



OREGON REAL ESTATE AND LAND USE DIGEST

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

25th Anniversary Issue

Vol. 26, No. 5 • October 2004

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The Digest at Twenty-Five

Twenty-five years ago the newly formed Real Estate and Land Use Section of the Oregon State Bar instituted a publication to inform its members of changes and developments in these fields of law. The publication, commonly known as the "RELU Digest," was to apprise members of case law developments in the courts (as well as the Land Use Board of Appeals, which came into being at about the same time as the *Digest*) and of statutory and rule changes, and also to provide a forum for members to expound their views. In all of this the *Digest* has succeeded admirably.

Aside from past editorial participation by the section officers, the *Digest* has maintained an editor in chief, two associate editors, and an assistant editor. In its twenty-five years, there have been only three editors in chief: Pat Randolph, who left after a few months to take a teaching position in Missouri; the late and well-remembered Larry Kressel, who managed to edit the journal and be a LUBA referee for much of his fifteen years as editor in chief; and Kathryn Beaumont, who continues and enhances the work of her predecessors. Other than section officer participation, there have only been three associate editors during the same period: the late Frank Josselson, Alan Brickley, and yours truly. Traditionally, the assistant editor position was filled by law students and changed every year or two as the students completed their education. More recently, the editors have engaged Nathan Baker in lieu of a rotating student position. Mr. Baker has long passed his student years and is now an active, practicing attorney.

The *Digest* appears five or six times a year. The end product belies the considerable effort involved in its production. The editors, particularly the assistant editor, monitor Oregon appellate, federal, and LUBA cases, and assign them to a collection of talented writers who volunteer to "digest" these cases and provide appropriate commentary. Similarly, the editors work with the Section's legislative committees on real estate and land use to summarize legislative developments for members. On occasion, the *Digest* is favored by an article or commentary to discuss some aspect of the law. And over the years, readers have been delighted by Larry Kressel's humor in explaining "Fasanology" or otherwise skewing the foibles of the law in the mythical city of La Tush, Oregon.

As with food, the delight of the *Digest* is not in its assembly and presentation, but in its consumption. Editors, like chefs, attempt to prepare the best combination of exposition and commentary on real estate and land use material, with an occasional opinionated article thrown in, to provide instruction and delight for the reader.

Continuing the dining analogy, it is the reader (like the diner) who rules. The *Digest* has no other justification for its existence and continuation than the approbation of its readers. The Section's Executive Committee is currently considering whether to add a new format to the *Digest*, i.e., whether it should transform itself into an electronic publication completely or whether it should exist as both a print and an electronic publication. Section members should consider these questions and convey their opinions to the Executive Committee. Electronic publications were unknown when the *Digest* was founded, but are common today. The editors look forward to these and other changes in the next quarter century in our efforts to delight and inform the *Digest's* readers.

Edward J. Sullivan is an owner at the Portland office of Garvey Schubert Barer and is an original Associate Editor of the RELU Digest.

Edward J. Sullivan

Appellate Cases—Real Estate

■ LENDERS IN MORTGAGE TRANSACTIONS CAN SEEK RECOVERY UNDER BONDS

In *American Bankers Insurance Co. v. State of Oregon*, 337 Or 151, 92 P3d 117 (2004), the petitioners, Robert and Sandra Graf, loaned funds to individuals through the offices of Mortgage One, Inc., an Oregon-licensed mortgage broker. Mortgage One maintained a bond that was supplied by American Bankers Insurance Co. After the loan went into default, the Grafs alleged that Mortgage One had made misrepresentations and sought recovery on the bond. American Bankers received multiple claims against the bond and initiated an interpleader action. The trial court determined that the Grafs were not among the class to be protected by the bond and the court of appeals affirmed. 188 Or App 606, 72 P3d 666 (2003).

The Oregon Supreme Court allowed review and reversed the court of appeals' decision. The supreme court began its analysis of the statute utilizing the principles set out in *PGE v. Bureau of Labor & Industries*, 317 Or 606, 859 P2d 1143 (1993), which essentially require giving the words of the statute "their plain, natural and ordinary meaning." 317 Or at 611. ORS 59.925 (6) provides that "[a]ny person having a right of action against a mortgage banker or broker shall under this section have a right of action under the bond or irrevocable letter of credit provided in ORS 59.850." The court also reviewed ORS 59.925(1) through (3):

- (1) As used in this section, "mortgage banker transaction" and "mortgage broker transaction" mean a transaction in which a person, in order to engage in the transaction, is required to be licensed as a mortgage banker or a mortgage broker under ORS 59.840 to 59.980.
- (2) 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:
 - (a) Transacts business as a mortgage banker or mortgage broker in violation of any provision of ORS 59.840 to 59.980; or
 - (b) Transacts business as a mortgage banker or mortgage broker by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.
- (3) The person suffering ascertainable loss may recover damages in an amount equal to the ascertainable loss.

The court further cited ORS 59.845(1) for the rule that a license is required for anyone who engages in residential mortgage transactions and ORS 59.840(9) for the rule that a residential mortgage transaction is one that involves the creation of a security interest in residential property. Therefore, the terms "mortgage banker transaction" and "mortgage broker transaction" include transactions that create security interests in residential real property.

Applying those principles, the court determined anyone who is harmed as a result of a misrepresentation in a residential mortgage transaction is entitled to claim the bond proceeds. Because the Grafs alleged that they suffered a loss as a result of a broker's misrepresentation that induced them to loan money in a residential mortgage transaction, they were within the protection of the statute, including the right of action on the bond.

Alan K. Brickley

Am. Bankers Ins. Co. v. State of Oregon, 337 Or 151, 92 P3d 117 (2004).

■ COURT OF APPEALS FINDS NO WAIVER OF RIGHT TO PARTITION TRUST PROPERTY

In *McMillan v. Follansbee*, 194 Or App 145, 93 P3d 809 (2004), the Oregon Court of Appeals reviewed the ability of relatives to extricate themselves from a convoluted property trust. The court found that the plaintiffs had not waived their right to seek a partition and that a trust continuation agreement (signed by the plaintiffs, but unperformed) did not change that conclusion.

The case involved the ownership of more than 12,000 acres of timberland in Linn County. The timberland was once owned by two brothers, each with an undivided one-half interest in the property. Through their respective wills, they created separate trusts to be managed as a single unit for the benefit of the family. In general terms, the trust was set up to distribute the undivided interests in the timberland to the grandchildren after the death of the brothers and their daughters, the last of whom passed away in 1999.

In anticipation of the death of the brothers and their daughters, the trustees decided to continue the unified management of the timberland and, to that effect, they requested each of the beneficiaries to sign a continuation agreement that required those who received their distribution prior to 2000 to convey their interests to the trustees and execute a trust agreement for the property. All of the plaintiffs signed the continuation agreement.

Four of the plaintiffs received their distribution in 1996, but they did not convey their interests to the trustees nor sign the trust agreement as required by the continuation agreement. The other two plaintiffs received their distributions after 2000 and, thus, had no obligation under the continuation agreement. No party disputed that the purpose of the original trust and the continuation agreement was to keep the timberland under common management for the benefit of the family.

Unfortunately, significant strife arose among the family members, and the plaintiffs, who owned 24% of the interest in the property, sought to partition the property under ORS 105.205. The trial court denied their request, reasoning that the plaintiffs had waived their rights to seek a partition by signing the continuation agreement. The plaintiffs appealed.

The court discussed case law regarding the right to partition, noting that the right to partition is sometimes described as "absolute," *Maupin v. Opie*, 156 Or App 52, 964 P2d 1117 (1998), but also noted a number of cases where that absolute right had been limited. See, e.g., *Owen v. Zorn Farms, Inc.*, 186 Or App 199, 205, 62 P3d 854 (2003); *Michael v. Sphier*, 129 Or 413, 272 P2d 902 (1928).

Ultimately, the court concluded that the trial court had erred because the continuation agreement had been neither performed nor enforced and therefore had no contractual significance. In addition, because the continuation agreement did not discuss partition or waiver at all, it did not separately constitute a waiver of the right to seek partition. Relying on well-established waiver law requiring "a clear, unequivocal and decisive act" of a party to demonstrate waiver (*State v. Rogers*, 330 Or 282, 4 P3d 1261 (2000)), the court of appeals reversed and remanded.

William Kabeiseman

McMillan v. Follansbee, 194 Or App 145, 93 P3d 809 (2004).

A LA Tush Retrospective

Long-time readers will remember tales of the mythical town of La Tush, Oregon and the antics of its inhabitants, Glen and Nadine Twidley, which occasionally appeared in the *RELU Digest*. La Tush and the Twidleys were created by Laurence (Larry) Kressel, editor of the *Digest* from 1980 to 1997, who used these characters and stories to gently poke fun at the complexities of Oregon land use law and to prevent us from taking ourselves too seriously.

Planning Commissioner Glen Twidley was known as the father of "Fasanology," described as "a tax exempt belief system based on *Fasano v. Board of Commissioners of Washington County*." Nadine Twidley fulfilled various positions and functions, including mayor of La Tush, order filler at the La Tush Press, and director and custodian of Fasanomentia, Inc. In honor of the *Digest's* twenty-fifth anniversary and in remembrance of Larry's sly wit, excerpts of the occasional series "News from La Tush" are reprinted below.

■ *Publications: La Tush Press Publishes Treatise Explaining Commissioner Twidley's Motions*

The scenario is now familiar. It is after midnight at the La Tush City Hall. A tense, five-hour hearing has just ended. Petitioner's request to install yet another diesel-powered chicken plucker and a variable speed tweezer at its process-

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Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 5200 SW Meadows Road, Lake Oswego, OR 97035-0889.

Subscription Price: free to Real Estate and Land Use Section Members, \$24.50 per year for others. To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

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The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

ing plant is finally before the Planning Commission. The chairman calls for a motion. As Commissioner Twidley takes the microphone, anxious attorneys and their clients lean forward to catch each word.

TWIDLEY: I would like to make a motion that we approve this, including the findings and conditions of the Staff, but that we also add a review of the site connected with the structure and landscaping, but put forth in front of the staff for approval, and that in every consideration of scenic acceptability in the area, that if it is financially feasible without due hardships that they can't do it, that it be considered and put in, and that includes the landscaping and the structure, otherwise to be denied as a fasano per the nonconforming use.

McVAPID: O.K., I'll second that.

A victory for petitioner? Or a cleverly disguised zoning defeat? La Tush Planning Commissioner Glen Twidley cogently answers these and other billable questions about his art in an authoritative volume (with annual pocket parts) soon to be published. For further information write Twidley's Motion Sickness, c/o La Tush Press, La Tush, Oregon (attention Nadine Twidley).

■ *Gift Ideas from La Tush: Twidley Publishes Holiday Gift Ideas for Fasanomaniacs*

Glen Twidley Enterprises, Inc., the La Tush, Oregon Mail Order Firm, has published its 1985 catalog of gift ideas for land use fanatics. The publication is available at no charge by writing to Fasanomania, P.O. Box 300 La Tush, Oregon 97800 (Attention: Nadine).

Trivial Disputes: The popular question and answer game about obscure land use issues. Spend hours of holiday fun answering brainteasers like: When should the Statewide Goals be capitalized? and What county planning department adjoins a cemetery? Hundreds more where these zingers come from! The perfect gift for hypercompetitive land use nuts who no longer enjoy normal conversation. (\$30.00, comes in junior, senior and complete-nerd levels).

The Illustrated Joy of LUBA: 100 successful positions taken before Oregon's Land Use Board in recent unpublished cases. An extremely helpful manual. (\$17.50, hard-bound edition mailed in plain brown wrapper).

■ *La Tush Firm Publishes More Gift Ideas for Land Use Nuts*

Bernstein and Springstein: Whole Lotta Zonin' Going On! The maestro and the boss finally team up on an album. Side 1 features Lenny at the ivories and includes his hit rap single "Whither Fasano?" On Side 2, the boss belts out "Born in the UGB" and "Pay for It!," the new rallying call for anti-zoning landowners. And here's an inside secret: the backup group on "Pay for It!" is The Supremes! (\$6.50)

Laptop Reasonable Mind: This new digital item is for attorneys who have difficulty recognizing substantial evidence in land use cases. An alarm sounds and the attractive laptop unit lights up and vibrates to warn of the entry of evidence a reasonable mind would rely on. Frees the attorney to concen-

trate on other matters during own and opponent's presentations. Standard model does not take conflicting evidence into account in warning of reasonableness; super-duper deluxe unit does. Only a few left! (\$1,500 for standard model, \$2,500 for deluxe).

■ *Filmed in La Tush, Raising Fazona Will Delight Land Use Whackos*

Movie buffs who yelled for more after seeing *Fazona the Zoning Enforcer Part I* last year are lining up for the prequel, *Raising Fazona* (see advertisement this issue). The film opens April 1 at the La Tush Downtown Capri.

Raising recalls the formative years of Fazona, the flying protectress of The Code. By day she was a waxer and mint flavorist at the Drive-In Jiffy Floss. By night, Fazona soared above the city, using her infrared fazondetector to check setbacks and expose unsupported findings. What made this wonderwoman tick? Why did she pick zoning for her schtick?

Director Glen Twidley's *Raising Fazona* will tell it all, in color, from the beginning. The film brings back Nadine Twidley (*The Unbearable Vagueness of Headnotes; Honey I Shrunk the UGB!; The Enforcer, Part I*) as the adult Fazona, but the real star is little Baguette Twidley. She portrays the infant Fazona, who mysteriously appears on a La Tush doorstep one night while the town sleeps. Her uncanny knowledge of The Code, even the procedural parts not even grownups understand, immediately makes her the mortal enemy of Thordo the Developer (Merkin Twidley). Thordo hires the evil-hearted Condo (Warren Twidley) to make sure little Fazona doesn't foul up Thordo's plan to build a theme park on Spotted Owl Creek. But Condo is smitten by the adorable baby Zona. He decides to raise her as his own and help her thwart Thordo's terrible theme. Or does He?

Don't miss *Raising Fazona*, A Glen Twidley Production. Subtitled in English for the zoning-impaired. (No discounts or passes.) Coming soon to your neighborhood screen!

■ *Twidley's La Tush Index*

The following index of land use planning facts was compiled by Twidley Research, Inc., La Tush, Oregon. Any similarity to the Harper's Magazine Index is pure coincidence. For sources of data used to compile the index, contact Glen Twidley, Box 1400, La Tush, Oregon 90001.

- Zykovv Believability Rating for La Tush EcoProtecto Gortex Policy Plan, 1989-2000: -50 (score of +50 means "believable").
- Number per thousand of Oregon lawyers who talked about zoning during foreplay in 1970: 2
Same figure for 1989: 253
- Total dry weight of land use findings of fact approved by La Tush City Council, 1970-75: 6 oz.
Same figure for first two weeks in 1990: 1,500 lbs.
- Number of lawyers in 1989 who won a land use case in which they questioned a Commissioner about pre-hearing ex parte contacts: .05

- Average length of City Attorney answer to Planning Commission question when bottom line was “I really don’t know”: 14.5 minutes (data covers 1980-89)
- Times anyone kept track of what was in or out of the record for La Tush Planning Commission hearings in 1989: none.
- Percent of appeals heard by La Tush City Council that supposedly were limited to “evidence in the planning commission record” during same period: 95
- Appearances by Nadine Twidley at side yard variance hearings that were none of her business during first quarter of 1990: 23
- Total numbers of coffee and cookie breaks taken by Oregon planners assigned to do something about adult bookstores in 1989: 16,345 (does not include decaf)
- Percent of teenagers who would rather mow all afternoon than attend a 15-minute land use hearing: 98.8

Appellate Cases—Land Use

■ U.S. SUPREME COURT UPHOLDS ORDINANCE REGULATING ADULT BUSINESSES

In a recent First Amendment Case, *City of Littleton, Colorado v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. ___, 124 S. Ct. 2219 (2004), the U.S. Supreme Court unanimously ruled that the City of Littleton, Colorado’s “adult business” license ordinance did not violate the First Amendment. The Court ruled that the city’s ordinance contained sufficient procedural protections to satisfy the First Amendment’s requirement for prompt judicial review.

The Littleton ordinance requires that all adult businesses apply for an “adult business license.” To comply with the First Amendment, the ordinance contains procedural safeguards requiring that the city make a decision on a license application within a specified definite time period. Furthermore, the ordinance provides that a denial of a license can be appealed to the local state court pursuant to Colorado’s civil procedure rules.

Z. J. Gifts opened a store in a location not zoned for adult businesses. The store sold, among other things, “adult” books. Instead of seeking a license, Z. J. Gifts sued, claiming that the Littleton ordinance was facially unconstitutional because it did not provide for prompt review by a judge. Z. J. Gifts argued, and ultimately the Tenth Circuit agreed, that the ordinance did not contain the required procedural protections described in two key Supreme Court free speech decisions, *Freedman v. Maryland*, 380 U.S. 51 (1965), and *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990).

The Supreme Court reversed the Tenth Circuit, ruling that the Littleton ordinance does contain the procedural protec-

tions required by the First Amendment. The Court noted it had held that the regulations at issue in *Freedman*, which attempted to censor the content of motion pictures, must include First Amendment procedural protections, including a process that ensures a “prompt final judicial decision” in the review of any statutory censorship. Additionally, the Court in 1990 in the *FW/PBS v. Dallas* case had concluded that these same protections were also required for ordinances that regulated adult businesses. That plurality opinion contains language relied upon by the City of Littleton, which argued that any municipal ordinance that regulates adult businesses need only provide for prompt access to judicial review, not necessarily a prompt decision. The Supreme Court disagreed with the City of Littleton, reaffirming that “adult business” regulations need to contain provisions ensuring a prompt judicial decision. However, the Court agreed with the City of Littleton that the city did not need to create a special judicial review process to achieve such a goal. Rather, the Court held that Colorado’s general civil procedures for judicial review satisfied the First Amendment requirement for a prompt judicial determination in licensing cases.

Thus, the Supreme Court has again ruled that government actions, such as licensing requirements that amount to a “prior restraint” of speech, must be adjudicated promptly. However, cities do not need to include special accelerated procedures with two- or three-day time limits in their adult-business-licensing ordinances.

Jack D. Hoffman

City of Littleton, Colorado v. Z. J. Gifts D-4, L.L.C., 541 U.S. ___, 124 S. Ct. 2219 (2004).

■ NINTH CIRCUIT UPHOLDS OREGON’S MASS GATHERING ACT

Southern Oregon Barter Fair v. State of Oregon, 372 F3d 1128 (9th Cir. 2004), arose from a facial challenge to the Oregon Mass Gathering Act, ORS 433.735–.770, 433.990(6) (2001), as a prior restraint on First Amendment rights. The Act requires a permit to conduct outdoor gatherings of more than 3000 people over a continuous 24-hour span (but not exceeding 120 hours within a three-month period). ORS 433.735(1). The Act allows counties to use the permit process to address health and safety burdens and law enforcement concerns. ORS 433.750.

The plaintiff received permits from Jackson County to operate events in 1994 and 1995. However, the county granted a permit the next year only after long delay and pursuant to many conditions. The plaintiff challenged the permitting process authorized by the Act, alleging the following as First Amendment violations: (1) the lack of concrete deadlines for decisionmaking, (2) the lack of prompt judicial review of permit denials, and (3) unbridled discretion for setting permit fees. The state intervened to defend the Act. Upon the state’s motion, the district court dismissed the case, holding that the Act is a valid content-neutral time, place, and manner regulation on free speech. The Ninth Circuit affirmed.

The court surveyed the main precedents. In *Freedman v. Maryland*, 380 U.S. 51, 58–60 (1965), the Supreme Court considered whether a film-licensing regime was an unconstitutional prior restraint on free speech. Such a regime must be upheld where (1) the restraint is imposed for a “specified brief period” pending judicial review, (2) expedited judicial review is available, and (3) the government bears the burdens both of “going to court to suppress the speech” and of proof once it gets there. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (plurality opinion) (citing *Freedman*, 380 U.S. at 58–60). However, in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), the Court refused to apply *Freedman* because the regulation in question was content-neutral.

To the allegations made by the plaintiff, the court applied the exception set forth in *Thomas*. The court found that the Act applies equally to all mass gatherings, without consideration of their expressive content. In addition, it noted that compliance by an applicant with health, safety, and law enforcement regulations triggers automatic approval of the permit; the authority no longer has discretion to deny issuance.

The court went on to reject the argument that the Act allowed unbridled discretion to set permit fees. Without actual evidence of a pattern of abuse, the broad discretion over the amount of the fee did not fail the *Thomas* test. Also, limitation of fees to a county’s “reasonable and necessary costs,” ORS 433.750(6), to process applications and the existence of a \$5000 cap constrained discretion and allowed for effective judicial review.

Southern Oregon Barter Fair affirms the validity of the Oregon Mass Gatherings Act under the First Amendment. For another recent discussion of the Act, see *Landsem Farms, LP v. Marion County*, 190 Or App 120, 78 P3d 103 (2003) (summarized in the Feb. 2004 issue of the *RELU Digest*).

Ty K. Wyman

S. Or. Barter Fair v. State of Oregon, 372 F.3d 1128 (9th Cir. 2004).

■ COUNTY LAND EXCHANGE IS QUASI-JUDICIAL DECISION SUBJECT TO WRIT OF REVIEW BY ADJACENT PROPERTY OWNER

In *Hood River Valley Residents' Committee, Inc. v. Board of County Commissioners of Hood River County*, 193 Or App 485, 91 P3d 834 (2004), the Oregon Court of Appeals held that county approval of a land exchange agreement was quasi-judicial and therefore subject to a writ of review and that an adjacent property owner who used the public property for outdoor recreation had sufficient standing to appeal the decision.

Mt. Hood Meadows and Hood River County entered into a land exchange agreement that would convey 640 acres of county-owned forest land for 785 acres of forest land owned by Mt. Hood Meadows. The agreement was considered and approved consistent with the process for land sale exchange provided for under state law. See generally ORS 275.335. The county commissioners conducted a public hearing on August

20, 2001 and tentatively approved the agreement subject to conditions. The agreement became final on March 11, 2002.

The petitioners, Hood River Valley Residents' Committee, filed a petition for writ of review in circuit court challenging the land exchange agreement on several grounds including compliance with the land exchange statutes and the lack of substantial evidence in the record to support the decision. In reviewing a motion to dismiss the case under ORCP 21, the trial court concluded that the county's decision was not a “quasi-judicial” function and consequently dismissed the case. This appeal followed.

Under ORS 34.040, a writ of review may be filed to challenge a decision that was the product of a “quasi-judicial function” of the local governing body. The factors used in deciding whether a decision is “quasi-judicial” are set out in *Strawberry Hill 4 Wheelers v. Benton County Board of Commissioners*, 287 Or 591, 601 P2d 769 (1979), and include whether (1) the process is bound to result in a decision, (2) the decision applies preexisting criteria, and (3) the decision is directed at a closely circumscribed factual situation or a relatively small number of persons. While these three factors do not amount to a bright-line test, they assure factual accuracy in decisions affecting particular individuals.

In applying this test the court considered first the statutory process governing land exchanges set forth in ORS 275.335. A land exchange requires a public hearing for consideration of whether the subject property is of equal value and whether the exchange itself is in the “best interests of the county.” ORS 275.335(1), (2). As a part of the required public process the county must provide a report from the county assessor and county forester regarding the value of the property.

In considering the first factor under *Strawberry Hill*, the court of appeals concluded that regardless of whether the statutes require a final decision, the county in this case was bound to complete the transaction by way of the land exchange agreement.

Under the second factor, notwithstanding the court of appeals' decision in *Lane v. City of Prineville*, 49 Or App 385, 619 P2d 940 (1980), the court further concluded that the statutes for a land-sale exchange are sufficiently narrow to qualify as a quasi-judicial decision. In *Lane*, the court of appeals dismissed a writ of review challenging the City of Prineville's decision to sell city-owned property and concluded that the statutory standard for approving the sale of property “whenever the public interest may be furthered” was discretionary and does not entail the application of specific criteria to a set of concrete facts. 49 Or App at 389. The court of appeals distinguished *Lane*, concluding that although a transfer must be in the best interests of the county, the hearing process and equal value requirements weigh in favor of a quasi-judicial process.

Finally, the court found that despite the size and scope of the exchange, the specific properties involved were a closely circumscribed factual situation. The court concluded,

We cannot, and will not, pretend that the *Strawberry Hill 4 Wheelers* criteria are exact or that their applica-

tion is certain. Nevertheless, applying those factors, we conclude that the land exchange decision challenged here was “quasi-judicial” for purposes of ORS 34.040 and that the trial court erred in concluding otherwise.

193 Or App at 499.

The county further argued an alternative basis for affirming the decision based on the petitioner’s alleged lack of standing. The county relied primarily on *League of Oregon Cities v. State of Oregon*, 334 Or 645, 56 P3d 892 (2002), for the proposition that a mere land exchange without developing the property has no negative impact on the adjacent property. In reviewing the record the court concluded that the proposal to construct a resort area, including 450 housing units, retail shops, a skating rink, an amphitheater, a golf course, and associated development was plausible and that the petitioner had standing because he specifically alleged how this development would affect the farming operation.

As a final note, the court of appeals denied a request by the county to submit additional evidence regarding standing. While an appellate court may accept evidence that would otherwise render a case moot on appeal (see *First Commerce of America v. Nimbus Center Assocs.*, 153 Or App 561, 567, 958 P2d 850 (1998)), the court in this case reasoned,

[W]e do not understand *Nimbus* to hold that an appellate court is *compelled* to supplement the record and to engage in factfinding in every case in which a party belatedly proffers extra-record materials that purport to controvert justiciability. Rather, *Nimbus* refers repeatedly to the court’s “inherent power”—not obligation—to consider such evidence. The appellate court is to engage in a principled exercise of that “inherent power,” as informed by prudential considerations. Nothing more.

193 Or App at 505.

The court distinguished *Nimbus* on the facts, concluding that the evidence offered in *Nimbus* was not in dispute, while the accuracy and significance of the evidence offered in this case was vehemently in dispute.

Christopher A. Gilmore

Hood River Valley Residents' Comm., Inc. v. Bd. of County Comm'rs of Hood River County, 193 Or App 485, 91 P3d 834 (2004).

■ PLAYING THE FARM PRACTICE CARD

Hood River Co. v. Mazzara, 193 Or App 272, 89 P3d 1195 (2004), discusses the relationship between local government regulation of nuisances and state law that immunizes farm practices from such local legislation.

The appellant was convicted of violating a Hood River County ordinance that prohibits a dog owner from allowing the dog to become a nuisance through frequent or prolonged noises. The county charged that the appellant had allowed her dog to bark, apparently consistently, for roughly six hours, thereby creating a nuisance. The appellant appealed her conviction, arguing on appeal, as she had before the trial court, that the barking of her dogs constituted a farm practice that was immune under ORS 30.935 from the application of

the local government ordinance.

ORS 30.935 invalidates local legislation that attempts to regulate or prohibit acts that might otherwise constitute a nuisance or trespass if those acts also constitute farm practices. ORS 30.935 incorporates the prohibition of ORS 30.936, which bars private causes of action for nuisance or trespass for acts that constitute farming practices and applies the same prohibition to governmental attempts to proscribe such acts. A “farming practice” is defined by ORS 30.930(2) as

[A] mode of operation on a farm that:

- (a) Is or may be used on a farm of a similar nature;
- (b) Is a generally accepted, reasonable and prudent method for the operation of the farm to obtain a profit in money;
- (c) Is or may become a generally accepted, reasonable and prudent method in conjunction with farm use;
- (d) Complies with applicable laws; and
- (e) Is done in a reasonable and prudent manner.

The appellant operated a farm with 60 cashmere and angora goats. The farmland bordered a national forest that was inhabited by predators of the goats, including coyotes, cougars, bears, and bobcats. The appellant utilized her dogs to guard the goats. When they sensed a predator, they would bark until either the predator left or someone came to investigate.

At her trial, the appellant presented evidence of her use of the dogs in her goat-farming operation and argued that using guard dogs for livestock constitutes a farm practice and that the dogs’ barking is an essential element of that use. The trial court, however, rejected her argument. In essence, the court was unwilling to conclude that six hours of dog barking was a reasonable and legitimate farm practice that could not be regulated by the county, at least without some specific evidence that the barking had been provoked by the presence of a predator.

The court of appeals disagreed. It found that the appellant had introduced uncontradicted evidence establishing all the elements of a “farming practice” as defined by ORS 30.930, including testimony by an expert that the appellant’s use of her dogs in her goat-farming operation was a legitimate, reasonable, and prudent farming practice. The court of appeals also pointed out that the county had not introduced evidence that the dogs were *not* reacting to a predator and that once the appellant had introduced sufficient evidence to raise the defense (by meeting the elements of the farming practice definition), it was the county’s burden to disprove the defense. Because the only evidence before the trial court established that the elements of the farming practice definition had been met, the court of appeals found that the county was prohibited under ORS 30.935 from enforcing its ordinance, and reversed the trial court.

H. Andrew Clark

Hood River County v. Mazzara, 193 Or App 272, 89 P3d 1195 (2004).

■ COURT OF APPEALS DISCUSSES INTERIM TRANSPORTATION FACILITY FAILURES

In *Jaqua v. City of Springfield*, 193 Or App 573, 91 P3d 817 (2004), PeaceHealth sought to construct a large regional hospital complex on 99 acres of land in the City of Springfield. The Jaquas, owners of nearby property, appealed to LUBA the city's adoption of two ordinances that amended the regional land use plan and refinement plan to allow for the rezoning of the subject property in order to accommodate the proposed development.

The ordinances redesignated 33 of the 99 acres from "medium-density residential" to "community commercial" (enabling the city to rezone the 33 acres "mixed use commercial") and made possible the future rezoning of the remaining 66 acres to a "medical service" designation. Furthermore, one of the challenged ordinances required the development of a large hospital on the 66-acre area, as well as a master plan review process to consider the future development application for the 99 acres. The ordinances adopted conditions intended to limit traffic impacts and ensure needed public facilities for the development.

LUBA for the most part affirmed the city's decisions, only remanding for findings regarding compliance with Goals 9 and 12. The Jaquas petitioned for review of LUBA's decision and the city and PeaceHealth filed cross-petitions.

The Jaquas challenged LUBA's decision on three grounds:

- (1) LUBA erred in ruling that the ordinances did not violate the Eugene/Springfield Metro Area General Plan's limited authorization for "auxiliary" uses on land designated for residential use;
- (2) LUBA erred in ruling that the proposed hospital complex and associated non-residential uses do not violate statewide planning goals and/or statutes; and
- (3) LUBA erroneously interpreted the Eugene/Springfield Metro Area General Plan not to require the participation of the City of Eugene and Lane County as the other participants of the plan.

In turn, the city and PeaceHealth argued that

- (1) LUBA erred in concluding that the city's findings did not show consistency with the Springfield "Commercial Lands Study" and Goal 9; and
- (2) LUBA erred in concluding that the city misinterpreted the transportation planning rule (TPR) in OAR chapter 660, division 12 by reading it not to require the resolution of the transportation issues until the end of the planning period in 2018.

Addressing first whether LUBA had erroneously excluded Eugene and Lane County from participation, the court explained that while the Metro Plan required participation from Eugene and the county for amendments, the more specific refinement plans were meant to implement the Metro Plans and be "site-specific" in application, and so could be amended by the individual entities. The court found that the ordinances were indeed "site-specific" amendments and, as such, the participation of Eugene and the county was not required.

Returning to the Jaquas' first issue, the city and PeaceHealth claimed that this argument was an impermissible collateral attack on the 1989 ordinances creating the "medical services" and "mixed use commercial" zoning categories. However, the court held that because the petitioners were not challenging the creation of the medical services district but rather the city's decision authorizing its use in this particular case, a "controversy" did not arise until the city made possible the application of the medical services classification to the subject property. Addressing the Jaquas' claim, the court held that under the Metro Plan, medical services districts could be located in residential areas only when they are "auxiliary uses" to the residential areas and so the city was required (by the Metro Plan) to demonstrate that the subject uses qualified as auxiliary to the residential neighborhood. Because "auxiliary use" was not defined in the local land use regulations, the court relied on dictionary-definition analysis to determine that the hospital complex would function in a primary as opposed to a supplementary capacity and so was not an auxiliary use. In analyzing the use, the court contrasted the proposed regional hospital to uses such as neighborhood churches, public facilities, parks, and streets. The court noted that its decision did not outright ban hospitals in residential neighborhoods, emphasizing that a hospital is prohibited only if it crosses over from an auxiliary use to a primary use of a given residential area.

The court briefly rejected the Jaquas' last argument that the ordinances violated Goal 10, and then turned to the cross-petitions of PeaceHealth and the city challenging LUBA's decision that the ordinances were inconsistent with the TPR. In a portion of its decision that has created much buzz among local governments, the court held that the city was required to consider whether the changes authorized by the ordinances would cause or accelerate the failure of any transportation facility within the planning period, even temporarily.

The city had identified numerous traffic facilities that would have been impacted by the development of the hospital complex, but assumed that certain traffic improvements would be made before 2018, the end of the planning period. Making that assumption, the city found that all of the traffic facilities but one would meet performance standards, and imposed a condition to address the one failure.

Arguing that the city could not allow PeaceHealth to wait until 2018 to see that all the improvements were made, the Jaquas claimed that even if a transportation facility fails only temporarily during the planning period, the city is required under the TPR to implement mitigating measures under OAR 660-012-0060(1) until the failure is corrected. The court agreed, reasoning that to hold otherwise would make the provided mitigation measures meaningless.

Ruling that local governments engaging in land use decision making must consider whether transportation facilities accommodate the proposed development, the court held that the TPR is indeed concerned with even temporary facility failures. Thus, while clarifying that under its ruling the TPR does not necessarily require road improvements before land development occurs, the court did hold that any failure (including only a temporary failure) of a transportation facil-

ity qualifies as a significant effect under OAR 660-012-0060(2), requiring the application of the mitigation measures set out in OAR 660-012-0060(1).

Spencer Q. Parsons is an associate attorney with Beery, Elsner & Hammond, LLP in Portland.

Spencer Q. Parsons

Jaqua v. City of Springfield, 193 Or App 573, 91 P3d 817 (2004).

■ *CROSS ON NATIONAL RESERVE VIOLATES ESTABLISHMENT CLAUSE, SAYS NINTH CIRCUIT*

Buono v. Norton, 371 F3d 543 (9th Cir. 2004), is the latest in the seemingly endless series of cases where government insists that a decision to permit one religious faith to maintain a religious display on public property, while denying the same right to another faith, is somehow constitutional. Not surprisingly, this position has once again failed to carry the day.

Buono concerned an eight-foot cross constructed of four-inch white metal pipe atop an outcropping in the federally owned Mojave National Preserve known as "Sunrise Rock." The cross is plainly visible from a secondary road through the Preserve about eleven miles off Interstate 15 in San Bernardino County, California. Private parties originally erected the cross in 1934 and have maintained it since, occasionally denoting the cross as a memorial to veterans lost in World War I.

In a series of appropriations acts from 2002 through 2004, Congress required the Department of the Interior (Department) to swap the land on which the cross sits with a private party in exchange for other nearby property. Congress also, however, required the Department to spend federal funds to rededicate the cross as a veteran's memorial, prohibited federal funds from being used to remove the cross, and directed that ownership of the land will revert to the Department if the private owners no longer maintain the property as a memorial.

At the time of the Ninth Circuit's decision, the cross was still in public ownership. The plaintiffs challenged the presence of the cross as violating the Establishment Clause.

The Department first challenged the action based on "impending mootness." The court quickly rejected this argument, noting that the transfer into private hands might not take place for years, and even so, ownership could revert back to the public at any time. Thus, the Department had not shown that the allegedly wrongful behavior could not reasonably be expected to recur.

Next, the Department challenged the plaintiffs' standing. The court found that one plaintiff alleged sufficient injury-in-fact based on claims that he was a regular visitor to the Preserve, was offended by the presence of the cross, and as a result would avoid the area despite the fact that the nearby road was the most convenient means of access to the Preserve. The Department argued that because the plaintiff

was Roman Catholic, his offense to the cross must have been ideological rather than religious in nature and therefore not protected by the Establishment Clause. The Ninth Circuit disagreed. The nature of the psychological discomfort suffered by the plaintiff was irrelevant; what mattered was that he alleged actual personal injury—the inability to unreservedly use public land—as a consequence of the government's unconstitutional conduct.

Having rejected the Department's procedural arguments, the court turned to the merits of the case and found that the matter was squarely controlled by *Separation of Church and State Committee v. City of Eugene (SCSC)*, 93 F3d 617 (9th Cir. 1996), where a fifty-one-foot-tall concrete cross in a city park was found to violate the Establishment Clause. The Department tried several avenues to distinguish *SCSC*, all without success.

First, the Department noted the relative remoteness of the Sunrise Rock cross, in comparison to the urban location of the *SCSC* cross near government buildings. The court parried, holding that the number of people likely to view the cross was irrelevant to whether it created an appearance of government endorsement of religion, especially because the aura of government ownership is no less strong for a remote national preserve than for an urban park.

Second, the Department opined that a "reasonable observer" would not perceive the cross as being on public property, given the proximity of two private ranches to Sunrise Rock. The court found that a reasonable observer would at least suspect that the cross was public, given that 90 percent of the 1.6 million acres in the Preserve are federally owned and a public campground is located adjacent to the site.

Nearing the bottom of the barrel, the Department then tried the opposite tack, arguing that the "reasonable observer" would be so well-informed as to know the history of the cross as a private endeavor intended to memorialize fallen veterans, not to promote Christianity. Here, the Department felt the point of its own petard. The court noted that such a well-informed observer would no doubt know that the land was actually public, that Congress had prohibited the use of federal funds to remove the cross, and that the Department had recently denied a request by Buddhists to erect their own religious symbol nearby, all facts suggesting that the Department had endorsed the religious message conveyed by the cross.

In the end, this rather pedestrian case affirmed the long-standing principle that "[w]hatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 605 (1989). The cross must come down.

David J. Petersen

Buono v. Norton, 371 F3d 543 (9th Cir. 2004).

■ *FAILURE TO BRING FIRST AMENDMENT CHALLENGES AS COUNTERCLAIMS TO AN ENFORCEMENT ACTION DOES NOT BAR THESE CLAIMS IN LATER SUIT*

In *Maldonado v. Harris*, 370 F.3d 945 (9th Cir. 2004), the Ninth Circuit Court of Appeals held that the district court erred in dismissing plaintiff Maldonado's First Amendment challenges to California's Outdoor Advertising Act (COAA), Cal. Bus. & Prof. Code §§ 5200–5486 (West 2003), on the ground that they were barred on *Rooker-Feldman*, claim preclusion, and ripeness grounds.

Since 1991, Maldonado has owned a commercial building adjacent to U.S. Highway 101 in Redwood City, California. Mounted on the roof of that building is a double-sided billboard. Caltrans is responsible for enforcing California's Outdoor Advertising Act, which generally regulates advertising displays along highways. In 1993, Maldonado applied to Caltrans for a permit to use his billboard for off-premise advertising. That permit was denied because billboard advertisements along landscaped freeways are prohibited unless the advertisement is for products or services offered on the premises. See Cal. Bus. & Prof. Code §§ 5440, 5442.

Despite the permit denial, Maldonado installed off-premise advertising. In 1998, Caltrans brought a state nuisance suit against him. In his answer, Maldonado raised a number of defenses, but he did not raise any arguments regarding the constitutionality of the COAA. After a bench trial, the state trial court entered judgment against Maldonado, including a permanent injunction restricting his ability to post further advertisements on his billboard. Despite the injunction, Maldonado continued to test the COAA's advertising restrictions. He was twice found in contempt of the injunction, and right before filing this case, he posted a number of political and religious signs.

In July 2002, Maldonado filed this action in district court, alleging that the COAA violated the First Amendment on its face and as applied to him. Caltrans moved to dismiss the case on various grounds and the district court granted the motion. The district court found that (1) it did not have jurisdiction over this matter under the *Rooker-Feldman* doctrine (see *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)); (2) any constitutional challenge was barred by claim preclusion; and (3) the claims were not ripe for review. The Ninth Circuit considered each of these issues.

As the court summarized, the basic premise of the *Rooker-Feldman* doctrine is that “a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court.” 370 F.3d at 949 (quoting *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003)). In other words, a federal plaintiff cannot assert a legal wrong in state court, obtain a judgment, and then seek review of the same wrong from a federal court. In this case, the court found that the legal wrong for which Maldonado sought redress was the continued enforcement by Caltrans of the statute against him, not the state court's ruling on the nuisance claim. Thus, the court found that *Rooker-Feldman* did not apply.

Next, the court considered whether Maldonado's claims were barred by claim preclusion under either California's compulsory cross-complaint statute or common law. California's compulsory cross-complaint statute requires a cross-complaint on any related cause of action that arises out of the same transaction or occurrence against the plaintiff. Cal. Civ. Proc. Code § 426.30 (West 1973 & Supp. 2004). The plaintiff in the 1998 nuisance action against Maldonado was Caltrans. The court held that Maldonado could not have filed a cross-complaint against Caltrans under 42 U.S.C. § 1983 because state agencies are not “persons” within the meaning of section 1983. Because Maldonado had no claim of action against Caltrans under section 1983, he was not required to bring a cross-claim in the previous case. In addressing common law claim preclusion, California courts employ the “primary rights” theory. The “primary right” is the salient and indivisible harm suffered by the plaintiff. In this case, the primary right in the nuisance action was not Maldonado's right to advertise on his billboard, but the right of people to be free from obtrusive advertising displays along major highways. Because the primary rights involved in each case were different, Maldonado's claims were not barred.

When considering the issue of ripeness, the court explained that it must consider two different components: a constitutional component and a prudential component. The constitutional component focuses on three factors: (1) whether the plaintiffs have articulated a “concrete plan” to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning, and (3) the history of past prosecution. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc). The court reasoned that although there had been no specific threats of enforcement against Maldonado for his current signs, the fact that an injunction has been entered certainly qualified as a threat of enforcement, and concluded that these factors are met. As for the prudential consideration, the court must look to “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Thomas*, 220 F.3d at 1141. In answering these questions, the court found that nothing else needed to happen for the court to be able to consider these legal issues and that withholding consideration of these issues would require Maldonado to risk being found in further contempt of the injunction.

Finally, the court considered whether the one-year statute of limitations would bar his claim. Because Maldonado filed his complaint in July 2002, he could only pursue those claims that accrued after July 2001 and was barred from challenging application of the COAA to the commercial signs that were at issue during the nuisance trial in the 1990s.

A more difficult question for the court was whether Maldonado's facial challenge of the statute was barred by the statute of limitations. There the court said that it had serious doubts that a facial challenge could ever be barred by a statute of limitations. But it did not need to resolve that question conclusively, because the permanent injunction against Maldonado constituted a continuing enforcement of the statute against Maldonado. Thus, Maldonado could raise a

facial challenge to the statute at any time the injunction remains in force.

For these reasons, the court reversed the dismissal and remanded so that Maldonado's claims could be heard on the merits.

Carrie Richter

Maldonado v. Harris, 370 F3d 945 (9th Cir. 2004).

■ **RESIDENTIAL DRAINFIELD NOT ALLOWED IN ZONE THAT PROHIBITS DWELLINGS, SAYS COURT OF APPEALS**

In *Hodge Oregon Properties, LLC v. Lincoln County*, 194 Or App 50, 93 P3d 93 (2004), a neighboring property owner appealed the county's approval of a conditional-use permit for a nonforest dwelling. The parcel on which the dwelling would be located was zoned part "Timber Conservation" (TC) and part "Planned Marine" (M-P). Dwellings are allowed as a conditional use in the TC zone, but not allowed in the M-P zone. According to the proposed site plan, the dwelling itself would lie within the TC zone, but the septic drainfield would be located in the M-P zone. LUBA remanded the decision to the county, and the court of appeals affirmed LUBA's decision.

Hodge argued that the county could not approve a dwelling with a drainfield in the M-P zone, even if the building itself was not in that zone. The court agreed, reasoning that because the county code defined "dwelling" as a living unit including, among other things, "sanitation," the drainfield providing that sanitation must be considered part of the dwelling. The court rejected the county's argument that the dwelling could be approved because there was no specific prohibition against installing a drainfield in the M-P zone, noting that the county had cited no provision specifically allowing drainfields in that zone.

Hodge's second argument arose from the fact that the county had approved the dwelling with conditions to provide a fire break "as necessary" and demonstrate an authorized source of domestic water. LUBA held these were required criteria, and the county must determine whether they are met prior to approving an application. The court agreed with LUBA's approach, citing its opinion in *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741 (1984), for the proposition that in considering approval criteria the decision maker must find, at a minimum, that it is "feasible" to satisfy the criteria. *Meyer*, 67 Or App 274, 280 n 5.

Michael E. Judd

Hodge Or. Props., LLC v. Lincoln County, 194 Or App 50, 93 P3d 93 (2004).

Appellate Cases— Landlord/Tenant

■ **RELIEF UNDER F.E.D. ACTION ELUSIVE WHEN NO LANDLORD-TENANT RELATIONSHIP EXISTS**

In *Kerr v. Jones*, 193 Or App 682, 91 P3d 828 (2004), the Oregon Court of Appeals held that a co-owner of property could not be evicted through a forcible entry and detainer (FED) action.

Prior to the plaintiff's FED action, the defendant was one of several co-owners of property. Some of the co-owners filed for a partition of the property, and a court ordered the partition. The defendant appealed the partition and continued to occupy the property. In the meantime, the plaintiff purchased the property at a public sale and promptly filed the FED action to gain possession.

The court focused on the defendant's first assignment of error: that the trial court had no authority under the FED statutes to grant possession to the respondent. Citing *Bunch v. Pearson*, 186 Or App 138, 142, 62 P3d 878, *rev den*, 335 Or 422 (2003), the court agreed that possession may only be awarded under the FED statutes when a landlord-tenant relationship is present. *Bunch v. Pearson* held that under ORS 105.110 and 105.115 a plaintiff must establish either a forcible entry or an unlawful holding by force.

The court held that because the defendant had entered the property as a co-owner, he had not entered the property by force. In addition, because ORS 105.115(1) defines unlawful possession in the context of a landlord-tenant relationship, which had never existed between the plaintiff and the defendant, the defendant did not hold the property by force. Consequently, the court reversed the trial court ruling, which had granted the plaintiff possession of the property.

Glenn Fullilove

Kerr v. Jones, 193 Or App 682, 91 P3d 828 (2004).

Cases from other Jurisdictions

■ **NOTICE OF LAND USE CONDITION MUST BE REASONABLY AVAILABLE, SAYS NEW JERSEY COURT**

In *Island Venture Associates v. New Jersey Department of Environmental Protection*, 846 A.2d 1228, 179 N.J. 485 (2004), the New Jersey Supreme Court considered whether a condition placed on a coastal permit issued to the plaintiff's predecessor could be effective against the plaintiff, even if the plaintiff could not, with reasonable diligence, determine that the condition existed.

The condition was imposed in 1998 as part of a coastal permit issued for an 18-lot subdivision, including a marina, and required the applicant to file a deed restriction limiting the use of a certain area to water-dependent purposes. The applicant recorded the restriction, then re-subdivided a portion of the property. The condition was not attached to the partition created as a result of the re-subdivision. In response to a later inquiry, a state regulatory agency said that no further permits were required, and the plaintiff bought two of the lots at auction. The plaintiff secured a title insurance policy, which did not reveal the conditions.

When the plaintiff sought to construct houses on the two lots, the water-dependent nature of the underlying property was then discovered and the plaintiff sought administrative relief. The state agency upheld the restrictions; however, the appellate division reversed.

The state supreme court saw the public policy issue as between the coastal facilities legislation under which the permits were granted and the state's recording legislation. While agreeing that the state had the power to regulate coastal areas and that a permit would be binding on subsequent owners, the court also noted the countervailing concerns of the recording statute. The court noted that a bona fide purchaser without actual or constructive knowledge of the restrictions who made a diligent search for the same was ordinarily not liable to follow those restrictions. While the coastal facilities statute does not require recording, its implementing rules do. The recording statutes were enacted to assure that a record is made of all instruments affecting title or use of real property.

The court identified stability of title as a very important value and determined that it outweighed the goals of the coastal facilities statute. The plaintiff, it explained, had done all it reasonably could have to discover any restrictions, and said that the state had already taken steps to avoid recurrence. The court also noted that the state had relied on the recording statutes in imposing the initial restrictions. Finally, the court said that the state had misinformed the plaintiffs about the restrictions applicable to the property, and concluded, "When there is that much uncertainty or confusion affecting the integrity of land titles, equity requires that an innocent purchaser prevail." 846 A.2d at 1236.

While the result of this case may not be palatable to state and local government interests, it does underline the need to ensure that all property owners are aware of restrictions, particularly when the government controls the imposition of those restrictions.

Edward J. Sullivan

Island Venture Assocs. v. N.J. Dep't of Env'tl. Prot., 846 A.2d 1228, 179 N.J. 485 (2004).

■ *IN WASHINGTON STATE, TRAFFIC IMPACT FEES ARE NOT CONDITIONS OF APPROVAL AND STILL ARE NOT SUBJECT TO THE VESTED RIGHTS DOCTRINE*

In *Pavlina v. City of Vancouver*, ___ Wn. App. ___, 94 P3d 366 (2004), Division II of the Washington Court of Appeals reiterated the holding in *New Castle Investments, LLC v. City of La Center*, 98 Wn. App. 224, 989 P2d 669 (1999), review denied, 140 Wn. 2d 1019 (2000), that impact fees are properly assessed at the time of application for building permits and are not subject to the vested rights doctrine. *Pavlina* adds to *New Castle* that impact fees may be imposed despite the absence of any conditions of approval relating to such fees. Accordingly, the issuance of preliminary site plan approval prior to the adoption of the ordinance authorizing fees did not preclude assessment of impact fees against the project.

In 1988, Clark County approved *Pavlina's* preliminary plat and site plan for development of office buildings. Five years later, *Pavlina's* development site was annexed by the City of Vancouver, and *Pavlina* proceeded to complete the project in accordance with the preliminary approvals. Meanwhile, in 1995 the Washington Legislature adopted RCW 82.02.050, which authorizes local governments to impose proportional impact fees against new development. The City of Vancouver adopted its impact fee ordinance (VMC 20.97.030(C)) shortly thereafter and began collecting impact fees from developers during review of building permit applications.

In 2002, *Pavlina* received final site plan approval, building permit approvals, and an impact fee assessment of \$111,112.00. *Pavlina* appealed the impact fee assessment, arguing that the 1988 preliminary site plan approval was a final land use decision for the purposes of charging traffic impact fees (TIFs), and that the grant of preliminary approval afforded the right to complete the project according to the terms of the approval.

The impact fee assessment was upheld by the court of appeals. Noting that if TIFs were conditions of approval they would be subject to the vested rights doctrine, the court reiterated the *New Castle* holding that TIFs are not "land use control ordinances." Rather, a city may impose impact fees on an approved application even if they were not included as conditions of approval in the preliminary approvals. The court reasoned that affording a developer an unfettered right to complete a project according to the terms of preliminary approval would directly conflict with the intent of impact fee legislation. Because the purpose of impact fees is to mitigate the effects of new development, there is no need to collect fees until projects actually begin to affect public facilities. The court also rejected the argument that TIFs are additional conditions of approval. Conditions of approval are defined narrowly and include only requirements that affect the physical aspects of the development or the types of uses allowed; TIFs do neither.

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Sindy Sadri

Pavlina v. City of Vancouver, ___ Wn. App. ___, 94 P3d 366 (2004).

■ *ELEVENTH CIRCUIT DISMISSES BILLBOARD CHALLENGE FOLLOWING ORDINANCE AMENDMENT*

Coral Springs Street Systems, Inc. v. City of Sunrise, Florida, 371 F3d 1320 (11th Cir. 2004), involved a challenge by the plaintiff billboard company to the defendant city's sign code, which the plaintiff contended was unconstitutional in its entirety. The defendant amended its code prior to the filing of any litigation to deal with the alleged constitutional infirmities, but denied the application under provisions that existed in both the previous and amended ordinances. The plaintiff did not apply for a permit under the revised code but instead filed this federal lawsuit, claiming that the original and revised codes were both invalid on their face and as applied. The plaintiff also claimed that the unconstitutional provisions could not be severed from the remainder of the ordinance and that there was no valid sign code in place when it applied for its permit. The plaintiff also claimed that portions of the revised code were unconstitutional.

The defendant city responded that (1) the case was moot, given the revisions to the code; (2) the former code was not unconstitutional; (3) if it were unconstitutional, the flawed provisions could be severed from the remainder; and (4) the plaintiff had not applied for a permit under the new code.

The trial court found the old sign code unconstitutional for favoring commercial speech over noncommercial speech and for distinguishing among certain signs on the basis of content. The trial court further held that because the application was made under the former code and would be judged under that code, the case was not moot. The plaintiff was granted summary judgment and the city appealed.

The Eleventh Circuit held that mootness relates to the "case or controversy" provisions of Article III of the federal Constitution, and said that this issue must be addressed before the merits could be evaluated. Here, the defendant amended its sign code to respond to the plaintiff's stated concerns, and it did so before any lawsuit was filed. While voluntary cessation of unconstitutional activity would not alone prevent a constitutional adjudication, that principle does not apply if it is reasonably certain that the wrongful behavior will cease. The repeal of an allegedly unconstitutional law will normally moot the challenge to that law, unless it is likely that the previous ground for concern would reappear under a new code provision. Courts are likely to assume that public entities will not resume unlawful conduct once voluntarily ceased. Nevertheless, a trial court may inquire into the likelihood of recurrence of the allegedly wrongful conduct. In this case, the court declared itself satisfied that the conduct would not recur and noted that if it did, the court would address the matter by prohibiting the city from re-enacting constitutional barriers to free expression.

The court then turned to whether the plaintiff had a vested right to a sign permit and found that such a right must be recognized by the highest court of the relevant state. Florida law recognizes vested rights only in cases involving equitable estoppel or bad faith activity by municipalities. Neither of these circumstances were involved in this case. The court noted that the plaintiff's agreement with its lessor required no payment by the plaintiff unless and until a billboard was erected and that the

plaintiff did not make an equitable estoppel argument. In addition, the city's actions in amending its code to respond to the allegations of unconstitutionality or unlawfulness did not prove prior bad faith, especially because the old and new codes both prohibited the signs on dimensional and other nondiscretionary grounds. The court concluded that the plaintiff held no vested rights.

The court then turned to the validity of the revised ordinance. In this case, the plaintiff argued that the revised ordinance contained some of the same alleged defects as its predecessor, e.g., that it favored commercial speech over noncommercial speech and favored certain types of noncommercial speech over others. The court noted that the ordinance prohibited all off-site signs (i.e., billboards), which were defined as commercial signs. Under *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), such a ban is permissible. The court noted its decision in *Southlake Property Associates, Ltd. v. City of Morrow, Georgia*, 112 F3d 1114 (11th Cir. 1997), in which it determined that noncommercial messages are inherently on-site messages, so that a billboard definition for an off-site advertising sign does not include noncommercial messages.

As for discrimination against types of noncommercial speech, the court noted that *Metromedia* held that governments are limited in permitting bans on matters of public interest. However, some of the claims that the plaintiff had made regarding the original ordinance had been resolved by the revisions and were thus moot. A former distinction between public interest signs and other noncommercial messages had been eliminated so as to avoid the constitutional problem. A temporal limitation on political signs had been amended to clarify that the time limits applied only to signs connected with an election. The revisions also reduced administrative discretion over the issuance of permits and provided for an administrative and judicial review process.

The court declined to consider whether other parts of the code, which were unrelated to the permits sought by the plaintiff in this case, were at issue, because they were severable even if they were found to be unconstitutional. Citing Florida Supreme Court precedent, the court said it would sever an unconstitutional or invalid provision from the remainder of an ordinance if the purpose of the legislation is not defeated and the remainder of the legislation is complete. The court found these standards met, noting that each of the grounds for the denial of the plaintiff's application were valid, and said it was improbable that the city would have chosen no sign ordinance at all instead of one in which a peripheral provision might be struck. Even if all the remaining challenged provisions were invalidated, the plaintiff's application still would have been denied. The trial court's decision was thus reversed and the case remanded for dismissal on mootness grounds.

This lengthy opinion deals with the issue of mootness fairly well. In the sign code field, there may be amendments to correct invalid or unconstitutional provisions that do not affect the remaining portions of the ordinance.

Edward J. Sullivan

Coral Springs Street Sys., Inc. v. City of Sunrise, 371 F3d 1320 (11th Cir. 2004).

■ LOCAL CODE INTERPRETATION

In *Doob v. City of Grants Pass*, 47 Or LUBA ____ (LUBA No. 2004-043, June 16, 2004), LUBA concluded that the city's interpretation of a subdivision approval criterion did not survive review under the deferential standard articulated in *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003), and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). The approval criterion in question describes when street improvements are required for a subdivision:

Where proposed development abuts an existing substandard street or a future street as shown on the Official Street Map, the applicant is obligated to improve one-half (1/2) the street width for the distance the property abuts the street to the full standards contained in this Code. The improvements must be constructed or secured either prior to Final Plat or Map, if subdividing or partitioning, or prior to Final Use and Occupancy Permit.

Proposed subdivisions, major partitions, and private streets (serving 4 or more dwelling units) shall be connected to an existing City standard paved street. [Emphasis added.]

The petitioners in *Doob* appealed the city's approval of a 16-lot subdivision that abuts two substandard city roads, Willow Lane and Redwood Avenue. Access to the subdivision would be from Willow Lane. In its decision, the city council interpreted the approval criterion as presenting "a question of timing of the improvements" and, in approving the subdivision, required the applicant to post cash security for the improvements needed for both roads.

LUBA and the parties agreed that requiring the applicant to provide cash security for the improvements to Redwood Avenue is consistent with the first paragraph of the approval criterion, which gives an applicant the choice of either securing or building required street improvements before final plat or map approval when proposed development abuts a substandard street. The more difficult issue was whether the city's decision allowing the applicant also to provide security for the improvements to Willow Lane satisfied the requirement for subdivisions to be connected to "an existing city standard paved street" in the second paragraph of the approval criterion.

Because access to the subdivision would be from Willow Lane and because that street is substandard, the petitioners argued that the city's decision misinterpreted the second paragraph. LUBA agreed, noting that the requirement for subdivisions to connect to an "existing" standard city street is explicit. In LUBA's view, the city's interpretation effectively replaces the word "existing" in the approval criterion with "existing or future." LUBA admonished that "the city may not interpret its code to say what it does not say" and remanded the decision. 47 Or LUBA at ____ (slip op at 6).

■ LUBA PROCEDURE

In a rare victory for local governments, LUBA granted the prevailing city's motion for an award of attorney fees in *Cape v. City of Beaverton*, 47 Or LUBA ____ (LUBA No. 2004-010, Order, June 9, 2004). To obtain an award of attorney fees, a prevailing party must show that "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause (i.e., merit)." *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). The probable cause standard is satisfied where "no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit." *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1997).

The petitioner in *Cape* appealed a city decision annexing two undeveloped parcels into the city. The two errors the petitioner asserted in his appeal were (1) the city should have treated the annexation as a major boundary change, rather than a minor change, due to its large size (109 acres); and (2) the city should hold a public hearing or provide an opportunity for public input if a citizen or public official from another local government requests it.

LUBA concluded that no reasonable attorney would have raised the petitioner's first argument because the Metro Code explicitly designates annexation as a minor boundary change and excludes annexations from the definition of a major boundary change. With respect to the second argument, LUBA noted that it had resolved this issue against the petitioner in an earlier appeal involving him and that he offered no legal argument or citation to authority for his position. As a result, LUBA determined that no reasonable attorney would conclude that the petitioner's argument had any legal merit.

The city asked for \$453.62 in attorney fees (representing 8.49 hours at an hourly rate of \$55.43) and \$40.40 in expenses. LUBA granted the city's request in full, stating that "[t]he requested amount is certainly reasonable." 47 Or LUBA at ____ (order at 3).

■ TRANSPORTATION PLANNING RULE

The petitioner in *Concerned Citizens of Malheur County v. Malheur County*, 47 Or LUBA ____ (LUBA No. 2004-008, June 30, 2004), challenged the county's decision approving a comprehensive plan and zoning map amendment and an exception to Statewide Planning Goal 3 to allow a bio-refinery and agricultural processing plant to be approved on a 115-acre parcel. Among the many issues on appeal, LUBA's resolution of issues concerning compliance with local code provisions that parallel the transportation planning rule (TPR) is of particular interest. Specifically, LUBA wrestled with when, and under what circumstances, a local government may defer a determination of whether a proposal will significantly affect a transportation facility and whether amendments to an adopted transportation system plan (TSP) will be required to prevent new vehicle trips from significantly affecting a transportation facility.

The primary products of the proposed facility will be wheat and barley bran, protein, starch, and beta glutens. By-products include ethanol, commercial grade carbon dioxide, wet distiller's grain, and eventually, bio-diesel and glycerin. The facility will have 60 full-time employees and will operate 24 hours a day, seven days a week. Approximately 90 percent of the raw materials used at the facility will be trucked in from nearby farms and approximately 90 percent of the finished product will be shipped by rail. An estimated 75 to 90 truck trips will be made Tuesday through Friday, with additional trips on Mondays and during the harvest season. There are no truck trips planned for the weekends.

The petitioner argued that the county's decision will significantly affect Alameda Avenue, a minor collector, and will result in levels of travel that are inconsistent with its functional classification in violation of the county's code. Like the TPR, the county's code describes the circumstances under which a text or zoning map amendment will "significantly affect" a transportation facility and, where a facility is significantly affected, the options available to ensure that allowed land uses are consistent with the function, capacity, and level of service of the facility identified in the transportation system plan.

The county's decision notes that a minor collector generally carries fewer than 500 trips per day, but that the county's TSP allows Alameda Avenue to carry 501 to 1,000 trips per day. The decision also stated that the applicant has not committed to any particular route for its truck trips and that "no traffic will be routed on Alameda that exceeds its functional classification. This is required in the site design review process and by condition of approval." Condition 3 of the county's decision prohibits future applicants for any processing uses from "contributing new traffic trips that exceed road designation classifications listed in the County [TSP] for traffic facilities on the day the operating permit for the proposed use is issued by the County." Also under condition 3, before obtaining an operating permit, an applicant must submit evidence to the planning department indicating that the facility "will not contribute new traffic trips that exceed the functional classification of the relevant transportation facilities or that reduce the levels of such facilities below levels identified as acceptable by [ODOT] or applicable locally adopted TSP."

LUBA's analysis of the county's decision and condition 3 relied on two cases, *ODOT v. City of Klamath Falls*, 39 Or LUBA 641, *aff'd* 177 Or App 1, 34 P3d 667 (2001), and *Citizens for Protection of Neighborhoods v. City of Salem*, 47 Or LUBA ___ (LUBA No. 2003-201, June 9, 2004). In the *ODOT* case, the city approved a zoning ordinance amendment and determined that part of the affected property could be developed without significantly affecting a transportation facility and part of the property could not. While a local government may not amend its zoning ordinance and defer findings of compliance with the TPR, LUBA held in the *ODOT* case that the city could impose a condition that prohibited development on part of the site until a specific, identified transportation facility is built. LUBA viewed the condition as a permissible means of limiting allowed uses under the TPR to ensure

that the zoning decision and the functional classification of the affected transportation facility are consistent.

The Salem case involved a factual situation similar to the *ODOT* case. To avoid running afoul of the TPR, the city prohibited development on the parts of the property that would significantly affect transportation facilities until master plans were approved for these parts. The city standards that applied to the review of master plans substantially replicated the standards in the TPR.

Applying these rulings, LUBA concluded that the county's decision and Condition 3 are sufficiently similar to the approach taken in the *Salem* case to overcome the petitioner's argument that the county had improperly deferred consideration of TPR-based transportation issues. The similarities LUBA relied on included (1) the fact that the county's code parallels the TPR language and (2) the restrictive nature of Condition 3, which requires the developer of a processing plant to show that the plant will not significantly affect a transportation facility. Under the county's code, when development of the processing facility is actually proposed, the applicant will have to show that it will not result in trips that are inconsistent with the functional classification of Alameda Street and will not reduce any applicable performance standards. This showing will have to be made during site design review, which is a discretionary review requiring notice and a public hearing. In LUBA's view, this process is sufficiently similar to the master plan approval process in the *Salem* case and will result in a decision that can be challenged on further review. LUBA affirmed the county's decision.

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