITY "VETO" OF COMMUNITY'S INCORPORATION PETITION DOES NOT VIOLATE 14TH AMENDMENT

In *Green v. City of Tucson*, 340 F.3d 891 (9th Cir. 2003), the plaintiffs, residents of Tortolita, a community located in Pima County, Arizona, challenged an Arizona law that prohibits the incorporation of a community unless all existing municipalities of 5,000 or more inhabitants within six miles of the community's boundaries give their prior consent. In 1997, a majority of Tortolita's qualified voters petitioned the Pima County Board of Supervisors to incorporate Tortolita as a new municipality. Because three neighboring communities opposed the proposed incorporation, the petition was denied.

The plaintiffs then filed a 42 U.S.C. § 1983 action in federal court, arguing that Arizona's statute violated the Equal Protection Clause of the Fourteenth Amendment because it impermissibly burdened their right to vote on a municipal corporation. The district court granted the cities' motion for summary judgment, holding that the Arizona statute did not burden the right to vote, and that the statute was rationally related to a legitimate state interest. On appeal, the Ninth Circuit Court of Appeals affirmed.

First, the court reviewed the framework for an equal protection analysis of legislation, noting that statutes that impermissibly burden fundamental rights, such as the right to vote, will be subject to strict scrutiny. When a statute makes distinctions based upon certain other suspect classifications, such as gender, an intermediate level of scrutiny applies. Finally, all other statutes are subjected to the third, less exacting type of scrutiny: the rational basis review. Such statutes will be upheld if they are rationally related to a legitimate governmental purpose.

The plaintiffs argued that the Arizona statute adversely affected their voting rights and should be subject to the strict scrutiny test. In response, the court first determined whether the plaintiffs had a constitutionally protected right to vote on municipal incorporation. The court concluded that Arizona had granted its citizens the right to vote on municipal incorporations.

The Court then held, based upon its decision in *Hussey v. City of Portland*, 64 F.3d 1260 (9th Cir. 1995), that Arizona's petition procedure for direct incorporation was sufficiently similar to voting to be treated as such for equal protection purposes. In *Hussey*, written consents of voters under Oregon's double majority annexation procedure were held to be the constitutional equivalent of votes.

The next issue the court addressed was whether strict or rational basis scrutiny applied. The court, citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), observed that the Supreme Court has not subjected every voting regulation to strict scrutiny. Rather, the Supreme Court has applied strict scrutiny to only two types of voting regulations. The first type includes regulations that unreasonably deprive some residents in a geographically defined governmental unit from voting in a unit-wide election. The second type involves regulations that contravene the principal of "one person, one vote" by diluting the voting power of some qualified voters within the electoral unit.

The Ninth Circuit rejected the plaintiffs' claims that their right to petition for municipal incorporation was analogous to either of those types of regulations. The court observed that the relevant electoral unit was the community of Tortolita. The court then focused its equal protection inquiry on whether some voters of Tortolita were prohibited from voting while others were not, or whether the votes of Tortolita residents were given unequal weight. The court answered "no" to both questions, finding that Tortolita's voters were treated equally with respect to the right to vote on the municipal corporation, and that the votes of all Tortolita residents were given equal weight.

The Ninth Circuit observed that the Arizona statute discriminated between different electoral units based on their proximity to existing municipalities, rather than between voters in any single electoral unit. After concluding that the statute was subject to a rational basis scrutiny, the court concluded that Arizona's statute easily passed constitutional muster under that standard. The Ninth Circuit noted that Arizona had a legitimate state interest in protecting the interests of already existing municipalities. Unrestricted municipal incorporation of communities on the edges of existing cities could result in intergovernmental conflict over tax resources and economic development. If left unheeded, it could result in the loss of effective local government. The Ninth Circuit concluded that the Arizona statute was rationally related to that interest.

Jack D. Hoffman

Green v. City of Tucson, 340 F.3d 891 (9th Cir. 2003).

■ A MEETING THAT LIMITS TESTIMONY TO DISCUSSION OF EX PARTE CONTACTS IS A "HEARING" FOR PURPOSES OF CALCULATING APPEAL DEADLINES

In *Friends of Jacksonville v. City of Jacksonville*, 189 Or App 283, 76 P3d 121 (2003), the court of appeals affirmed LUBA's dismissal of an appeal for failure to file a Notice of Intent to Appeal (NITA) within the 21-day appeal deadline under ORS 197.830(9).

This is the second time the case has been before the court of appeals. The first time was in *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd*, 183 Or App 581, 54 P3d 636 (2002), in which LUBA held that a council member should have recused himself from participation on a church's land use application, and remanded to allow the city to consider the application without the councilor's participation.

Following the remand, the city issued a notice for a remand hearing at which testimony would be limited to disclosure of *ex parte* contacts by council members and rebuttal evidence by the public regarding any such contacts. Some of Friends' members opposed this limitation and requested a full evidentiary hearing. At the hearing, the city refused to take evidence on the merits of the land use application, and voted again to approve the proposed development. The city formally adopted the council's decision on January 7, 2003 and mailed a notice of decision on January 13, 2003. Friends filed a NITA on February 3, 2003 and the church moved to dismiss for failure to file the appeal within the time limit under ORS 197.830(9), which provides that a NITA must be filed not later than 21 days after the decision sought to be reviewed becomes final.

Friends responded that the city's decision was rendered "without providing a hearing" and therefore the timeline for filing the NITA was governed not by the date of the final decision under ORS 197.830(9), but instead by ORS 197.830(3), which provides that a NITA must be filed within 21 days of actual notice where notice is required, or within 21 days of the date a person knew or should have known of the decision where no notice is required. Friends also asserted that the 21 days began on the latest date one of its members received actual notice of the decision.

LUBA held that the NITA was not timely filed and dismissed the appeal, relying on ORS 197.830(9). In LUBA's view, holding the remand hearing was a continuation of the local proceedings, in which prior hearings had been held, and it did not matter whether the city provided an additional hearing following the remand. 44 Or LUBA 379 (2003).

Friends sought review of LUBA's dismissal of its appeal. On appeal, the court agreed that the city's decision was not rendered "without providing a hearing," but for different reasons than those given by LUBA.

The court conducted a statutory analysis under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611–12, 859

P2d 1143 (1993), to determine the meaning of the term "hearing" in ORS 197.830(9). First, the court observed that the statutes provide procedures for initial determinations on land use applications, but do not address procedures on remand from LUBA. The court recognized a prior holding that proceedings before a local government on remand from LUBA remain the same case that existed before the remand for purposes of exhaustion of issues, *Beck v. City of Tillamook*, 313 Or 148, 151–53, 831 P2d 678 (1992), and another holding that the hearing after remand should be regarded as a discrete proceeding for purposes of notice, *Hausum v. City of Salem*, 178 Or App 417, 422–23, 37 P3d 1039 (2001). However, neither of these holdings directly answered the issue here.

The court then went on to find that the city's decision on remand is a "land use decision" as defined in ORS 197.015(10)(a) and that the statutory procedures for seeking review of that decision remain the same as those that applied to the initial local government decision on the matter before remand. Therefore, ORS 197.830(9) is applicable when a "hearing" is held on remand. The court held that the city's proceeding on remand involved a "hearing"—defined in ORS Chapters 197, 215, and 227 as a quasi-judicial proceeding held to determine whether an application for a land use permit should be granted. The court reasoned that whether or not a permit should be granted depends on the law applicable to the proposal and to the facts underlying the application, and therefore a "hearing" connotes a "proceeding to gather evidence about the application, or to hear and consider argument on issues of fact and/or law relevant to the application for a land use permit." 189 Or App at 293.

Applying that understanding to the facts of the case, the court concluded that the city's meeting for a public declaration of ex parte contacts by council members and an invitation to the public to offer rebuttal evidence regarding any such contacts constituted a hearing. Although the scope was limited, it was a proceeding conducted to take and consider evidence relevant to the grant or denial of a permit. Therefore, ORS 197.830(3) was inapplicable and the time limits for appeal under ORS 197.830(9) applied. LUBA's dismissal of the appeal for failure to timely file the NITA was affirmed.

John Pinkstaff

Friends of Jacksonville v. City of Jacksonville, 189 Or App 283, 76 P3d 121 (2003).

■ SOCIAL GATHERINGS ON FARMLAND

Relying on textual clues, context, and the legislative record, the court of appeals in *Landsem Farms, LP v. Marion County*, 190 Or App 25, 78 P3d 103 (2003), interpreted the exemption for a mass gathering on farmland provided under ORS 197.015(10)(d) as limited to a single gathering within a three-month period for not more than five days.

The petitioner in this case, Landsem Farms, owns a twenty-acre parcel of property in Marion County. The property is zoned for exclusive farm use (EFU). In 1972, prior to the EFU designation, Marion County issued a conditional use permit for a private airfield on the property.

The petitioner sought approval from the county to expand the airstrip operation to allow social gatherings. The county required the petitioner to submit an application for a conditional use permit. In its application, the petitioner proposed social gatherings that would be limited as follows:

(1) Except for those uses which would require the landing strip, e.g., fly-ins, bag drops, etc., the social gatherings would be limited to the area immediately surrounding the private residence, the hangers [sic] and the parking area.

(2) These gatherings would not be open to the general public.

(3) There would be no more than twenty-five (25) gatherings per year. [This was later reduced to 15.]

(4) The maximum number of people allowed to attend any gathering would be two hundred fifty (250).

(5) Gatherings would be limited to the hours of 8:00 a.m. until 10:00 p.m. in the evening.

In the proceeding before the hearing officer, the petitioner argued that social gatherings are exempt from land use regulation under ORS 197.015(10)(d).

ORS 197.015(10)(d) exempts an "outdoor mass gathering" as defined in ORS 433.735 or other gathering of fewer than 3,000 persons that is "not anticipated to continue for more than 120 hours in any three-month period" from the definition of a "land use decision." ORS 433.735 in turn defines an "outdoor mass gathering" as "an actual or reasonably anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure."

The petitioner argued that the exemption was provided for the purpose of permitting "outdoor mass gatherings" or other small gatherings as provided in ORS 197.015(10)(d) without any land use regulation. The petitioner further argued that such gatherings are permitted outright, regardless of the number of gatherings, so long as the events include less than 3,000 persons and add up to no more than 120 hours within a three-month period.

The county hearings officer rejected this interpretation and denied the conditional use permit. The hearings officer found the exemption under ORS 197.015(10)(d) was limited to only one gathering within any single three-month period. The petitioner appealed the decision to the county board of commissioners and the board affirmed.

On appeal, LUBA concluded,

The only way that we can see to give any meaning to the

"in any three month period" requirement is to read it to qualify or limit the number of "gatherings" on the property where gatherings will occur. In other words, a county may not apply its land use regulations to gatherings of "fewer than 3,000 persons" if the gatherings are shorter than 120 hours in duration and the gatherings do not occur on the relevant property more frequently than once each three-month period.

44 Or LUBA 611, 621 (2003).

The petitioner filed an appeal to the court of appeals, again arguing that the 120-hour limitation provided in ORS 197.015(10)(d) is a limit on the cumulative number of hours for any number of gatherings and is not a maximum limitation for a single gathering.

The court of appeals turned to the principles of statutory construction provided in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993). Turning first to the statutory text, the court found the phrase "not anticipated to continue for more than 120 hours in any three month period" unclear. The court did, however, find the use of the singular "gathering" as opposed to the plural "gatherings" significant; any limitations provided within that exemption modify that single "gathering."

Turning to context, the court found further support in the statutory provisions governing mass gatherings under ORS 433.735(1), which are limited to a single "assembly."

Finally, the court gleaned a single statement in the legislative record from Ron Eber, a representative of the Department of Land Conservation and Development, that the bill would not "authorize anything . . . that should normally come within the land use statutes" and that the bill would "make it clear that those activities, the short duration, temporary kind of activities, are not subject to the zoning regulations."

Based on this legislative history and context, the court concluded that a narrow exemption was intended, rejected the broad interpretation offered by the petitioner, and affirmed LUBA's decision.

Christopher A. Gilmore

Landsem Farms, LP v. Marion County, 190 Or App 25, 78 P3d 103 (2003).

Appellate Cases—Takings

OREGON COURT OF APPEALS LOOKS AT PUBLIC USE REQUIREMENT FOR INVERSE CONDEMNATION AND RELATIONSHIP TO TORT CLAIMS ACT

In September, the Oregon Court of Appeals issued the third appellate opinion in the long-running inverse condemnation case of *Vokoun v. City of Lake Oswego*, 189 Or App 499, 76 P3d 677 (2003). The case has its origins in a landslide that occurred in 1996 and caused substantial damage to the yard areas of the plaintiffs' property and also threatened their house. The plaintiffs claimed that the soil had been destabilized by outfall from the defendant city's storm drainage system. They filed a lawsuit against the city in late 1996 for, among other theories, inverse condemnation and negligence. The plaintiffs prevailed on their inverse condemnation and negligence claims, and a jury awarded more than $300,000.

In the first appeal, the court of appeals ruled that the trial court should have granted the city's directed verdict motions on these two claims and reversed. 169 Or App 31, 7 P3d 608 (2000). The Oregon Supreme Court then accepted review and reversed the court of appeals, holding that the plaintiffs had sufficiently established substantial interference with their property by the city to survive a directed verdict motion on their inverse condemnation claim and that the city could not rely on discretionary immunity to avoid the negligence claim. 335 Or 19, 56 P3d 396 (2002). The supreme court then remanded the case to the court of appeals for consideration of several other issues the parties had raised that were not addressed in the first round. This latest chapter resulted.

This time the court of appeals affirmed the trial court on the inverse condemnation claim and largely affirmed it on the negligence claim. Although the court of appeals addressed a number of points, two elements stand out for their practical significance to inverse condemnation litigation.

First, the court of appeals concluded that the "public use" required for an inverse condemnation claim did not mean that the plaintiff had to show that the property taken would be put to a beneficial use by the government agency involved. Relying on *Lincoln Loan v. State Highway Commission*, 274 Or 49, 545 P.2d 105 (1976), and *Hawkins v. City of La Grande*, 315 Or 57, 843 P2d 400 (1992), the court of appeals found that an inverse condemnee must only show that the property involved was taken by the public, and not that the public would necessarily benefit from that taking. That holding has great practical utility for inverse condemnees in situations like *Vokoun* and *Hawkins* (which involved a sewage discharge onto agricultural property) where it would be difficult to show that the public was particularly "benefited" by the taking.

Second, the court of appeals disagreed with the city's argument that the damage cap imposed by the Oregon Tort Claims Act, ORS 30.260–.300, applied to the inverse condemnation claim. The court of appeals held that an inverse condemnation claim is a direct action against the government to enforce rights guaranteed under the Oregon and United States constitutions. The court of appeals reasoned that if the damage cap applied, then claimants in many instances—including this case—would be denied their constitutional right to full "just compensation" for the property taken. This finding, too, has great practical significance to inverse condemnees. Moreover, although the court of appeals did not address the pre-filing notice requirement for tort claim actions (likely because there was an accompanying negligence claim in this case), the court's reasoning and conclusion suggests that the Tort Claims Act simply does not apply to inverse condemnation claims at all.

Mark J. Fucile

Vokoun v. City of Lake Oswego, 189 Or App 499, 76 P3d 677 (2003).

■ U.S. SUPREME COURT DENIES CERT. IN OREGON SPOTTED OWL TAKINGS CASE

The U.S. Supreme Court recently denied certiorari of the Oregon Court of Appeals' decision in *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 186 Or App 291, 63 P3d 598 (2003) (summarized in the August 2003 issue of the RELU Digest).

In this case, the state temporarily denied Boise Cascade the ability to log 56 acres of land where a pair of northern spotted owls then nested, and Boise Cascade sued for inverse condemnation. The court of appeals' opinion largely dealt with the futility exception to the ripeness defense in the takings arena. The court of appeals agreed with the state that Boise Cascade had not shown that it would have been futile to request an incidental take permit and therefore had not satisfied the futility standard.

In one short paragraph of its opinion, the court of appeals rejected an attempt by Boise Cascade to reargue issues concerning ripeness and futility that had already been decided by the court of appeals in a prior opinion, *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 164 Or App 114, 991 P2d 563 (1999), *rev den*, 331 Or 244 (2000), *cert den*, 532 US 923 (2001). The court relied on *State v. Pratt*, 316 Or 561, 853 P2d 827 (1993), for the proposition that, under the law of the case doctrine, "when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal." *Pratt*, 316 Or at 569.

Boise Cascade unsuccessfully requested review by the Oregon Supreme Court, and then petitioned the U.S. Supreme Court for certiorari review. The question presented was

> Whether the Supremacy Clause of the U.S. Constitution required the Oregon Court of Appeals to apply controlling new case law from this Court, *i.e. Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); and *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), to Petitioner's pending federal constitutional takings claims or whether the lower court was free to ignore those decisions based upon the "law of the case" doctrine.

On December 8, 2003, the U.S. Supreme Court denied Boise's petition.

Nathan Baker

Boise Cascade Corp. v. State ex rel. Bd. of Forestry, 186 Or App 291, 63 P3d 598, rev den, 335 Or 578 (2003), cert den, 72 U.S.L.W. 3389 (U.S. Dec. 8, 2003) (No. 03-626).

■ OAKLAND HOTELS UNSUCCESSFUL IN CHALLENGING CITY NUISANCE ABATEMENT ORDINANCES

In *Hotel & Motel Association of Oakland v. City of Oakland*, 344 F.3d 959 (9th Cir. 2003), the Ninth Circuit reviewed the constitutionality of city nuisance abatement ordinances.

In response to an observed pattern of illegal activity at poorly maintained, legally nonconforming hotels, the city of Oakland adopted two ordinances designed to encourage maintenance. The first ordinance regulated housekeeping conditions, property security, criminal and nuisance activity, and record-keeping of guest receipts. The second ordinance reclassified all legally nonconforming hotels to "Deemed Approved" status and set new performance standards that, if not adhered to, could result in misdemeanor prosecution, fines, and enforcement actions, and ultimately lead to revocation of a hotel's Deemed Approved status. Operators of affected hotels and their trade association raised state and federal constitutional challenges to the ordinances.

The claims remaining on appeal were that the ordinances were an unconstitutional taking under the Fifth Amendment, violated procedural due process and equal protection rights, and were unconstitutionally vague. The Ninth Circuit rejected each of the claims and affirmed the lower court's dismissal of the action.

The Ninth Circuit first held that the takings claim was unripe because the owners had neither sought nor been denied just compensation by the state. The plaintiffs also argued, however, that the ordinance did not advance a legitimate government interest and that this was a factual question that could not have been decided on a motion to dismiss before discovery. Because this argument dealt with the city's authority to adopt the ordinance, regardless of any compensation that might be offered, the ripeness defense did not

apply. Nonetheless, the court also rejected this argument and concluded that the record was adequate for disposition by a motion to dismiss.

Prior to adopting the ordinances, the city had recorded the problems associated with poorly maintained hotels. Increased police activity and civil abatement actions had not resulted in a significant decrease in the pattern of illegal activity observed at poorly maintained hotels. The city had noted, however, that a number of these hotels did not have land use approvals and therefore did not risk the loss of entitlements if the facilities were not maintained. The ordinances were designed to address public health and welfare concerns by "target[ing] an increasing concentration of illegal activity, unsanitary and dangerous conditions, and a variety of nuisances associated with problem hotels." 344 F.3d at 967. The court concluded that the purpose was both legitimate and substantially advanced by the ordinances.

The plaintiffs' procedural due process claim alleged that they were each due an individualized hearing under *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990), because the city had targeted "a relatively small number of persons" who were "exceptionally affected . . . on an individual basis." *Harris*, 904 F.2d at 502 (internal quotation marks omitted). The court disagreed, holding that the ordinances were "the purest of legislative acts", "garden variety statute[s] affecting an entire class of Oakland hotels." 344 F.3d at 969. The 49 individual plaintiffs were not exceptionally affected on an individualized basis and the ordinances only required compliance with basic health and safety regulations applicable to all hotels. The court also found it significant that there was a provision for a noticed public hearing and appeal if there was an allegation that the ordinances had been violated.

The plaintiffs also argued that equal protection rights were violated because the ordinance impermissibly targeted nonconforming hotels. However, no suspect class or fundamental interest was involved, and the court found that the ordinances were rationally related to a legitimate state interest. All hotels were held to the same health and welfare standards. The fact that "Deemed Approved" hotels were subject to a different enforcement mechanism was reasonable given that very few of the legal nonconforming businesses had land use permits.

Finally, the Ninth Circuit rejected the plaintiffs' vagueness claim. The plaintiffs claimed that the ordinances were unconstitutionally vague on their face. The court held that a facial void-for-vagueness challenge not brought under the First Amendment must demonstrate that the legislation would be impermissibly vague in all possible applications. According to the court, the plaintiffs had failed to make any such showing.

Michelle Rudd

Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959 (9th Cir. 2003).

CASES FROM OTHER JURISDICTIONS

SECOND CIRCUIT ALLOWS RESERVED FEDERAL TAKINGS CLAIMS TO BE HEARD

In *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2nd Cir. 2003), the plaintiff landowner and his real estate firm appealed from a trial court judgment dismissing his takings claim. The action was based on a newspaper's announcement that the plaintiffs' property was a candidate site for a low-level radioactive waste disposal facility. The plaintiffs owned two contiguous parcels, had received subdivision approval on one of them, and had invested in infrastructure. The defendant was a state agency created pursuant to the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. No. 96-573, 94 Stat. 3347, *repealed by* Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–2021j). The plaintiffs' site was one of three candidate sites chosen. Subsequent state legislation amended the process and effectively invalidated the selection about a year after it was made. Nevertheless, there was little market for development of the site thereafter, and the plaintiffs sued for damages for a taking in state court because he believed that he could not pursue a federal claim first. This approach was consistent with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

The state trial court heard the case under the takings clause of the state constitution and found no taking. The Connecticut Supreme Court upheld the trial court's decision. 251 Conn. 121, 739 A.2d 680 (1999). The United States Supreme Court denied certiorari. 530 U.S. 1225 (2000).

The plaintiffs then brought suit in federal district court under the Fifth and Fourteenth Amendments, and the defendant moved to dismiss the case. The defendant's motion was based on three grounds:

(1) the *Rooker-Feldman Doctrine* (see *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)), which holds that when state and federal takings claims are "inextricably intertwined," a dismissal of the state claim will also result in dismissal of the federal claim, *Moccio v. N.Y. State Office of Court Admin.*, 95 F.3d 195, 198–99 (2d Cir. 1996);

(2) collateral estoppel, because the two sets of claims were identical; and

(3) lack of a final decision by the defendant.

The district court granted the motion to dismiss, ruling that the *Rooker-Feldman* doctrine applied, the plaintiffs were collaterally estopped from pursuing their taking claim, and, in any event, the defendant's action did not constitute a taking. On appeal, the Second Circuit affirmed the district court, but on significantly different grounds.

First, the court found the plaintiffs' claim to be ripe, because *Williamson County* had been met and because the plaintiffs had no other available remedy. The siting choice decision was a final decision and was thus ripe for adjudication.

Turning to the *Rooker-Feldman*, collateral estoppel, and res judicata issues, the court said that the essence of all three is that if a state court has reached a final judgment on the merits, that judgment cannot be reexamined by a federal trial court. This doctrine covers not only final judgments actually reached, but also those inextricably intertwined with federal claims (*e.g.*, where a plaintiff had an opportunity to litigate a claim). The plaintiffs argued that they had not litigated the federal claim in state court and that *Rooker-Feldman* therefore did not apply.

The court held that the federal and state claims were different and that the plaintiffs would be free to litigate the federal taking claim in federal court. In addition, the court declined to apply the collateral estoppel doctrine because it would create a "Catch-22" whereby the plaintiffs could not litigate their federal claims in either state or federal court. Instead, the second circuit took a "middle ground," which it dubbed the "Santini reservation," by which a plaintiff may bring a claim in state court and "reserve" its federal claims to bring later in federal court. 342 F.3d at 128, 130 (citing *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964)). That reservation would be effective to deprive a state court of jurisdiction to make a judgment that would have preclusive effect in federal courts. While the plaintiffs had not explicitly reserved their federal claims, they could not do so in any event under *Williamson County*. The court suggested that it did not believe that the United States Supreme Court had meant to deprive a large class of federal claimants from having their day in court, and concluded that the reservation process would be effective in all future cases.

After holding that the plaintiffs had reserved the federal taking claim, the court proceeded to consider the merits of that claim. The reservation was of no ultimate benefit to the plaintiffs, because the Ninth Circuit upheld the trial court's grant of summary judgment. The court found that the siting was typical pre-condemnation activity that was not compensable under *Agins v. City of Tiberon*, 447 U.S. 255, 263 n.9 (1980). The mere announcement of candidate sites does not equate to a taking, particularly when many other steps must be undertaken. The court found no deprivation of all economically viable use of the property. Finally, the court said that public policy discourages compensating takings claimants whose property values are harmed as a result of mere planning; otherwise, planning in secret and hasty decision making would be encouraged.

This case is inconsistent with the result reached by the Ninth Circuit in *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995), which applied collateral estoppel in a similar circumstance. The Second Circuit view appears to be a minority view. It is now up to the United States Supreme Court to resolve the split in the circuits.

Edward J. Sullivan

Santini v. Connecticut Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2nd Cir. 2003).

WHAT IS A CHURCH AND WHEN DOES A LOCAL REGULATION IMPOSE A SUBSTANTIAL BURDEN UNDER RLUIPA?

In *North Pacific Union Conference Association of the Seventh-Day Adventists v. Clark County*, 118 Wn. App. 22, 74 P.3d 140 (2003), the church association sought to construct a three-floor, 40,000-square-foot administrative center that would house a 2,400-square-foot sanctuary accommodating 120 people. The rest of the structure would house a gymnasium, book store, youth outreach facilities, child and adult education classrooms, and church administrative offices.

The hearings officer found that the proposed use was more akin to an office building than a church and therefore could not be located on agricultural land. "Church" was defined under the local code to mean "a permanently located building primarily used for religious worship." The association challenged the hearings officer's finding, asserting that worship must be broadly defined to include missionary work, education, charitable giving, and publication activities.

The Washington Court of Appeals found that the hearings officer had rightly considered the physical appearance of the proposed structure, the relationship of the sanctuary to the overall size of the church, the association's stated intent to serve a five-state region rather than a local congregation, and the fact that two of the three floors would be dedicated to administrative work. The court further found that denying the proposed use did not violate the Establishment Clause or the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, because the association had failed to show that the prohibition placed a burden on religion. The association argued that the denial of the proposed building compromised the hierarchical structure of the church and required that it locate the building on a site that would not provide the same visibility or access, and that these effects were substantial burdens on religion. The court did not agree. It determined that denial of a conditional use permit did nothing to alter the church hierarchy and that the church did not adequately show that locating in another area that did not provide the same visibility and access would impose a substantial burden. Therefore, the Free Exercise Clause and RLUIPA were not violated.

Carrie Richter

N. Pac. Union Conference Ass'n of the Seventh-Day Adventists v. Clark County, 118 Wn. App. 22, 74 P.3d 140 (2003).

ARIZONA COURT OF APPEALS NIXES "PRIVATE USE" CONDEMNATION

In *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (Ariz. Ct. App. 2003), the plaintiff landowners contested by way of a special action whether the defendant judge had properly entertained a condemnation action by the City of Mesa. Specifically, the plaintiffs contended that the taking was not for a public use.

The plaintiffs in *Bailey* ran a brake service business. The city had set up a redevelopment area that did not include the plaintiffs' land. However, a hardware store chain later expressed a desire to expand and relocate onto the same street corner where the plaintiffs' business was located, and the city council then expanded the redevelopment area to include the plaintiffs' land and awarded the redevelopment rights to the hardware store and an investment company. The plaintiffs approached the hardware store and investment company, seeking an opportunity to retain their business as part of the redevelopment project. They were unsuccessful. In a memorandum of understanding with the redevelopers, the city agreed to acquire the land and convey it to them.

When the city commenced the acquisition, the plaintiffs claimed that the action violated the public use provisions of the Arizona constitution. When the defendant judge granted an order of immediate possession, the plaintiffs brought this special action. The appellate court accepted jurisdiction for the special action, finding no other available remedy to cure the irreparable harm that the plaintiffs would suffer through the loss of their business.

The plaintiffs complained that the effect of the condemnation action would be to displace them in favor of another private landowner to allow for a private shopping center. The city contended that the area was a gateway to the city's downtown, that aesthetics would be improved, and that job and tax revenues would be enhanced, and argued that a public use was thus realized.

The appellate court construed the state constitutional provision to protect private property interests against improper exercise of the eminent domain power, such as for the private use of another (except in certain limited circumstances not applicable here). The state constitution required the court to determine whether the eminent domain action was truly for a public use. The appellate court found that the trial court had either not undertaken that determination or had applied the wrong standard (*i.e.*, whether there was a "necessity" for the condemnation, for which a deferential standard of review would be applied).

While the plaintiffs contended that any transfer of land to a private party automatically failed the public use test, the city contended that, because the public would benefit, the use was therefore public and automatically passed the test. The court reviewed prior Arizona cases, but distinguished them. The court also rejected two federal cases, holding that the state constitution provides more protection to property owners than the federal constitution.

The court rejected both "automatic" tests proposed by the parties and devised a rule by which, in those cases involving a transfer of land to private parties through eminent domain, the courts must "carefully scrutinize[]" the public advantages of the proposed redevelopment against the constitutional backdrop. 76 P.3d at 903. The court determined that the Arizona "public use" constitutional provision had been taken from the Washington constitution and that decisions from that state were persuasive, though not controlling. A use that created a public benefit was not necessarily equivalent to a public use. The court added that the public benefits must "substantially outweigh" the private character of the end use to pass muster, and listed a number of factors, including the purposes for which the property would be used, whether title would be held by a public entity, whether the property would generate private profit, and whether the use would provide needed public services. Applying these and other factors, the court determined the city had not carried its burden of showing that the use was truly public in nature. The court thus vacated the trial court's order.

Perhaps it was the unique wording of the Arizona constitution that caused the court to make a searching inquiry of the nature of the public use, a determination that most other state courts would not have made. As with judicial review of land use decisions, it appears that courts will exercise more scrutiny if they sense that the processes are being abused.

Edward J. Sullivan

Bailey v. Myers, 206 Ariz. 224, 76 P.3d 898 (Ariz. Ct. App. 2003).

LUBA Cases

LCDC 45-DAY NOTICE

A local government's failure to give DLCD the full 45-day notice required by ORS 197.610(1), and the consequences of that failure, is an issue that continues to evolve under LUBA's jurisprudence. Under that statute, a local government must give DLCD notice of a proposed new or amended land use regulation or comprehensive plan provision at least 45 days before the first evidentiary hearing on the proposal. DLCD in turn notifies persons on its notification list of the proposed regulatory amendment.

Until recently, LUBA and the court of appeals held that failure to give the full 45-day notice was a substantive error that requires a remand to the local government. *See, e.g.*, *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 854 P2d 495 (1993); *Donnell v. Union County*, 39 Or LUBA 419 (2001). But in a series of recent cases, LUBA reexamined these rulings and concluded that a local government's failure to give the full 45-day notice only warrants a remand if this failure prejudiced the petitioner's substantial

rights or was likely to have prejudiced the substantial rights of persons who may rely on DLCD's notice to determine whether to participate in the local proceedings. In *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 658 (2003), LUBA held that providing notice to DLCD 26 days before the first evidentiary hearing did not require reversal or remand. Similarly, in *Donnell v. Union County*, 40 OR LUBA 455, 459–60 n 2 (2001), LUBA questioned, but did not resolve, whether 19 days of advance notice to DLCD was sufficient to avoid remand. *See also OCAPA v. City of Mosier*, 44 Or LUBA 452, 468–72 (2003); *Stallkamp v. City of King City*, 43 Or LUBA 333, 351–52 (2002), *aff'd*,186 Or App 742, 66 P3d 1029 (2003).

LUBA's decision in *Bryant v. Umatilla County*, 45 Or LUBA ___ (LUBA No. 2003-108, Nov. 26, 2003), follows the most recent line of cases and concludes that the 22 days notice to DLCD the county provided did not merit reversal or remand. The petitioner in Bryant challenged the county's adoption of a comprehensive plan amendment that added an aggregate site to the county's resource site inventory. Despite the county's failure to give the full 45-day notice, petitioner appeared and participated in the local proceedings, as did DLCD. Petitioner did not claim any prejudice to his substantial interests as a result of the short notice, nor did DLCD suggest that the short notice prevented DLCD or others from participating in the county's proceedings. On these facts, LUBA concluded that the county's failure to give the full 45-day notice did not provide a basis for reversal or remand.

■ *LUBA APPEAL AND EXHAUSTION REQUIREMENTS*

LUBA's decision in *Comrie v. City of Pendleton*, 45 Or LUBA ___ (LUBA No. 2003-096, Nov. 4, 2003), addresses the "vexing" issues of when local administrative remedies must be exhausted, which local decision may be appealed to LUBA, and the timelines governing a LUBA appeal when a local participant did not receive notice of a decision in time to file a local appeal. 45 Or LUBA at ___ (slip op at 8).

The petitioner appealed the city's approval of ODOT's application to build a bridge and overpass on a highway located within the city limits. The petitioner and two individual petitioner-intervenors are members of the Pendleton Taxpayers Association (PTA), which opposed the application. The petitioner attended the planning commission's February 20, 2003 hearing on the application and, at the beginning of the hearing, offered a prayer that referenced ODOT's application. The petitioner was unable to stay for the duration of the hearing and gave the petitioner-intervenors documents to submit for him, which they did during their testimony. The planning commission approved the application at the conclusion of the hearing. One day later, the city mailed notice of the commission's decision to persons who appeared before the commission, including the intervenor-petitioners. The city did not mail notice to the petitioner, believing that he had not appeared before the planning commission. The petitioner learned of the commission's decision on May 29, 2003 and filed an appeal to the city council within the seven-day local appeal period. The city attorney rejected the petitioner's local appeal on June 9, 2003 on the ground that the petitioner had not appeared before the planning commission and was not entitled to appeal. The petitioner appealed the planning commission decision to LUBA on June 20, 2003.

The city moved to dismiss the appeal on numerous grounds, including that the petitioner had failed to exhaust his administrative remedies and, alternatively, that he had failed to appeal the planning commission's decision within 21 days of the date it became final, as required by ORS 197.830(9). Before answering these questions, LUBA first reviewed some relevant statutes and case law.

In three 1998 decisions, LUBA held that the exhaustion of local remedies requirement in ORS 197.825(2)(a) applies in cases where a local government makes a decision on a "permit" without giving the required notice of decision and right of local appeal. *Dack v. City of Canby*, 17 Or LUBA 1015 (1988); *Pienovi v. City of Canby*, 16 Or LUBA 604 (1988); *Dack v. City of Canby*, 17 Or LUBA 265 (1988). Until the required notice is given, the local appeal period is tolled for persons who were entitled to notice and did not receive it. In 1989, the legislature adopted ORS 197.830(3), which allows a person to appeal a land use decision made without a hearing within 21 days of receiving notice of the decision or within 21 days of the date the person knew or should have known of the decision. Despite the statutory change, LUBA continued to apply the *Dack* and *Pienovi* principles, leaving open the question of how ORS 197.830(3) might affect the time for filing a local appeal where a local government fails to provide required notice to a petitioner. In a subsequent decision, LUBA held that where ORS 197.830(3) applies, a petitioner may appeal directly to LUBA even though the deadling for filing a local appeal has expired. *Beveled Edge Machs., Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

In 1999, the legislature amended ORS 197.830(3) to exclude from the statute's coverage permit decisions made without a hearing, and adopted ORS 197.830(4), which allows these decisions to be appealed directly to LUBA. Based on these statutory changes, LUBA's more recent decisions reflect "a sea change with respect to the options facing a petitioner who belatedly learns of a permit decision made with a hearing due to the failure of the local government to provide that petitioner with required notice of the decision, when the local code or statute provides for local appeal of that decision." 45 Or LUBA at ___ (slip op at 12). Formerly, under *Dack* and *Pienovi*, a petitioner's only viable option was to file a belated local appeal. Under the more recently decided *Warf v. Coos County*, 42 Or LUBA 84 (2002), LUBA's "current view is precisely the opposite" and a petitioner must file a direct appeal to LUBA. 45 Or LUBA at ___ (slip op at 12). LUBA was careful to note that if a local government makes a decision after holding a hearing, ORS 197.830(9) applies (and the appeal must be filed within 21 days of the decision), and

ORS 197.830(3) does not provide an alternative timeline for appeal. LUBA summed up as follows:

> [L]and use decisions appealed to LUBA pursuant to ORS 197.830(3) or (4) are not subject to the ORS 197.830(2)(a) exhaustion requirement, absent circumstances . . . where the local government voluntarily grants a local appeal. Land use decisions appealed to LUBA pursuant to ORS 197.830(9) are subject to the exhaustion requirement. Even in circumstances where the local government failed to provide required notice of the decision to petitioner, petitioner must perfect any local appeal from that decision. Conversely, the local government must accept an otherwise properly filed local appeal, and cannot reject that appeal on the basis of an imperfection that is caused by the local government's own procedural failure.

45 Or LUBA at ___ (slip op at 13–14).

Applying these principles to the facts of this case, LUBA concluded that because the city held a hearing and the petitioner appeared at the hearing, the petitioner was required to exhaust available local appeals and could not appeal the planning commission's February 20, 2003 decision directly to LUBA. Unless the petitioner's notice of intent to appeal (NITA) could be construed to appeal the June 9, 2003 letter rejecting his local appeal, his LUBA appeal must be dismissed. The NITA mentions both the February and June decisions. However, LUBA determined that the February decision is the "clear subject" of the NITA and the June decision is cited only to support petitioner's argument that the February decision did not become final and appealable until the June decision rejected his local appeal.

Nevertheless, LUBA acknowledged that identifying the decision appealable to LUBA was "no trivial undertaking," and elected to treat the NITA as appealing the June decision because it was the only decision that could be appealed. 45 Or LUBA at 17 (slip op at ___). As a result, the only remaining issue was whether the city had correctly rejected the petitioner's local appeal. Because LUBA had previously resolved a standing challenge in the petitioner's favor, LUBA concluded that "the only conceivable outcome of the present appeal is to remand the city's June 9, 2003 decision to the city, to provide petitioner with the local appeal to which he is entitled." 45 Or LUBA at ___ (slip op at 19).

■ *LUBA JURISDICTION*

In *Friends of Linn County v. City of Lebanon*, 45 Or LUBA ___ (LUBA No. 2003-057, Sep. 25, 2003), the question before LUBA was whether a city resolution that increased 228 different city fees, including the fee to appeal a planning commission decision to the city council, is a fiscal decision that is exempt from LUBA review.

In a prior decision, *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002), LUBA determined that the county's increase in appeal fees was a statutory land use decision because it concerned application of the county's zoning ordinance, even though the increased fee had not been codified in the code. Under *Yamhill County*, the key questions are "whether the challenged appeal fees 'concern' the application of a land use regulation; and . . . whether they are an integral part of the zoning code provisions governing the processing and review of land use applications." 45 Or LUBA at ___ (slip op at 6) (quoting Yamhill County, 43 Or LUBA at 273). In dicta in *Yamhill County*, LUBA suggested that the answer to the jurisdictional question might be different if a fee increase for land use appeals was part of a comprehensive ordinance changing fees for a wide variety of county services. LUBA commented that "treating such a decision as a land use decision might take on a tail-wagging-the-dog character that could support a different result." 43 Or LUBA at 275.

Acknowledging that the city resolution challenged here presented the question left open in *Yamhill County*, LUBA concluded that the resolution was a land use decision and overruled the dicta in *Yamhill County*. Contrary to LUBA's suggestion in *Yamhill County*, when a county bundles together land use appeal fee changes with other non-land use fee changes, the jurisdictional question does not depend on whether the appeal fee increase is a small or large component of the decision. Accordingly, LUBA held that "[g]iven the integral role appeal fees play with respect to land use reviews and citizen involvement, we see no reason to decline to review a decision regarding land use appeal fees that is otherwise subject to our jurisdiction, simply because the challenged fee is bundled with a large number of other fee changes, most of which do not touch on land use matters." 45 Or LUBA at ___ (slip op at 8). Because the petitioner's appeal was directed at the appeal fee increase adopted in the resolution, LUBA held that the resolution was an appealable land use decision.

LUBA went on to reject the petitioner's substantive challenge to the merits of the appeal fee increase, holding that the county's decision was supported by substantial evidence.

Kathryn S. Beaumont

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

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