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Highlights

Article — Condemnation

LEGISLATURE CHANGES CONDEMNATION CODE IN TWO KEY AREAS

The Oregon Legislature last year enacted two key changes to the condemnation code that went into effect earlier this year and are now codified in ORS Chapter 35. The first, House Bill 3372, gives condemners (both public and private) the ability to temporarily enter property before a condemnation action is filed to conduct surveys and environmental testing. The second, House Bill 3371, requires condemners (again, both public and private) to give only a single 40-day prefiling offer rather than separate 20- and 40-day offers. Both changes have important practical benefits for agencies and utilities acquiring property through eminent domain.

Environmental Testing. Although some agencies had survey rights before the recent changes, the ability to conduct invasive environmental testing under the prior survey and inspection provisions was less clear. *See* Or Laws 2003, ch 477. Because a property's environmental condition is relevant to compensation under Oregon substantive valuation law and might affect an agency's decision whether to proceed with an acquisition, the changes enacted under House Bill 3372, which are now codified at ORS 35.220, offer an important practical tool to condemners. *See generally ODOT v. Hughes*, 162 Or App 414, 419–20, 986 P2d 700 (1999) (discussing the relevance of a property's environmental condition to its valuation in condemnation).

Under ORS 35.220(1), condemners may enter, survey, and conduct "tests upon and take samples from" real property that is subject to their condemnation authority. Under that same provision, the condemner must give notice of its intent to conduct testing, and may actually conduct testing only with the consent of the property owner or through a court order. ORS 35.220(2), in turn, establishes an expedited procedure for a condemner to obtain a court order by filing a petition in circuit court. The court may establish terms governing the inspection and sampling and may direct the condemner to pay compensation either before or after the inspection. Compensation may be awarded under ORS 35.220(3) for both physical damage caused during the inspection—including "any damage attributable to the diffusion of hazardous substances found on the property"—and for any "substantial interference" with the property's possession or use caused by the inspection. ORS 35.220(4), however, prevents double recovery by excluding damages for which payment has already been made under the inspection provision from any subsequent condemnation award. Finally, ORS 35.220(5) appears to reserve potential tort claim liability for other acts conducted during an inspection.

40-Day Offer. ORS 35.346(1) long contained a requirement that a condemner serve an offer on a property owner at least 20 days before filing a condemnation action. In 1997, the legislature enacted a number of significant reforms to the condemnation process—including a requirement that a prefiling offer remain open for at least 40 days, which was codified at ORS 35.346(4). *See* Or Laws 1997, ch 797. That led to confusion over whether condemners were subject to a single 20-day offer that had to remain open for 40 days, a 40-day offer that incorporated both the 20-day period outlined in ORS 35.346(1) and 35.346(4), or a combined 60-day period before a condemnation action could be filed. On time-sensitive projects, the differing interpretations had significant practical import.

The legislature clarified the prefiling offer requirement by amending ORS 35.346(1) to mirror ORS 35.346(4) and create a single 40-day offer requirement. *See* Or Laws 2003, ch 476. The requirement that an appraisal report accompany offers of $20,000 or more remains. ORS 35.346(2). Although ORS 35.348 allows condemners to dispense with the 40-day waiting period (but not a prefiling offer) in an emergency, the new unified 40-day offer provision in ORS 35.346(1) will, as a practical matter, govern almost all project-related condemnations.

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Appellate Cases—Takings

■ NINTH CIRCUIT UPHOLDS SAN FRANCISCO HOTEL CONVERSION ORDINANCE AGAINST TAKINGS CLAIM

In *San Remo Hotel L.P. v. San Francisco City and County*, 364 F.3d 1088 (9th Cir. 2004), the plaintiff challenged as an unconstitutional taking a hotel conversion ordinance that imposed a monetary fee as a prerequisite to allowing the conversion of residential hotel space to tourist commercial. The plaintiff lost its case in the California courts and then pursued a federal takings claim, which had been reserved. The federal district court found that the state court adjudication had been an "equivalent determination" of the federal takings claims, and, under *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), and *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), the plaintiff was barred from relitigating the matter.

Beginning in 1979, the defendant required a permit to convert residential units to tourist hotel units. In 1981, the city adopted an ordinance requiring such conversions to be offset by the construction or rehabilitation of an equivalent number of units or the payment of a fee to the city's residential Hotel Preservation Fund Account. The city also required a land use permit to establish a tourist hotel in its North Beach area. Because a previous hotel lessee had mistakenly listed all of the units as residential (as opposed to some of them being tourist units), the plaintiff could not operate a tourist hotel without a conditional use permit. The city's land use decision makers approved the permit with conditions requiring the plaintiff to pay a fee and offer lifetime leases to long-term residents. The plaintiff filed a state court action, which was stayed, and then brought a civil rights action, alleging that the conversion regulations would constitute a facial, and as-applied, taking.

The trial court originally abstained on the facial claim and determined that the as-applied claims were unripe. The plaintiff then returned to state court to litigate (unsuccessfully as it turned out) those claims. However, the plaintiff specifically reserved its federal takings claims for the federal courts under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 420–21 (1964).

The California Supreme Court found the state constitution's takings clause to be somewhat more protective than its federal counterpart, but otherwise construed the two clauses consistently. The court found no taking in any event. With respect to the plaintiff's facial claim, the court found that (1) neither *Nollan* nor *Dolan* applied to the housing conversion fee, which was imposed through an ordinance of general applicability, and (2) the fee bore a reasonable relationship to the intended use and also was proportional to the perceived problem. The court also rejected the plaintiff's as-applied claim, ruling that the fee was reasonably based on the units reported as residential in 1979.

Following the state court adjudication, the federal district court found the facial claim barred by the statute of limitations and also found that no as-applied challenge could be made to this fee of general applicability. Alternatively, the district court found all claims barred by issue preclusion, and the Ninth Circuit affirmed the district court's decision on this basis.

The Ninth Circuit reviewed only the issue preclusion matter and applied a de novo standard. The court rejected the plaintiff's contention that an involuntary detour for state court adjudication should not preclude relitigation of the takings claims in federal court. The court distinguished claim preclusion (which bars the relitigation of claims that were raised or could have been raised) from issue preclusion (which bars the relitigation of issues that have been actually or necessarily decided). The plaintiff's reservation under *England* was sufficient to avoid claim preclusion; however, the issue was whether or not it was also sufficient to avoid issue preclusion under the *Dodd* cases. The court held that it was following Ninth Circuit precedent by finding that issue preclusion applied and rejected a Second Circuit case, *Santini v. Connecticut Hazardous Waste Management Service,* 342 F.3d 118 (2nd Cir. 2003), to the contrary.

The court said that issue preclusion (or collateral estoppel, as it is known in California) applies whenever the substantive law of takings under the California and federal constitutions are "similar," the issues are identical, and there was a final judgment on the merits against a party against whom issue preclusion is asserted. The court found all of these criteria satisfied, noting particularly the parallels between judicial interpretations of the California and federal takings clauses and the Ninth Circuit's previous rejection of the applicability of *Nollan* and *Dolan* to monetary exactions. The court also pointed to the United States Supreme Court decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999), in which the Court said that it had not extended *Nollan* and *Dolan* beyond real property dedications. Because the California Supreme Court had properly applied federal takings law when it dealt with this case under the takings clause of the California constitution, issue preclusion applied and the district court's decision was upheld.

This case is consistent with the two *Dodd* cases and suggests that if state and federal takings law are equivalent, federal courts will not revisit federal takings claims resolved in state court adjudications, even if the federal claims were reserved under *England*.

Edward J. Sullivan

San Remo Hotel L.P. v. San Francisco City & County, 364 F.3d 1088 (9th Cir. 2004).

■ *LAKE OSWEGO EXACTION WITHSTANDS* DOLAN *CHALLENGE*

In *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 193 Or App 24, 88 P3d 284 (2004), the Oregon Court of Appeals, hearing the case for the second time, determined that a condition imposed by the City of Lake Oswego was not an unconstitutional taking under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Costal Commission*, 483 U.S. 374 (1987).

In 1993, the City of Lake Oswego issued a permit to Hallmark Inns & Resorts, allowing Hallmark to develop its corporate headquarters. A condition of approval in the development permit required Hallmark to grant easements to the city for public walkways and bikeways. Hallmark initially agreed to the condition, and from early 1994 to 1996, the area remained open to the public. In 1996, after incidents of vandalism, Hallmark fenced off the easement area, prohibiting public access. Subsequently, the city cited Hallmark for failure to comply with the condition of approval. Hallmark challenged the city's enforcement action before LUBA. The case was appealed to the court of appeals, remanded to LUBA, and appealed again.

On appeal from LUBA's decision, the court of appeals held that, regardless of the fact that the city had once vacated the easement area, the city had a legitimate interest in promoting connectivity and safe and convenient nonvehicular traffic in the area. The court then determined that, consistent with administrative rules providing for optimum trip length for cyclists and pedestrians, the city had demonstrated an essential nexus between the required dedication and the city's interest.

Finally, with respect to the city's findings regarding the rough proportionality between the required dedication and the impact of the development, Hallmark argued that the city's assessment of the impact improperly relied on the projected occupancy of the development. The court compared the present case to *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), and distinguished it from *Schultz v. City of Grants Pass*, 131 Or App 220, 884 P2d 569 (1994). The court determined that the city's impact findings were correctly based on the potential use of the facility rather than its actual use, because no further permit applications or developments would be required in order for Hallmark to make full use of the facility. The court also made particular note of the fact that the need for the pathway was directly related to the development itself because the development created an impediment to the flow of traffic. In addition, the court observed that Hallmark's contribution to the need for the pathway was greater than its neighbors', but that Hallmark's dedication contributed less than its neighbors to the pedestrian and bicycle transportation system.

While this decision does not establish new takings law, it is a fresh application of Oregon takings law and it provides a thorough analysis of the issues.

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Hallmark Inns & Resorts, Inc. v. City of Lake Oswego, 193 Or App 24, 88 P3d 284 (2004).

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■ NINTH CIRCUIT AFFIRMS INVALIDATION OF HAWAII RENT CONTROL STATUTE ON TAKINGS GROUNDS

Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), involved an appeal of a federal district court judgment striking down a Hawaii statute that prescribed the maximum rent that oil companies could collect from their gas station lessees.

The Hawaii legislature, reacting to the concentration of economic power in gasoline wholesalers, which it tied to high prices at the pump, regulated the maximum rent that a wholesaler could charge to a gas station lessee. The plaintiff, one of two gas refineries in Hawaii, sold most of its gas through leases with 64 station owners. From 1984 to 1996, the plaintiff relied on estimates of gas sales to calculate its rent, but changed its rates in 1997 to a progressively escalating percentage of each dealer's gross margin on actual sales. The Hawaii legislature then limited the rents. The plaintiff filed suit against various state officials, claiming a regulatory taking because the statute had allegedly failed to substantially advance a legitimate state interest.

Both sides moved for summary judgment, and the plaintiff prevailed before the district court. In a previous decision, the Ninth Circuit generally affirmed, but remanded the matter for a determination of factual issues, and later denied the defendants' petition for rehearing. *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1033 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001). On remand, the trial court determined the factual issues in favor of the plaintiff, and once again invalidated the statute. The defendants appealed.

On appeal, the Ninth Circuit found that two of the three arguments presented by defendant were barred by the "law of the case" doctrine. In its prior denial of reconsideration, the Ninth Circuit had already rejected the defendants' arguments that (1) the Due Process Clause of the Fourteenth Amendment, rather than the Fifth Amendment Takings Clause, should be the standard, and (2) the district court had misapplied the "substantially advance" test.

The court also rejected application of the various opinions in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998) (which was decided after the first Ninth Circuit decision in this matter), in which four Justices found a taking under the Fifth Amendment; four Justices found the Fifth Amendment inapplicable and used a due process standard, finding no constitutional violation; and one Justice used the Due Process Clause and found a violation thereof. *Apfel* was an adjudication of medical benefits under a federal coal mining act. The Ninth Circuit found this case not on point as it focused upon the economic impact of the regulation (which was not an issue in this case) rather than the "substantially advance" test. The Ninth Circuit characterized Apfel as having no precedential value and noted later United States Supreme Court cases in which the "substantially advance" test was used.

Moreover, the Ninth Circuit declined to use a more deferential standard that the state contended should apply: whether the legislature "could have believed" that its actions substantially advanced a legitimate state purpose. The court held that a reasonable relationship must be established between a legitimate public purpose and the means chosen to effectuate that purpose, and that the means would be examined under an "intermediate level of scrutiny" of review, which was more stringent than the rational basis standard urged by the state, though less stringent than the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 375 (1994). The court pointed to *Nollan v. California Coastal Commission*, 483 U.S. 25 (1987), which it said rejected the rational basis test in favor of more exacting scrutiny. Other cases which appear to use the rational basis test involve physical takings, which the court distinguished from the present situation.

Turning to its review of whether a legitimate state interest was substantially advanced in this case, the court affirmed the trial court's findings that the effects of the legislation would be to raise gas prices at the pump, and to allow lessees to sell off their interests at a premium. The defendant said that a primary purpose of the legislation was to promote the viability of lessees without regard to gas prices; however, the court said these contentions were manifestly at odds with the stated purpose of the legislation, as well as the gist of the testimony on remand. While the court said it would defer to the goal set by the legislature, it found that that goal was consumer price stability for consumers and that the beneficial effect on lessees was a means to that goal that could be tested by the courts. The court also concluded that lessees would capture an increment when leases were transferred and that gas prices to consumers would not fall. The trial court decision was thus affirmed.

Judge William Fletcher dissented. After stating that if the proper standard of review were indeed "substantially advance," he would affirm, Judge Fletcher added that that test was not the proper one to be used. Rather, Judge Fletcher felt that a "reasonableness" test should apply. In particular, Judge Fletcher focused upon the admission of the plaintiff's expert that a dealer premium would not occur. Moreover, there was no authority, according to the dissent, for use of the "substantially advance" test, which Judge Fletcher suggested now applied to all rent control ordinances and regulations as a result of the majority's holding. Although these regulations may be, in individual cases, inefficient and unfair, they may not necessarily be unconstitutional.

This is a troubling case that places judges in the position of deciding the adequacy of legislation. The ghost of economic substantive due process may be rising from the grave.

Edward J. Sullivan

Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004).

■ U.S. SUPREME COURT APPLIES ADA TO STATE AND LOCAL GOVERNMENTS

Tennessee v. Lane, 124 S. Ct. 1978 (2004), involved the application of the Americans with Disabilities Act of 1990 (ADA) to state courtrooms. The majority opinion, authored by Justice Stevens, noted that the provisions of the ADA would normally apply to such cases.

The ADA provides in part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Plaintiff Lane and another paraplegics brought this federal action in 1998, alleging violations of the ADA by denial of access to, and services in, the state court system. Lane stated he was forced to crawl upstairs to get to a courtroom to respond to a criminal complaint because there was no elevator. When he refused to crawl or be carried, he was cited for willful failure to appear. Another plaintiff stated that she was a court reporter who could not gain access to courtrooms.

The defendant state argued that the suit was barred by the Eleventh Amendment. The United States appeared in response to the state's constitutional defense. The trial court denied the state's motion to dismiss and a divided Sixth Circuit Court of Appeals affirmed. The Supreme Court granted Tennessee's certiorari petition.

In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), the Supreme Court previously found that private money damages actions for state violations of Title I of the ADA are barred under the Eleventh Amendment. Later, the Sixth Circuit, in a case not related to the instant action, interpreted Garrett to bar private ADA suits against states based on equal protection principles, but not suits based on due process principles. *Popovich v. Cuyahoga County Court*, 276 F.3d 808, 811–16 (6th Cir. 2002).

The majority found that the ADA specifically abrogated state immunity, purportedly pursuant to Congress's powers under Section 5 of the Fourteenth Amendment. However, the majority also cited *City of Boerne v. Flores*, 521 U.S. 507 (1997), in which the Court found that the Religious Freedom Restoration Act of 1993 exceeded Congress's Section 5 powers. The Court also noted that it had recently upheld the application of the Family and Medical Leave Act of 1993 against a Section 5 challenge in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), as a means of combating unconstitutional sex discrimination through prophylactic legislation. Boerne demonstrated the limits of Congress's Section 5 powers: Congress may not work a substantive change in the governing law, and Congress's remedy must be congruent and proportional to the injury to be prevented. The Court noted that it had applied this test in finding the Violence Against Women Act unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000). In Garrett, Title I of the ADA failed this test when the Court found that the record did not support the remedy in state employment cases because there was no showing of widespread unconstitutional state employment practices.

The Court noted that the ADA seeks to treat similarly situated persons alike and that discrimination not based on a rational relationship to a legitimate governmental purpose would fail that test. In addition, the ADA protects access to the courts, implements the Sixth Amendment's Confrontation Clause, preserves certain rights associated with criminal cases, provides the right to have a jury representing all sectors of the community, and protects access to civil proceedings, and all of these rights are protected under the Due Process Clause and various substantive provisions of the federal Constitution. The court found that this prophylactic remedial legislation was necessary to prevent harm, reasonable, and congruent and proportional to a documented problem. According to the majority, especially prominent in the legislative history was the failure of state and local facilities, especially courts, to be accessible. This alone distinguished this case from *Hibbs*. The Court concluded that access to courts could be enforced under the ADA consistent with Section 5 of the Fourteenth Amendment. The court also found that Congress's remedy was reasonable because it only required reasonable modifications that would not "fundamentally alter" the nature of the services provided. 124 S. Ct. at 1993. Stronger measures need be taken only if these initial measures are unsuccessful. The majority analogized the ADA's modifications to accommodations that must be afforded to indigent parties in family-law and criminal cases.

Justice Souter, joined by Justice Ginsburg, concurred, noting that the Court had not authorized a "blunt instrument[]" to cure social ills as it had done in *Buck v. Bell*, 274 U.S. 200 (1927), which sustained implemention of the "quondam science of Eugenics." 124 S. Ct. at 1995.

Justice Ginsburg, joined by Justices Souter and Breyer, also concurred, saying that the ADA, which calls on all levels of government to respect the dignity of individuals, is "entirely compatible" with a commitment to federalism. *Id*. at 1996. Justice Ginsburg disagreed with Justice Scalia's view that Section 5 of the Fourteenth Amendment requires a showing of a history of constitutional violations by a particular state before Congress may use federal legislation against that state. Ginsburg also noted that the record in this case justified the ADA's application to public facilities and services nationwide.

Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, dissented, based on a perceived inconsistency of the majority opinion with *Garrett*. Under *Garrett*, congressional action must be an appropriate remedy for constitutional violations, rather than a substantive redefinition of the legal obligations of states. The dissent went on to say that courts assure *Garrett*'s limitation by requiring congressional action to exhibit "congruence and proportionality" between the injury to be prevented or remedied and the means chosen, and suggested that the majority effectively ignored recent precedents interpreting Section 5.

This dissent argued that the legislative record lacked evidence of a history and pattern of denial of court rights by

state and local government, and suggested that the majority resorted to a wide-ranging study of societal discrimination against the disabled in the context of an as-applied constitutional test. The dissent noted that this approach had been rejected in *Garrett*. The dissent found the majority's evidence to be anecdotal and from state judicial opinions, rather than from the congressional record sought to justify the remedy challenged here. The dissent also found no inherent due process violation in not providing accessible courtrooms and found no congruence or proportionality in the provision of special damages and accommodations for the handicapped.

Justice Scalia also dissented, speaking for himself, and said that the flexible Necessary and Proper Clause determined in most relevant cases whether legislation was "appropriate" under Section 5 of the Fourteenth Amendment. Justice Scalia added that the court had devised the "congruence and proportionality" test in *Boerne* to prevent Congress from rewriting the Bill of Rights using Section 5 of the Fourteenth Amendment, but he had misgivings over the use of such a malleable standard, which places the Court in the role of "taskmaster" to Congress, "regularly check[ing] Congress's homework" to assure that Congress has established sufficient constitutional violations and that the remedy is congruent and proportional, a test which Justice Scalia suggested had no basis in the Constitution. 124 S. Ct. at 2009.

Justice Scalia went on to review the text of Section 5, which allows Congress to "enforce" the provisions of the Fourteenth Amendment through "appropriate legislation," and suggested that one does not enforce access to the courts by requiring access to all state services, programs, or activities and that no enforcement may be done if the right is not in the Fourteenth Amendment in the first place. Justice Scalia also suggested that the history and purpose (though not the words) of the Fourteenth Amendment are directed against racial discrimination. For reasons of *stare decisis*, Justice Scalia said he would apply the more liberal "necessary and proper" test to deal with racial discrimination cases under Section 5 but would require a history of constitutional violations in order to apply congressional legislation against the states in other types of cases. He also said he would abandon the "congruence and proportionality" test because of its malleability.

This case is less about access to the courts than the interpretation of Section 5 of the Fourteenth Amendment. As the Court reevaluates federalism, whether the Constitution requires a record of abuse of constitutional rights before Congress may act under Section 5 and whether the courts may review congressional actions under a standard of "congruence and proportionality" that is not found in the Constitution are fair questions. These issues may well be revisited in one of the RLUIPA cases now winding its way up to the Big Court in the Sky.

Edward J. Sullivan

Tennessee v. Lane, 124 S. Ct. 1978 (2004).

■ OREGON COURT OF APPEALS UPHOLDS STATUTORY-BASED ADVERSE POSSESSION CLAIM

In *Manderscheid v. Dutton*, 193 Or App 9, 88 P3d 281 (2004), the Oregon Court of Appeals affirmed the trial court's judgment quieting title to property that the trial court concluded the plaintiffs had acquired by adverse possession. Because the plaintiffs' claim vested after January 1, 1990, the case was decided under the adverse possession statute, ORS 105.620. This case stands as one of the few that have upheld an adverse possession claim under the statute.

As with most adverse possession cases, the facts are critical to the decision. The defendant acquired 40 acres of rural land in 1977. In 1980, the defendant divided the property into four smaller units and sold the southernmost lot (lot 2000), which was approximately nine acres in size. The defendant retained lot 1900, which is located north of lot 2000. At the time of the sale, lot 2000 contained a mobile home that straddled the boundary line between lots 2000 and 1900. The mobile home was serviced by a septic tank that was located on lot 1900. The new owners of lot 2000 erected a fence around the perimeter of the lot. The fence encroached roughly 200 feet onto lot 1900 along the full width of the lot. The dispute involved the property located within the legal boundaries of lot 1900 but enclosed within the fence.

In 1988, the Haags acquired lot 2000. When they purchased the property, they assumed that the fence was consistent with the property boundaries. From 1989 to the spring of 1997, the Haags grazed approximately 60 goats, a few cows, and several pigs within the fenced area. They used the garden and septic tank in the disputed area and hauled in truckloads of manure for the garden. The Haags also improved the fences. In 1997, the Haags discontinued the grazing of goats and began boarding horses. The horses grazed for most of the year, but there were periodic interruptions of two to three months during the time of the year when pasturing was not possible. The Haages also placed a second mobile home on the property, which, like the first, straddled the boundary line between lots 1900 and 2000.

The Haags sold lot 2000 to the plaintiffs on March 1, 2000, informing them that the property consisted of all of the land within the fence. However, the plaintiffs soon discovered that the actual boundary line was different than the fence line. The plaintiffs then sued to quiet title to the area between the northern boundary line of Lot 2000 and the northern fence line. The trial court entered judgment for the plaintiffs.

In her appeal, the defendant made three arguments that the court of appeals addressed. First, the defendant argued that the plaintiffs had failed to prove that their predecessors, the Haags, had made continuous use of the property for the requisite ten years. Specifically, the defendant argued that the periodic two-to three-month interruptions in the Haags' grazing of horses between 1997 and 2000 showed that the plaintiffs' use had not been constant. The defendant contended that under *Hoffman v. Freeman Land & Timber LLC*, 329 Or 554, 994 P2d 106 (1999), adverse use must be constant.

In *Hoffman*, the Oregon Supreme Court explained that continuous use of property requires that it be "constant and not intermittent." 329 Or at 560. However, as the court of appeals explained here, the supreme court in Hoffman qualified its statement in situations involving the use of property for grazing of livestock to require "continuous use during the pasturing season." *Id.* at 560–61. The court of appeals also cited *Terry v. Timmons*, 282 Or 363, 578 P2d 405 (1978), which held that continuity of use may be satisfied by intermittent grazing so long as it is consistent with the nature of the property. The use required is that of an average owner of the property in question.

The court of appeals noted that the property used by the Haags for grazing was dry, rocky, and not irrigated, and therefore permitted limited pasturing. Consistent with *Hoffman* and *Terry*, the court of appeals found that the Haags' grazing use, including the temporary interruptions, was consistent with the nature of the property and did not interfere with the continuity of the Haags' possession of the property.

The defendant next argued that the plaintiffs' evidence of livestock grazing alone was not enough to carry their statutory burden because ORS 105.620(2)(b) provides that, "[a]bsent additional supporting facts, the grazing of livestock is insufficient to satisfy the requirements of subsection (1)(a) of this section." ORS 105.620(1)(a) sets forth the familiar common law elements of actual, open, notorious, exclusive, hostile, and continuous possession of property for ten years.

The court of appeals rejected the defendant's argument, finding that the plaintiffs' claim did not rest alone on the evidence of grazing. Additional supporting facts sufficient to meet the statutory standard included the Haags' occupation of the mobile home, the use of the septic tank, the tending of the garden, fence maintenance, and the addition of the second mobile home.

Finally, the defendant argued that the plaintiffs had failed to meet the additional statutory burden under ORS 105.620(1)(b) to show that their predecessors, the Haags, occupied the disputed property with a reasonable and honest belief that the property was theirs. ORS 105.620(1)(b) requires in part that an adverse possession claimant prove that the person occupying the land held a reasonable and honest belief for the entire 10-year vesting period that the person owned the property, and that the belief had an objective basis and was reasonable under the particular circumstances. Specifically, the defendant argued that a reasonable person should have known that the total area used by the Haags (roughly 14 acres) was larger than the stated acreage of Lot 2000 (nine acres). The court of appeals rejected the defendant's argument, concluding that the defendant had not shown that "as a matter of law, the parties' belief about the extent of the property that they purchased lacked an objective basis and was unreasonable." 193 Or App at 16.

H. Andrew Clark

Manderscheid v. Dutton, 193 Or App 9, 88 P3d 281 (2004).

Appellate Cases—Land Use

■ COURT OF APPEALS ADDS GLOSS TO PRACTICAL EFFECT REQUIREMENT FOR STANDING UNDER UTSEY

The Oregon Court of Appeals' decision in *Just v. City of Lebanon*, 193 Or App 132, 88 P3d 312 (2004), applies the Court of Appeals' closely divided decision in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *rev dismissed*, 335 Or 217 (2003), which changed the standing requirements for obtaining review of LUBA decisions at the court of appeals and the Oregon Supreme Court.

In *Utsey*, the League of Women Voters (League) had complied with the statutory standing requirements for appeal under ORS 197.850, which required it to have been a party to the proceedings before LUBA. The court of appeals dismissed the League's appeal from a LUBA decision, however, because the League had failed to satisfy the additional constitutional requirement to show that the challenged decision would have a "practical effect" on its interests. In *Utsey*, the court of appeals reasoned that (1) the party that invokes the jurisdiction of the court has the "obligation to establish the justiciability of its claim"; (2) to establish that the claim is justiciable, the party "must demonstrate that a decision in this case will have a practical effect on its rights"; and (3) "an abstract interest in the proper application of the law is not sufficient." 176 Or App at 549–50.

Just v. City of Lebanon was a challenge to the city's decision to annex several pieces of property and apply particular zoning designations to those properties. James Just appealed four of the annexation and zoning decisions to LUBA, and Friends of Linn County appealed a fifth. LUBA remanded because it concluded that the city had failed to meet certain annexation criteria in its comprehensive plan.

On appeal to the court of appeals, the petitioners argued that Just lacked standing because he was appealing the decisions as a statement of principle against the actions of the city. The petitioners asserted that his personal interests were not adversely affected and that the city's decision had no practical effect on his rights, and therefore, he lacked standing under *Utsey*'s practical effect requirement. The court of appeals held that (1) *Utsey*'s justiciability requirements for standing do not apply to proceedings before LUBA; (2) *Utsey* does not apply to a respondent on review in the court of appeals who therefore does not need to establish that a decision would have a practical effect on his interests in order to establish standing; but (3) *Utsey does* apply to a person who files a *cross-petition* in the court of appeals who therefore *does* need to demonstrate that the decision will have a practical effect on his interests in order to have standing.

On the first issue, LUBA held that the justiciability requirements for standing articulated in *Utsey* did not apply to proceedings before LUBA. LUBA cited *Central Klamath County CAT*, 41 Or LUBA 524, 527 (2002), which held that standing before LUBA is determined by ORS 197.830 (a person who appeared before the local government may petition

LUBA for review) rather than the practical effect standard discussed in *Utsey*. The petitioners in *Just* argued that even though LUBA is an executive branch agency, it exercises judicial review functions and adjudicatory powers just like a court, so the justiciability requirements articulated in *Utsey* should apply to LUBA. LUBA rejected the petitioners' argument and the court of appeals agreed, stating that LUBA is not a court in which the state constitution has vested judicial power, and therefore the justiciability principles described in *Utsey* do not apply to LUBA.

The court also rejected an alternative argument by the petitioners that ORS 197.805 provides that LUBA's decision be made "consistently with sound principles governing judicial review" and that LUBA has cited that statute as providing authority to apply the mootness doctrine, which the petitioners asserted is simply the requirement that the practical effect on a person's rights be present throughout the pendency of the entire case, and therefore part of the same general principle as justiciability. The court found that "consistently with" indicates that LUBA may modify sound principles of judicial review or choose not to apply certain principles to ensure that its decision is compatible with specific statutes and principles governing LUBA's review. The court analyzed ORS 197.830, which outlines standing requirements to appeal to LUBA that vary depending on the circumstances: in some situations, a person must be aggrieved or adversely affected, and in others a person must file a notice of appeal and have appeared during the local proceedings. Therefore, the court found that the petitioners' interpretation of ORS 197.805 (as requiring practical effect) would have the effect of adding a requirement to ORS 197.830(2) that the legislature did not impose.

On the second issue, the court held that under *Utsey*, only the person invoking the jurisdiction of the courts must establish that a decision would have a practical effect on him or her, and therefore Just, as the respondent on review, need not establish that the decision would have a practical effect on him.

On the third issue, on the motion to dismiss Just's cross-petition based on his failure to meet *Utsey*'s practical effect requirement, the Court of Appeals held that *Utsey* applied and that Just lacked standing to pursue his cross-petition because he had not demonstrated that a decision would have a practical effect on his interests.

In four companion cases decided the same day as the instant case, *Just v. City of Lebanon* 193 Or App 121, 88 P3d 307 (2004); *Just v. City of Lebanon*, 193 Or App 155, 88 P3d 936 (2004); *Just v. City of Lebanon*, 193 Or App 159, 88 P3d 937 (2004); and *Friends of Linn County v. City of Lebanon*, 193 Or App 151, 88 P3d 322 (2004), the court of appeals also upheld LUBA's decision that the city had erred in failing to require that a specific development proposal be presented before annexation could occur. The city had an annexation policy that provided that "[u]nless otherwise approved by the city, specific development proposals shall be required for annexation requests on vacant land adjacent to the city to [e]nsure completion within a reasonable time limit in conformance with a plan approved by the city." The city interpreted the phrase "unless otherwise approved" to allow the city discretion to defer the submission of a specific development proposal until after the annexation. LUBA rejected that interpretation by relying on the city's urban growth management agreement with the county, which permits applicants to receive specific development approval from the city before annexation. Additionally, several annexation comprehensive plan policies anticipate that the city will consider the impact of a specific development proposal on public facilities and whether the development and annexation will foster "orderly and efficient growth of the city." Applying the rule that it must affirm the city's interpretation of its own ordinance unless "that interpretation is inconsistent with the express language of the ordinance, considered in its context, or with the apparent purpose or policy of the ordinance," *Neighbors for Livability v. City of Beaverton*, 178 Or App 185, 190, 35 P2d 1122 (2001), the court of appeals agreed with LUBA's conclusion that the city's interpretation was inconsistent with the text and context of the pertinent portion of its plan, and therefore affirmed LUBA's remand.

Editor's Note: *Both Just and the Oregon Department of Land Conservation and Development (DLCD) sought review by the Oregon Supreme Court. On July 27, 2004, the Oregon Supreme Court granted their petitions for review. In a press release, the Supreme Court summarized the questions presented by Just and DLCD as follows: "(1) Whether* Utsey *was wrongly decided; and (2) Whether the Oregon Constitution imposes limits on the authority of the legislature to confer, statutorily, standing to seek judicial review, and whether such statutory standing is sufficient to render a claim constitutionally justiciable."*

John Pinkstaff

Just v. City of Lebanon, 193 Or App 132, 88 P3d 312 (2004).

■ *COURT REINFORCES* UTSEY *JUSTICIABILITY REQUIREMENT*

In *Barton v. City of Lebanon*, 193 Or App 114, 88 P3d 323 (2004), the petitioners (Barton and Friends of Linn County) challenged LUBA's order affirming three City of Lebanon decisions that collectively allowed the siting of a Wal-Mart "superstore." In its first decision, the city amended its comprehensive plan map to change the property's designation from Mixed Density Residential (which would prohibit the Wal-Mart proposal) to Special Plan District. Then, the city annexed part of the subject property and changed the zoning from the county's Urban Growth Management 10-Acre Minimum zone to the city's Mixed Use zone. Finally, the city amended the text of its comprehensive plan to loosen restrictions on commercial development in the vicinity of the subject property. On review, the petitioners challenged the second and third decisions.

The significance of this case lies in the court's comments regarding standing under *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *rev dismissed*, 335 Or 217 (2003). The court explained the standing requirements for LUBA cases on appeal, citing *Just v. City of Lebanon*, 193 Or App 132, 88 P3d 312 (2004), for the following rules:

> (1) The constitutional justiciability requirements articulated in *Utsey* do not apply to proceedings before LUBA. Specifically, a party before LUBA need not demonstrate that the decision will have a practical effect on his or her rights. (2) On judicial review, *Utsey*'s constitutional justiciability requirements apply to the person invoking the jurisdiction of this court and do not apply to respondents on review. (3) Under the holding in *Utsey*—the correctness of which we declined to reconsider—a petitioner on judicial review must demonstrate that a decision will have a practical effect on his or her rights.

193 Or App at 117 (citation omitted).

Here, the court of appeals found that Barton had statutory standing under ORS 197.850(1), but that did not end the inquiry. Notwithstanding the statutory standing, the courts always must determine whether the constitutional aspects of justiciability are satisfied. The court explained that under *Utsey*,

> (1) the party that invokes the jurisdiction of the court has the "obligation to establish the justiciability of its claim," . . . (2) to establish that the claim is justiciable, the party "must demonstrate that a decision in this case will have a practical effect on its rights," . . . and (3) "the case law concerning the 'practical effects' requirement clearly states that an abstract interest in the proper application of the law is not sufficient."

193 Or App at 118 (quoting *Utsey*, 176 Or App at 548–50)).

Because Barton owned a grocery store inside the city and was a competitor of the proposed Wal-Mart superstore, the court found that the decision would have a practical effect on his interests. Accordingly, Barton had constitutional standing to seek review of LUBA's decision.

The court also noted that Barton and Friends of Linn County made the same arguments on appeal. Because, under prior case law, the standing of one party is sufficient to reach the merits presented on appeal, the court declined to determine whether Friends of Linn County had independently established standing.

With respect to the challenge to the comprehensive plan text amendment, the court of appeals upheld LUBA's determination that the city's understanding of its policies regarding highway commercial development was consistent with the policies' text, context, and purpose. The court also rejected the petitioners' argument that the city was not allowed to rezone the subject property during the annexation process, but rather had to conduct a separate process and hearing specifically for the zone change.

Peggy Hennessy

Barton v. City of Lebanon, 193 Or App 114, 88 P3d 323 (2004).

Cases from Other Jurisdictions

■ FEDERAL COURT DENIES TAKINGS CLAIM ON OREGON LAND

In *Seiber v. United States*, 364 F.3d 1356 (Fed. Cir. 2004), the plaintiffs filed a takings claim against the federal government for denial of an incidental take permit (ITP) under the federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544. The plaintiffs owned 200 acres of forest land in Linn County, 40 of which were designated as northern spotted owl habitat. When they applied for a logging permit to the Oregon Department of Forestry (ODF), they were told that a federal ITP was required. The plaintiffs sought review before the Oregon Board of Forestry, arguing that the rules preventing logging should be withdrawn because they constituted a taking. The board denied the request, finding no taking under either the Oregon or United States constitutions. The Linn County Circuit Court found the action not ripe, and the plaintiffs did not appeal. The plaintiffs then requested an ITP, which the United States Fish and Wildlife Service (FWS) rejected because the habitat conversation plan (HCP) was inadequate.

After pursuing administrative appeals, the plaintiffs filed this suit in the United States Court of Federal Claims, alleging a physical taking, a per se regulatory taking by a denial of beneficial economic use, a claim that the ITP constituted a temporary regulatory taking under *Agins v. Tiberon*, 447 U.S. 255 (1980), and a claim that it also constituted a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Subsequently, the FWS did not oppose logging, having determined that the 40-acre tract was no longer inhabited by northern spotted owls. Later, FWS also determined that an ITP was no longer required. The plaintiffs pursued their temporary takings claim nonetheless.

The Court of Federal Claims then found that (1) the takings claim was not ripe, (2) the facts did not give rise to a physical taking (which issue had recently been decided in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002)), and (3) under the "parcel as a whole" rule, a regulatory taking had not occurred. The trial court also found no *Agins* claim, because the protection of spotted owls was a legitimate governmental interest, as was the designation of owl habitat. Finally, the trial court found no *Penn Central* claim, because the plaintiffs had not shown that they were "singled out" to bear the burden of the ESA. The Court of Federal Claims thus granted the government's motion for summary judgment.

The Federal Circuit Court of Appeals reviewed the grant of summary judgment without deference. Citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), the appellate court disagreed with the district court on the issue of ripeness and held that a temporary takings claim was possible in this case. Such a claim may result when an invalid regulation is struck down or discontinued, or when a permit denial is rescinded, or when the governmental decisionmaking process causes

"extraordinary delay." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993), *quoted in Seiber*, 364 F.3d at 1364. The plaintiffs claimed a temporary taking that lasted until the "effective rescission" of their permit denial. The court determined that the initial permit denial was sufficiently final to allow review of the plaintiffs' temporary takings claim.

The appellate court upheld the trial court's rejection of the physical takings claim, as it had done in *Boise Cascade*, and found nothing in the more recent United State Supreme Court decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), to change this result. Similarly, the court upheld the government's position on the *Agins* claim, finding the protection of spotted owl habitat to be a legitimate governmental interest, whether or not that interest had been administered evenhandedly or not. The court also upheld the trial court's ruling that the plaintiffs had not been denied all economically viable use of their property. While finding such a claim possible, the court applied the "parcel as a whole" rule that all lawful economic use of the entire property must be deprived before a takings claim could be made. The plaintiffs contended that every tree is a separate property interest; however the court found no such authority under federal takings jurisprudence for such an approach. Finally, the court rejected the plaintiffs' *Penn Central* claim, finding that there had been no showing of economic injury. The trial court decision was thus affirmed.

This case provides the latest thinking on regulatory takings claims. While the outcome may be satisfying to public land regulators, the holding that the FWS decision was final is disturbing.

Edward J. Sullivan

Seiber v. United States, 364 F.3d 1356 (Fed. Cir. 2004).

■ *TEXAS SUPREME COURT FINDS TAKING IN ROAD CONSTRUCTION REQUIREMENTS*

In *Town of Flower Mound, Texas v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620 (Tex. 2004), the defendant town sought review of a Texas Court of Appeals decision finding a taking when the town required the plaintiff to comply with its ordinance and construct full concrete road improvements for two town roads adjacent to its site. The plaintiff requested, and was denied, an adjustment to the town's requirement. The plaintiff claimed a taking under both the federal and Texas constitutions, and also sought relief under the federal Civil Rights Act of 1871. The trial court awarded damages for the costs of road construction not necessitated by traffic from the subdivision and granted attorney and witness fees under the federal Civil Rights Attorney's Fees Awards Act of 1976. The case involved three questions: (1) whether the plaintiff could build the improvements and then seek compensation after completion, (2) whether the town's imposition of the construction requirements amounted to a taking, and (3) whether the plaintiff was entitled to attorney and witness fees.

The plaintiff built a 247-lot subdivision on 90 acres adjacent to two town roads. As part of its subdivision approval, the town ordered the plaintiff to replace one of the roads, which was composed of asphalt, with a concrete road without public financial participation. The previous asphalt road was not in disrepair and the town made no rough proportionality determination, pointing instead to its ordinance requirement. The plaintiff built the road and then sued for its costs as a taking. The trial court awarded 87.8% of these costs as damages, plus attorney and witness fees and interest.

The court of appeals directly or indirectly rejected the town's contentions that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), do not apply to legislative acts, nor to nondedication requirements. The court of appeals found that the town's discretionary exceptions process for road construction requirements detracted from the town's contention regarding legislative acts. The court also viewed the state takings clause to be roughly equivalent to the federal clause and its case law. The town also claimed that the systems development charges it imposed did not measure up to the true impacts of traffic. The court of appeals upheld the trial court's holding that the proper calculation for damages was the difference between the plaintiff's actual expenses and the costs that the town could properly have required the plaintiff to make. However, the court of appeals reversed the award of attorney and witness fees because the plaintiff had prevailed on its state constitutional law claim and the federal claims were thus not reached.

Starting with the question of whether the plaintiff could construct the concrete road and then sue, the state supreme court struck down the town's public policy argument that courts should have required plaintiff to sue over the condition prior to constructing the improvements and building its subdivision. The supreme court said that public policy is reflected in statutory law, which does not require such an approach and noting that the only contrary state court authority was based on specific statutes. The court said that it was not inclined to impose such a rule by decision and noted that the plaintiff had objected to the cost at every opportunity and that the town was well aware of the plaintiff's position.

The state supreme court noted that the United States Supreme Court has been somewhat unclear in explaining when a regulation amounts to a taking. The town argued that there had been no taking of title or interest in real property, as had occurred in *Nollan* and *Dolan*; however, the court found that a requirement of street construction is like a dedication and did not read those cases, nor subsequent United States Supreme Court cases, to prohibit such a determination. The court noted a split among state courts on the issue, but decided to side with those states in which a taking can be found for non-dedication exactions. The court added that shifting the burden to the government to justify exactions is not particularly onerous and prevents unfair leveraging of the police power to extract benefits to which the town was not entitled. However, the court also said that determining when a regulation amounts to a taking is not an exercise in drawing bright lines, but rather a case-by-case determination, con-

cluding, "For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The *Dolan* standard should apply to both." 135 S.W.3d at 639–40.

Further, the supreme court rejected the town's argument that *Nollan* and *Dolan* are based on the legislative/quasi-judicial distinction, although it did note that most state courts have made that distinction. But the Texas Supreme Court said it was not convinced, finding that, while adjudicative acts are more likely than general legislation to constitute takings, it is "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Id.* at 641. Further, the court noted that the discretionary exceptions process which was used here may have taken the decision out of the legislative process. The court concluded that the bottom line was whether the plaintiff had been forced to bear burdens that should have been borne by the public as a whole, and stressed the need for an "'individualized determination'" of rough proportionality. *Id.* at 643 (quoting *Dolan*, 512 U.S. at 391).

Finally, the court applied the rough proportionality test to the facts of the case and noted that, while concrete roads may well be better than asphalt roads, the question was whether the regulations were "roughly proportional" to the impacts of the plaintiff's development. The court said that the previous road was in good shape; the approval of the application resulted in a minimal increase in traffic; and the the town's factoring in of its discounts in the plaintiff's impact fees was a post-hoc rationalization to justify an argument that the plaintiff had not carried its fair share of the costs, which the court rejected.

The court concluded that the costs imposed did not achieve rough proportionality. Because the regulation was applied to effect a disproportional burden on the plaintiff and the town had not challenged the calculations of damages by the lower courts, the decisions of the trial court and in the court of appeals were affirmed.

The Texas Supreme Court also affirmed the court of appeals' denial of attorney and witness fees, noting that these are allowed only for successful federal claims. Because the plaintiff had prevailed on its state constitutional claims, it was not entitled to those fees.

This is an important case in which a state court found a regulatory taking claim arising out of a general law construction requirement. While Texas may be a minority on these points, it is hard to feel sympathy for the town, which seemingly gouged the developer and unsuccessfully attempted to avoid the consequences of its actions.

Edward J. Sullivan

Town of Flower Mound, Texas v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004).

■ TO VEST OR NOT TO VEST: WHAT IS THE APPLICATION?

In *WCHS, Inc. v. City of Lynnwood*, 120 Wn.2d 668, 86 P.3d 1169 (2004), the Washington Court of Appeals affirmed the rule that ministerial decisions must be free of discretionary devise: local governments may not exercise discretion during ministerial review, even in determining whether the application requirements are met.

WCHS provides treatment services for persons suffering from chemical dependencies. It sought certification for such a facility in Snohomish County from the Department of Social and Health Services Division of Alcohol and Substances Abuse (DASA), then sought a suitable location for a treatment facility. WCHS soon found an existing professional building where medical services were permitted. After consulting with the city's planning manager, WCHS entered into a lease and submitted a building permit application for renovations required for the facility. WCHS also applied for a business license under the provisions of the city code.

On the very day the building permit application was filed, the city held an emergency meeting to consider an interim ordinance to regulate opiate substitution treatment centers. The emergency ordinance, which would have unquestionably prohibited the WCHS facility from being sited at the chosen location, was adopted and became effective four days later. Because development rights vest in Washington upon the filing of a complete application, the completeness of WCHS's application would determine its ability to proceed.

Even the most objective reader of the court opinion would have to conclude that the city merely sought to prevent a locally unwanted land use (LULU) from being sited within its jurisdiction. The city's code did not include state certification of the facility as an application requirement. Nonetheless, approximately one month after the application was submitted, the city halted processing the building permit and delivered a letter to WCHS's architects, indicating that the business license application was incomplete because it was submitted without DASA's certification of the facility. WCHS sought declaratory relief and damages.

The court posed the question as one implicating vested development rights. The court was obviously troubled by the fact that DASA certification to distribute substitution opiates does not involve review of the structural and safety issues governed by the building code. The court noted that "the purpose of the building code is to ensure that applicable standards and requirements are met in the construction of buildings and improvements." 86 P.3d at 1173. The state certification was simply not relevant to this analysis.

In response, the city argued that the local building official should be afforded discretion in determining which materials would be required for a complete application to vest. The court rejected this argument, calling it "ridiculous." *Id.*

The court noted that the statutory process for DASA certification includes a requirement that the applicant demonstrate that the facility conforms to local land use rules.

Therefore, according to the court, the city's proposal to require DASA certification in the land use application would place the applicant in a "Catch-22" scenario. To avoid such a scenario, the court focused on the application at hand. Issuance of a building permit is not a discretionary decision. To be valid, an ordinance must clearly and unambiguously notify the applicant of the application requirements, and must provide some level of certainty on how to vest an application. The court rejected the city's efforts to establish hurdles and moving targets as obstructions to vesting. The court did not address the question of whether the DASA process, requiring compliance with local land use regulations, was similarly defective.

Finally, the city argued that WCHS should be precluded from seeking declaratory relief. According to the city, WCHS's failure to appeal the city's letter informing WCHS that its application was incomplete meant that WCHS had not exhausted its administrative remedies. However, the court noted that the duty to exhaust arises only with the issuance of an order that is "clearly understandable as a final determination of rights." 86 P.3d at 1174. Although an agency letter can qualify as final and appealable, in this case, the city's letter did not comply with the notice requirements for final decisions found in the city's code. In addition, the city's position that the letter should have been appealed was undercut by a subsequent letter from the city attorney claiming that the application had not been denied, but only deemed incomplete. The court found the city's actions "unclear, inconsistent and noncompl[iant]," and therefore insufficient to constitute an appealable final order. *Id*. at 1175.

Keith Hirokawa

WCHS, Inc. v. City of Lynnwood, 120 Wn.2d 668, 86 P.3d 1169 (2004).

■ ACTION TO AVOID PUBLIC CALAMITY IS NOT A COMPENSABLE TAKING

In *In re 14255 53rd Ave. S.*, 120 Wn. App. 737, 86 P.3d 222 (2004), the Washington Court of Appeals determined that the Takings Clause in the state constitution did not require compensation to the owners of trees destroyed to avoid a beetle infestation.

The citrus longhorned beetle is a major pest of citrus and other fruit and ornamental trees. In August 2001, three beetles were found in imported maple tree bonsai stock in a Tukwila nursery. The stock had eight beetle exit holes, so the Washington State Department of Agriculture presumed therefore that five beetles had escaped. It convened a "Science Advisory Panel," which determined that the only effective way to respond to the exposure was to destroy the potential host trees within a 1/8-mile radius of the nursery. Governor Locke proclaimed an emergency in June 2002, and the Department of Agriculture established a $100,000 fund for the purchase of replacement trees and other vegetation. The three landowners who brought the case claimed that they were entitled to compensation before their trees could be destroyed and that their trees were valued at $116,262, $4,430, and $17,215 respectively.

The Department of Agriculture sought administrative warrants to gain entry to the landowners' properties. The superior court granted the warrants, but also ruled that the destruction of the trees constituted a compensable taking and conditioned issuance of the warrants upon the landowners first being compensated. To obtain the warrants immediately, the Department negotiated a stipulation with the landowners whereby it would be able to appeal "the subjective issues regarding takings and the timing of compensation," but would not challenge the amount of compensation.

The court of appeals started its analysis with the presumption that not every government action that takes, damages, or destroys property is subject to compensation. *See generally Eggleston v. Pierce County*, 148 Wn.2d 760, 768, 64 P.3d 618 (2003).

The landowners claimed that the destruction of their trees was a per se categorical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The court rejected this argument, stating that under *Loretto*, a per se taking occurs only where there is a permanent physical occupation, not where the invasion is temporary or where government action outside the property causes some consequential damage within it. The court cited *Sanguinetti v. United States*, 264 U.S. 146 (1924), which held that flooding that reduces property to "an irreclaimable bog" is a compensable taking, but also that compensation is not due in the case of intermittent flooding that does not destroy the usefulness of the property. The court concluded that destroying the landowners' trees did not reduce the landowners' property to an irreclaimable desert.

The court then decided that the case was better analyzed under the law of necessity. It first distinguished the law of necessity from the law of eminent domain: the law of necessity is not dependent on the sovereign power of the state. The court then rejected all of the plaintiffs' arguments as to why the law of necessity did not apply. In doing so it reaffirmed that the law of necessity applies to property as well as life; that the state need not wait for the catastrophe before taking defensive action; and when the private sacrifices that must be made to defeat a public enemy are not evenly distributed, the constitution will not necessarily compel an equalizing adjustment.

Jeff Litwak

In re 14255 53rd Ave. S., 120 Wn. App. 737, 86 P.3d 222 (2004).

■ GOVERNMENTAL ENTITIES ARE PROTECTED FROM "SLAPP" LAWSUITS

In *Gontmakher v. City of Bellevue,* 120 Wn. App. 365, 85 P.3d 926 (2004), Division I of the Washington Court of Appeals extended protection from strategic lawsuits against public participation (SLAPP) to governmental entities as "persons" under the statute. Such protection is found in RCW 4.24.500–.520. Under this statute, "[a] person who communicates a complaint or information to any branch or agency of federal, state or local government . . . is immune from civil liability for claims based on the communication. . . regarding any matter reasonably of concern to that agency or organization." RCW 4.24.510. A successful defendant in a SLAPP suit is entitled to an award of expenses, attorney fees, and statutory damages. The question in *Gontmakher* was whether a governmental entity qualifies as a "person."

The Gontmakhers applied for a single-family residence. They received building, clearing, and grading permits from the city and proceeded to remove all of the trees from the property. The Gontmakhers subsequently entered into an agreement with a third party to sell a portion of the property, subject to short plat approval. During the pendency of short plat review, the city planner assigned to the case expressed concern to her supervisors about clear-cutting on the property. The planner then contacted the Washington State Department of Natural Resources (DNR) to report the Gontmakhers' activities.

DNR officials issued a stop-work order and six-year moratorium, finding the clear-cutting in violation of the Washington Forest Practices Act, Chapter 76.09 RCW. In response, the city canceled the Gontmakhers' short plat application. However, the Gontmakhers appealed the DNR's decision to the Forest Practices Appeal Board, and the DNR subsequently rescinded the stop work order.

The Gontmakhers sued the City of Bellevue for damages under RCW 64.40.020(2), alleging that the city's contact with the DNR was arbitrary and capricious, unlawful, and in excess of the city's authority. The superior court rendered summary judgment in favor of the city, finding the city immune under RCW 4.25.510, and awarded attorney fees and expenses to the city under RCW 4.24.510 and 64.40.020(2). The award exceeded $71,000. The Gontmakhers appealed.

The appellate court limited the published portion of its decision to the applicability of RCW 4.24.510 to governmental entities. The Gontmakhers argued that protection is limited in the statute to "person[s]," and that the term "person" is limited to citizens able to exercise First Amendment rights. In support of their argument, the Gontmakhers cited sections in the statute identifying the protection of "citizens" and the expressed legislative intent to protect free speech. The court rejected these arguments, responding that while the free exercise of First Amendment rights was certainly a motivation behind RCW 4.24.500–.520, the legislature did not expressly limit the statute's protections to First Amendment purposes. The court also cited RCW 1.16.080, which defines "person"to include "the United States, this state, or any state or territory, or any public or private corporation."

Turning from the statutory language, the court found that public policy strongly supported its decision to extend protection to governmental entities. The court cited DNR's stated reliance on communications from other governmental entities, and emphasized that the statute affords protection only for communications to governmental agencies that are within that agency's areas of concern. The court's direction can be inferred from the decision: regulatory agencies can better enforce their own regulations if communications from other governmental agencies about specific enforcement controversies are protected.

The *Gontmakher* decision appears at odds with Division III's interpretation of SLAPP protection in *Skimming v. Boxer*, 119 Wn.App. 748, 82 P.3d 707 (2004). In *Skimming*, Division III indicated that governmental entities do not qualify as "persons" under the act. However, the *Skimming* court was faced with communications about a citizen to a newspaper by Spokane County's executive officer. The Gontmakher court recognized that the *Skimming* decision did not need to rest on the definition of "person," because the *Skimming* communication was made to a nongovernmental entity, and hence the protection did not apply.

Keith Hirokawa

Gontmakher v. City of Bellevue, 120 Wn. App. 365, 85 P.3d 926 (2004).

■ *ADMINISTRATIVE* RES JUDICATA *AND THE "SUBSTANTIAL CHANGE" RULE*

In *DeTray v. City of Olympia*, 121 Wn. App. 777, 90 P.3d 1116 (2004), the Washington Court of Appeals examined the confines of administrative *res judicata* in the land use context. The doctrine of *res judicata* operates to provide certainty and avoid repetitive litigation over the same subject matter. The doctrine applies when there is concurrence of identity in (1) the subject matter, (2) the cause of action, (3) the parties asserting or litigating the claim, and (4) the quality of the persons for or against whom the claim is made. When the criteria are met, parties are precluded from reasserting claims previously decided.

At issue was DeTray's initial conditional use application (CUP) to develop a 55-unit mobile home park on 13.35 acres, accessed by a 22-foot wide private road. The city's mitigated determination of nonsignificance (MDNS) was issued with conditions that DeTray construct and dedicate (1) an extension for a local pedestrian trail, and (2) a public "local access street."

Detray appealed the MDNS to the city's hearing examiner, who affirmed the CUP approval but added conditions relating to the location of stormwater facilities. The examiner affirmed the pedestrian trail condition and declared the challenge to the road condition moot, because the condition had also been imposed under the CUP standards.

DeTray appealed the hearing examiner's decision to the Olympia City Council, challenging the findings relating to the necessity of the road and trail. However, DeTray withdrew his appeal before the hearing.

Four months later, DeTray filed a "modification" of the CUP application, decreasing the number of mobile units, but increasing the number of overall dwelling units to 98 with the introduction of three 20-unit apartment buildings. The modified application decreased the project size, relocated the stormwater system, and proposed construction and dedication of both the pedestrian trail and public access road as required in the initial approval.

In approving the modification to the CUP, the hearing examiner adopted the prior decision and incorporated the conditions from the prior permit. DeTray appealed to the city council, raising all of the previously abandoned challenges relating to the pedestrian trail and public road access, and additionally arguing that such conditions were improperly crafted exactions under RCW 82.02.020 and federal takings law. The city council dismissed the appeal on the grounds that DeTray's failure to appeal the 2001 MDNS precluded a subsequent challenge. The city council further found that the second application was not a "substantial change" warranting relief from the *res judicata* effect of the hearing examiner's prior findings.

The appellate court affirmed the city council's decision. In fashioning its holding, the court navigated its way between *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995), and *Davidson v. Kitsap County*, 86 Wn. App. 673, 937 P.2d 1309 (1997), both of which addressed the precedential effect of prior land use decisions on the applicant's ability to challenge prior decisions in subsequent, amended applications.

According to the *DeTray* court, under *Hilltop* and *Davidson*, a new application can be considered only if (1) it makes "significant changes to the proposal" and (2) the changes are "relevant to and and resolve the disputed conditions in the previous application." 90 P.3d at 1122. On the other hand, "if changes in the second application (for essentially the same land use project) do not resolve, or at least mitigate the original application's disputed condition(s), then the second application's changes are not 'substantial.'" *Id.*

Applying *Hilltop* and *Davidson*, the court found that the increased density of the revised project *exacerbated* the access deficiencies, and that DeTray had not made qualitative changes aimed at ameliorating the *need* for the disputed conditions. Hence, although the changes DeTray made to the application may have been significant, and although those changes did meet the conditions of the 2001 decision, it was not proper to revisit the prior conditions.

Keith Hirokawa

DeTray v. City of Olympia, ___ Wn. App. ___, 90 P.3d 1116 (2004).

■ LAKE TAHOE LANDOWNERS AND DEVELOPERS LOSE ANOTHER ROUND

Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 311 F. Supp. 2d 972 (D. Nev. 2004), involved a challenge to the defendant's scenic review system for limiting the scenic impacts of new construction and remodeling on the shorelands of Lake Tahoe. This system requires development within 300 feet of the lake to blend in with the environment, rather than stand out. The greater a project blends in with the environment in terms of shape, color, bulk, screening and the like, the greater square footage is allowed. Repair and maintenance of existing structures are generally exempt.

The plaintiff filed suit, alleging that the defendant lacked the authority to adopt the scenic review system ordinance; that the ordinance was not based on substantial evidence; that the defendant was required to prepare an environmental impact statement (EIS), that the ordinance effectuated a taking; that the ordinance was arbitrary, unreasonable, vague, and ambiguous; and that it violated the First Amendment to the federal Constitution.

The defendant filed a motion to dismiss. At the oral hearing on the motions to dismiss, the court dismissed most of the claims but reserved judgment on the "closer" claims.

The first issue was whether the defendant was authorized to adopt the challenged regulations. The court noted that it was limited in its review to whether the regulations were arbitrary, capricious, lacking in substantial evidentiary support, or not authorized by law. Among other things, the plaintiff alleged that the problems remedied by the challenged ordinance were the result of the defendant's previous actions; however, the court cut short that argument by stating that the defendant was under a statutory duty to review the regulations periodically. If the defendant made mistakes in the past, it may correct them in the revised regulations. To do otherwise would prevent agencies from curing past practices now seen as inappropriate.

Similarly, the court rejected the plaintiff's contentions that land use and design are exclusively local issues, given the language of the interstate compact creating the defendant and its congressional enabling legislation. The challenged requirements reflected a regional concern for the preservation of the lake. Under the regulatory scheme, local governments must enact regulations of equal or greater level to those of the defendant. Given the number of local government officials who sat on the advisory and governing bodies, the court found no failure to coordinate with affected local governments.

The court also found no unlawful intrusion into local fire protection and safety measures by regulations requiring landscaping and screening. The regulations expressly require landscaping and screening plans to abide by local fire protection standards. The court also found that the defendant had consulted with local fire protection agencies and had sought their comments in framing the regulations.

The court then turned to the claims that the challenged ordinances were arbitrary, capricious, and lacked substantial evidentiary support. The court determined that the enabling legislation requires findings to justify regulatory action. The court found the defendant's findings to be adequately supported by substantial evidence in the supporting reports.

The court then rejected the plaintiff's contention that the defendant had failed to prepare an environmental impact statement (EIS), noting that such a statement is required only if the action or regulation would have a significant impact on the environment. The defendant found no such impact and the court found that finding to be supported by substantial evidence.

The court also rejected the plaintiff's regulatory taking claims. The court characterized the plaintiff's challenge as "facial" and found no deprivation of all economically beneficial use under *Agins v. Tiberon*, 447 U.S. 255 (1980), so it turned to the Penn Central factors. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). While the plaintiff alleged substantial economic impact, the court said that the history of regulation in the Lake Tahoe Basin resulted in a continuing expectation of design regulation so that there could be little in the way of investment-backed expectations to the contrary. The court noted that the claims were made on a facial level and that *Penn Central* is geared to an as-applied analysis. Finally, because the action included regulatory action rather than a physical invasion, the third factor of *Penn Central* weighed in favor of the defendant. The court concluded that the *Penn Central* takings test was not violated on a facial level.

The court then turned to the first prong of *Agins*: whether the regulation was substantially related to a legitimate governmental interest. The plaintiff conceded that the interest was legitimate but contended that that interest was not substantially advanced by the challenged ordinance. The court, however, held that there was a reasonable relationship between the intended ends and the regulatory means chosen.

The court also rejected the plaintiff's contentions that the challenged regulations were arbitrary, vague, and ambiguous by noting that the defendant had provided a reasonable opportunity for the plaintiff to understand what was permitted and what was prohibited, and had provided several guideposts and differing levels of review and procedure, depending upon the project at issue. These opportunities negated the possibility of arbitrary and discriminatory enforcement of the provisions of the regulation, especially in light of the plaintiff's failure to point to specific processes or regulations that it contended did not meet a vagueness test.

Lastly, the court considered the plaintiff's First Amendment facial challenges to "patently expressive or communicative conduct" by finding that the plaintiff had not established that the construction or remodeling of housing implicates such conduct. The ordinance at issue was not aimed at limiting or prohibiting self-expression, but rather was neutral and of general applicability. On its face, the challenged ordinance was not found to violate the First Amendment. As to the plaintiff's overbreadth challenge, the court found that the ordinance did not significantly compromise recognized First Amendment protections and found no loss of expressive conduct. The court applied the same analysis to the plaintiff's vagueness claim.

The court thus granted the defendant's motion for summary judgment on the basis that the plaintiff had failed to state claims on which relief could be granted; however, it allowed 60 days for the plaintiff to file an amended complaint, if that were possible.

This is the second time in recent history in which opponents of the Tahoe Regional Protection Agency brought facial claims and lost them. This case illustrates once again how difficult it is to win a facial claim and that if constitutional claims are to be won, it requires that specific cases be brought for specific situations. There is usually no quick fix to remedy a policy disagreement.

Edward J. Sullivan

Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972 (D. Nev. 2004).

APA PLANNING AND LAW NEWSLETTER

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