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Highlights

Appellate Cases—Land Use

■ THE PROTECTION OF SACRED SITES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

In *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004), the Ninth Circuit Court of Appeals considered whether, among other things, the Establishment Clause of the First Amendment prohibited the Arizona Department of Transportation (ADOT) from refusing to grant a commercial source number to Cholla Ready Mix, thereby foreclosing Cholla from selling gravel materials removed from Woodruff Butte for state highway construction projects. Woodruff Butte is eligible for listing on the National Register of Historic Places for its religious, cultural, and historical significance to the Hopi Tribe, Zuni Pueblo, and Navajo Nation.

Government conduct does not violate the Establishment Clause if (1) it has a secular purpose, (2) its primary effect is not to advance or inhibit religion, and (3) it does not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). In considering the secular purpose, the court noted that a law's purpose does not have to be unrelated to religion. Rather, carrying out the government's programs to avoid interference with a group's religious practices is a legitimate secular purpose. *Kong v. Scully*, 341 F.3d 1062 (9th Cir. 2003). A practice must be wholly motivated by religious purpose to fail the secular purpose test. *Am. Family Ass'n, Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002). With this background, the court found that Cholla failed to allege facts that would support a conclusion that the state defendants were not motivated by a secular purpose in refusing to issue the source number.

In asserting that the primary effect of the regulation was to advance religion, Cholla argued that ADOT's actions were the result of an earlier federal district court injunction requiring consultation with the Hopi Tribe before spending federal funds on construction projects using materials from Woodruff Butte. Disagreeing with Cholla's arguments, the court found that ADOT's policy neither favors tribal religion over other religion, nor advances religion. The policy requires that construction projects should be carried out in ways that do not interfere with the tribes' religious practices or destroy religious sites with historical significance.

Finally, the court found that Cholla did not allege adequate facts to support an inference that ADOT's actions foster excessive government entanglement with religion. Consulting the tribes in the process of evaluating Cholla's application for a source number is not "excessive." Moreover, the court noted that Cholla did not allege that any government official had participated in the tribe's religious practices, inquired about the substance of their religious views, or monitored their religious practices.

Based on the foregoing analysis, the court concluded that the Establishment Clause does not bar the government from protecting a historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups.

Carrie A. Richter

Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969 (9th Cir. 2004).

■ LOCAL INTERPRETATION WINS AGAIN

After a long saga, another round of *Monogios & Co. v. City of Pendleton* has been decided by the court of appeals. 194 Or App 201, 94 P3d 118 (2004). In this latest round, the court upheld the city's interpretation of its parks and recreation policy. The policy mandated the design and equipment functions for several kinds of parks and established certain criteria including type, size, and the number of people to be served.

The city wanted to put a 15-acre park on both sides of a tributary of the Umatilla River in an area designated low density residential, with a 50-foot overlay along the Umatilla River and its tributaries. For new parks, the city was required to obtain a conditional use permit (CUP).

The petitioners, adjacent property owners, argued that the city could not meet the plan policy statement that community parks be 30 acres. The city policy stated "it shall be the policy" to provide a particular service level. A second policy established "[t]he park classification system and standards" for the city. One of the classifications was as follows:

> Community Parks are to be located and designated to be separated from any other major organized recreational area and equipped to provide major facilities and uses such as softball, baseball, archery, horse shoes, golf driving, tennis, handball, indoor passive facilities, restrooms, etc., for citywide use within a maximum distance of one mile walking or half hour riding. Minimum size: 30 acres.

On the first appeal, the court of appeals disagreed with LUBA's conclusion that the 30-acre statement is not a requirement. 184 Or App 571, 56 P3d 960 (2002). The court said the city had failed to explain whether the community park policy is aspirational or mandatory. On remand the city had to address how the "community park" policy was satisfied or why that policy was not applicable.

After the remand, the city again approved a conditional use for the park and the petitioners again appealed. LUBA concluded that the city had failed again to articulate whether the plan policy stated mandatory approval criteria or simply aspirational or descriptive policies. 44 Or LUBA 576 (2003).

After the second remand, the city found that the park plan policy "is a park classification system. It does not provide mandatory park development criteria." The city's finding addressed the policy language regarding the park commute modes and distances (*e.g.*, "one mile walking") and indicated this is aspirational. The city went on to say, "[s]imilarly, the provision in the Comprehensive Plan Policy that says that minimum size for a community park is 30 acres, is also aspirational. That goal is something the City would like to achieve, but it may not be financially possible."

On a third appeal, LUBA affirmed the city's interpretation, 46 Or LUBA 356, and the court, in this latest decision, after dismissing a mootness question, concluded that LUBA had not erred.

The main issue in the case was the question of "whether the city council's interpretation of its own comprehensive plan is inconsistent with the express language of the plan or its apparent purposes or policies." 194 Or App at 207 (citing ORS 197.829(1)(a); *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992)). First, the court parsed the plan into two relevant parts: a set of parks policies and then a set of programs. It found that the plan anticipated future planning efforts, *i.e.*, a plan for a plan. The inference is that a plan for a plan is not a mandatory standard to be applied to an application.

Second, it looked at the language of the policies and found nothing "that refers to approval or disapproval of particular applications." 194 Or App at 209. Again, an inference is that if a plan policy is to affect a particular decision, then the plan policy must expressly say so. This holding is a blow to citizens trying to see that general plan language is implemented.

Third, while the petitioners pointed to the use of such words as "standards" and "minimums," the "standards" used are standards of classification, and reference to "minimums" was properly interpreted by the city as being aspirational. This interpretation is further supported by both the city's findings about financial limitations and choices constantly being made by the city and by the irrationality of the consequence of the petitioners' position—namely that if the 30-acre standard could not be met, then there would be no park at all.

The practitioner takes several lessons away from this lengthy battle of multiple remands and appeals: (1) when a plan interpretation is being addressed, ORS 197.829(1)(a) ultimately poses tough odds on the opponent to the local government; (2) the traditional "badges" of mandatory plan policies, such as "shall" and "standards" and "minimums" do not necessarily lead to a conclusion that a policy creates a mandatory criterion when such words are found; and (3) the "garbage criterion" of compliance with the comprehensive plan, which is found in most conditional use permit standards, may not ultimately be a fair and addressable standard, regardless of whose side the practitioner is on.

With regard to the last point, ORS 197.195 deals with "limited land use decisions." It requires that plan standards be incorporated into development ordinances. The problem with the statute is that it does not say they should be set out *in haec verba*. Rather, it says all, some, or none of the plan standards can be incorporated. Likewise, where needed housing is involved, the local government can only "attach" clear and objective approval standards. ORS 197.307(3)(b). This would mitigate against comprehensive plan garbage standards. Perhaps the development ordinance statute, ORS 227.215, and its counterpart in ORS Chapter 215 need to be revisited by a future legislature to minimize comprehensive plan garbage standards for conditional use permits and require that whatever standards are chosen, they be set out in full in the development ordinance.

Steven R. Schell

Monogios & Co. v. City of Pendleton, 194 Or App 201, 94 P3d 118 (2004).

■ NINTH CIRCUIT UPHOLDS LIFTING OF STOP WORK ORDER FOR RELIGIOUS USE

Congregation Etz Chaim v. City of Los Angeles, 371 F.3d 1122 (9th Cir. 2004), involved a federal district court order lifting a stop work order regarding renovations to a home owned by the plaintiff and used as a place of worship. The plaintiff had been involved in lengthy litigation with the defendant city since 1997. The parties resolved the plaintiff's challenge under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, by a settlement agreement in which the district court retained jurisdiction. Pursuant to the agreement, the plaintiff submitted building plans, and after numerous modifications over a three-month period, the defendant issued the permits. However, a week later, the city revoked the permits, claiming that they had been issued in error and in violation of the building code. The district court took jurisdiction and ordered the stop work order lifted, noting that the city had, in fact, issued the permit in full knowledge of the details of the settlement agreement and after substantial changes by the plaintiff in reliance on the same.

On appeal, the Ninth Circuit found that both equitable estoppel and vested rights applied because the plaintiff had spent $21,000 in permit fees and $15,000 in demolition costs in reliance on the permit. The work was clearly set out in the permit application and the defendant claimed no fraud or bad faith. The court rejected the defendant's contentions that the application had to be submitted to a specific planning department official named in the agreement. The district court's decision was thus affirmed.

Judge Aldisert dissented, declaring that the issuance of the permit was contrary to the city's regulations and that equitable estoppel did not apply. Judge Aldisert found the notice provision to require a certain person to be the recipient of building permit applications. While that person was not authorized to issue building permits, he was the associate zoning administrator who deals on a regular basis with quasi-judicial decisions on zoning matters. Because the settlement agreement was tantamount to the issuance of a conditional use permit (as churches were not allowed outright in the relevant zone), the agreement required submission of all materials to the associate zoning administrator, who had the authority to approve a conditional use permit. The dissent emphasized that the purpose of the agreement was to assure that the religious use was compatible with the neighborhood, and disagreed with the trial court's view that equitable estoppel applied, saying that the trial court's decision should be overturned for abuse of discretion. The dissent added that equitable estoppel does not apply to an invalidly issued permit and that the city's duty to the public outweighed the mistake in issuing the permit.

It is a bit difficult to fathom how the city's building permit hand did not know what its zoning hand was doing in this case. It appears that Oregon law would not have applied either the vested rights or equitable estoppel doctrines, as did the Ninth Circuit here.

Edward J. Sullivan

Congregation Etz Chaim v. City of Los Angeles, 371 F.3d 1122 (9th Cir. 2004).

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Appellate Cases—Takings

■ NINTH CIRCUIT FINDS REGULATORY TAKING IN RENT CONTROL ORDINANCE

Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004), involved a regulatory taking challenge to the defendant city's rent control ordinance for mobile home parks, by which, absent administrative review, rent increases at such parks were set at the lesser of 6% or the changes in the consumer price index. The ordinance also prohibited additional rents for units left in place on the property and sold by one tenant to another. The plaintiffs, mobile home park owners, alleged that the ordinance did not substantially advance the city's interest in increasing affordable housing, because it gave a premium to mobile home owners who sold their units.

Originally, the trial court found the whole ordinance unconstitutional, but amended the judgment to deem unconstitutional only the "vacancy provision" (*i.e.*, prohibiting an increase in rent for a new owner who buys a mobile home already in place in the park). Both parties appealed, but while the appeals were pending, the Ninth Circuit decided *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000). At the city's request, the case was remanded to the trial court, which conducted a trial and found for the city. The plaintiffs appealed.

The Ninth Circuit first turned to whether the defendant's statute of limitation defense was valid. The court concluded it was not and that the plaintiff's challenge to the 1998 ordinance was timely filed. For section 1983 claims, such as the plaintiff's regulatory taking claim, the statute of limitations is one year for actions accruing after 1985. A facial regulatory taking claim accrues on the date that a state court denies compensation or the date the ordinance is passed. Because the plaintiffs had not sought compensation in state court and had filed their section 1983 action within one year of the date the 1998 ordinance was adopted, the court concluded that their taking claim was not time-barred. In so ruling, the court rejected the city's argument that the original 1979 rent control ordinance and the 1998 ordinance were so substantially similar that the statute of limitations for the plaintiff's claim should run from the date the 1979 ordinance was adopted. The court found numerous differences between the two ordinances, including the vacancy control provision in the 1998 ordinance.

The Ninth Circuit considered the matter *de novo* and found incorrect the trial court's ruling that the challenged ordinance did not violate the first prong of *Agins v. Tiburon*, 447 U.S. 255, 261 (1980) (*i.e.*, the substantially advance test), determining that the city's stated interest in increasing the amount of affordable housing was not substantially advanced by permitting incumbent tenants to capture a premium based on the present value of reduced rent.

The Ninth Circuit said that, as a matter of law, a rent control ordinance that allows tenants to capture premiums is unconstitutional unless there is evidence of externalities rendering a premium unavailable. The Ninth Circuit also found that the trial court erred in requiring the plaintiffs to prove that there will in fact be a premium captured by the tenants, stating that enabling or allowing such a premium was sufficient. Given that rents are controlled, the separate ownership of the units and the land creates the grounds for a premium. It is the city's burden to show externalities that prevent the realization of that premium. The court distinguished the *Chevron* case, in which the record did not support the premium (although on remand that evidence was supplied and satisfied the Ninth Circuit in a later iteration of that case). The trial court was found to be in error in failing to make that distinction, and the matter was remanded for the trial court to enter a judgment in favor of the plaintiffs.

Judge William Fletcher dissented, saying that both *Chevron* and *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), were wrongly decided and questioning the basis for the "substantially advance" prong of Agins, as well as its application in these circumstances. Even if these cases were correctly decided, Judge Fletcher found them incorrectly applied here, disagreeing with the majority's conclusion that the possibility of capturing any part of a premium renders the ordinance unconstitutional. The dissent pointed out the difference between rents in a usual residential situation and those found in a mobile home park, where the park owner owns the land but the tenant owns the structure. In reality, mobile homes are not mobile, but fixed and cannot be moved without significant expense. Because the tenant cannot easily move, the owner has great leverage in charging rents.

The dissent noted that the challenge was not, in fact, a facial challenge, which must involve whether the ordinance can be constitutional in all of its applications, and in which the burden rests on the plaintiffs. Here, the burden was placed on the city to show externalities present when a premium could be captured. Further, the city had provided testimony of two economists (not one economist, as stated by the majority) that a premium was unlikely. The dissent stated that the district court properly set the case for trial and that the case should not have been decided on summary judgment.

The dissent concluded with a portion of the opinion entitled "A Return to Judicial Activism" in which it stated, "We learned in the 1930s that economic regulation is generally done better by politically accountable legislators than by life-tenured judges. I regret to say that the Ninth Circuit is unlearning that painful lesson." 374 F.3d at 905.

This is a disturbing case. *Chevron* is now before the United States Supreme Court and may determine whether *Agins*'s "substantially advances" prong is still viable. But the Ninth Circuit is currently alone in its position that any possibility of a premium to a tenant is sufficient to sustain the burden that the regulation fails to further a legitimate state interest.

Edward J. Sullivan

Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004).

Appellate Cases—Real Estate

■ "AS IS" CLAUSE AND DELIVERY OF STATUTORY DISCLOSURES DO NOT PRECLUDE LIABILITY UNDER OREGON'S LEGAL LOT STATUTE

DK Investment Co. v. Inter-Pacific Development Co., 195 Or App 256, 97 P3d 675 (2004), considered and rejected several potential limitations on a seller's liability under ORS 92.018, which creates a private cause of action for buyers against sellers who convey parcels that are not legal lots.

The plaintiff purchased an undeveloped portion of a large parcel owned by the defendants. At the time of sale, the defendants had not partitioned the property as required by ORS 92.016, and under ORS 92.025, the defendants were barred from selling the parcel. After the sale, the property was partitioned, at which time the City of Salem imposed restrictions on development of the land that effectively reduced by one-third the area of the property that defendants had advertised as usable. The plaintiff was also prohibited from developing the property until a plat was recorded, and as a result of the delay, the plaintiff's original building permit expired and relevant building code changes required the plaintiff to redesign its project substantially.

At trial, the plaintiff sought damages under ORS 92.018 for the reduction in value of the property measured by the difference between the actual and advertised usable land, the development costs for the original design of the plaintiff's project, and carrying costs. A jury awarded the plaintiff $75,000 in damages.

On appeal, the defendants made four arguments against liability under ORS 92.018. First, they argued that compliance with ORS 93.040 operates to relieve sellers of liability. ORS 93.040(1) requires sellers to include in deeds and similar instruments a statutorily specified disclosure that puts purchasers on notice of the potential of restrictive land use regulations and advises purchasers to inquire as to the existence of such restrictions with local planning departments. The defendants argued that had the plaintiff inquired with the city planning department as recommended in the ORS 93.040(1) notice, the plaintiff would have discovered that the property had not been lawfully partitioned and thereby would have avoided incurring damages. The court disagreed, reasoning that ORS 93.040 is intended to protect buyers and that "[n]othing in the statute suggests that it was intended to limit the remedies that buyers have against sellers." 195 Or App at 260.

Next, the defendants argued that the purchase and sale agreement's "as is" clause assigns to the plaintiff the risk of any injury caused by the defendants' failure to partition the property lawfully. The "as is" clause in question was fairly typical, specifying that the seller makes no representations or warranties regarding the property and that the purchaser will perform its own due diligence on the property.

The court rejected this argument for several reasons, reasoning that (1) nothing in the clause suggests that the plaintiff agreed that it would accept the consequences of purchasing property that the defendants could not lawfully sell; (2) although the clause recites that the plaintiff acquired the property subject to the restrictions that existed at the time of sale, the restriction that caused the plaintiff damage did not come into effect until after the sale and as a result of partitioning the property, which partition was necessary because the defendants had unlawfully sold the property to plaintiff without first creating a legal lot; (3) the "permitted use" and "zoning classification" of the property, which plaintiff assumed responsibility for under the clause, did not cause the damages; rather, a restriction on the amount of buildable land that arose as a consequence of the defendants' failure to partition the land caused the damages; and (4) although a statutory right can be waived, such a waiver must be "a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part," *McMillan v. Montgomery*, 121 Or 28, 32–33, 253 P 879 (1927), and the clause did not include the requisite clear and unequivocal language.

The court next considered what damages could be recovered under ORS 92.018 and concluded that (1) nothing in the statute precludes recovery of consequential damages and (2) the causal connection between the defendants' failure to comply with the legal lot statute and the plaintiff's damages was satisfied when an appraiser testified that the difference between the expected and the actual buildable land (as a result of the subsequent partition condition) reduced the property's value by $110,000 and when the plaintiff presented evidence that carrying costs (*i.e.*, property taxes and development costs) would not have been incurred if the defendants had properly partitioned the land before selling it.

DK Investment should serve as a reminder to Oregon property owners of the importance of complying with statutory legal lot requirements. It rejects a narrow view of both the trigger for and the extent of liability. The case appears to keep open the possibility that a purchaser could waive the seller's liability under the statute, but such a waiver would have to be clear and unequivocable; a standard "as is" clause does not do the trick.

Rene Gonzalez

DK Inv. Co. v. Inter-Pacific Dev. Co., 195 Or App 256, 97 P3d 675 (2004).

■ CLAIM BY A MEMBER OF A HOMEOWNERS ASSOCIATION TO ENFORCE THE DECLARATION AGAINST THE DEVELOPER IS EQUITABLE

In *Frasier v. Nolan*, 195 Or App 211, 98 P3d 392 (2004), the Oregon Court of Appeals considered whether a claim against the developers of a community association was legal or equitable, which subsequently determined whether the action was barred by the applicable statute of limitations.

In 1972, the Nolans developed a residential subdivision in Crook County named Twin Lake Ranch. The declaration governing the operation and use of the subdivision stated that the developers would transfer title in the subdivision's common areas to the homeowners association. However, the developers failed to transfer any interest to the association. This was finally discovered by the association in 2001, when the developers wished to develop and sell portions of the common area.

A homeowner in the subdivision then brought a claim against the developers for a declaration of the association's rights to the property, the imposition of a constructive trust in favor of the association, and specific performance of the provision in the declaration that required the developers to transfer the interest to the association. The developers defended on the grounds that the claim was contractual (because it was based on enforcement of the declaration) and, therefore, was barred by the statute of limitations.

The trial court agreed with the developers and stated that the case was governed by the ten-year statute of limitations in ORS 12.040 or 12.050. The trial court determined that the developers' obligation to transfer the land to the association "arose" in 1973, when the plat and subdivision documents were filed. At the time of filing, the association was on constructive notice of the interest in the property and had ten years from that time to act. Because the association did not act within ten years, the claim was barred.

The court of appeals reversed the decision of the trial court and found that the claim against the developer was equitable, and therefore the ten-year statute of limitations did not apply. The court referred to *Ass'n. of Unit Owners v. Far West Federal Bank*, 120 Or App 125, 852 P.2d 218 (1993), to reject the contention that the association was on constructive notice of the interest upon the filing of the documents. In *Far West*, the court determined that if the claim arose in equity, constructive notice of the claim did not trigger the statute of limitations. Here, the court analyzed the plaintiff's claim for relief, and because the plaintiff was requesting declaratory judgment, specific performance, and the imposition of a constructive trust, ruled that the claim was equitable in nature. Filing the subdivision documents did not provide constructive notice to the association and did not trigger the statute of limitations. Rather, the statute of limitations began to run when the plaintiff was on notice that there was a problem with the association's interest, which did not occur until 2001. Because the plaintiff filed its lawsuit against the developer within two months of learning of the association's interest, the applicable statute of limitations was clearly met and the developer could not use the defense of laches. Thus, the case was reversed and remanded to the trial court.

It should be noted that in *Far West*, the court ultimately determined that the case was legal in nature because the association was seeking money damages. Therefore, the claim was time-barred. Attorneys working with the enforcement of an association's declaration or bylaws should take notice that any enforcement claim that seeks money damages may be legal in nature, and therefore barred by the contract or real property statute of limitations. However, the statute of limitations problem may be avoided by seeking equitable relief only.

In conclusion, this case may open the door for associations seeking equitable relief from developers who defend on account of the statute of limitations. In many association situations, claims arising under the declaration are not discovered until much later, thereby reducing the associations' chances of remedying a valid claim. This case may allow associations to seek equitable relief for problems that are not discovered until much later, and thereby extend the time that an association may bring suits against developers for claims that are by nature difficult to quickly ascertain, such as defects with underground utilities or structural building defects.

In writing this article, the author received assistance from Kevin Harker, Esq., and Tara Bosch, law student at Lewis & Clark Law School.

A. Richard Vial

Frasier v. Nolan, 195 Or App 211, 98 P3d 392 (2004).

■ NO NEED TO CORRECT NEIGHBOR WHO MISTAKENLY BELIEVES HE HAS AN EASEMENT ACROSS YOUR LAND

In a dispute between neighbors, the court of appeals concluded that, absent a duty to speak, silence is insufficient to support a claim for equitable estoppel, and that knowledge that a neighbor apparently mistakenly believes that his property is the beneficiary of an easement does not impose a duty to speak. *Pfaendler v. Bruce*, 195 Or App 561, 98 P3d 1146 (2004).

Pfaendler sued Bruce, his neighbor to the south, claiming that Bruce's improvements, including a retaining wall and walkway, interfered with Pfaendler's use and enjoyment of an easement along a shared driveway. Bruce counterclaimed for an easement along the portion of the driveway that crosses Pfaendler's property, so that Bruce could park in the upper area of his lot, which was otherwise blocked to vehicles

by Bruce's own house. Bruce's real estate agent had told Bruce that such an easement existed; in fact, it had been vacated earlier.

Bruce sited his house assuming that he had a right to use the driveway over Pfaendler's land. Pfaendler served on the subdivision's architectural control committee (ACC), which had oversight of Bruce's construction and reviewed the construction plans, and watched as the construction crew used Pfaendler's driveway during construction. Pfaendler never informed Bruce that Bruce didn't have an easement to use the driveway.

The court assumed but did not decide that equitable estoppel is sufficient to create an interest in real property. However, the court concluded that absent a duty to speak, silence is not sufficient to establish equitable estoppel; there must be an affirmative promise or misrepresentation to support a claim. Pfaendler's service on the ACC did not create a duty to speak, because Pfaendler would be serving only his private interests by informing Bruce of the absence of an easement. The court thus concluded that Bruce had not established an easement across Pfaendler's property based on equitable reliance.

As for Pfaendler's original claim involving Bruce's improvements, the court held that the improvements did not interfere with Pfaendler's ability to use and enjoy his easement.

Tod Northman

Pfaendler v. Bruce, 195 Or App 561, 98 P3d 1146 (2004).

■ *NO PRESCRIPTIVE EASEMENT ESTABLISHED WHERE USE OF DRIVEWAY WAS NOT OF NEW AND DIFFERENT CHARACTER*

In *Martin v. G. B. Enterprises, LLC*, 195 Or App 592, 98 P3d 1168 (2004), the Oregon Court of Appeals held that one party's use of a driveway on another party's property had been permissive and was pursuant to an express agreement, and therefore no prescriptive easement had been established.

When the use of the driveway began, the plaintiffs' property ("Front Lot") was used for servicing and sales of mobile homes, and the defendant's flagpole-shaped property ("Back Lot"), on which the driveway was located, was used as a mobile home park. At one point, a dispute arose, and the owners of the mobile home park on the Back Lot blocked access so that the owners of the Front Lot could not use the flagpole driveway. The owners of the Front Lot responded by placing mobile homes at the edge of their property, where the driveway met the highway. This blocked the view of the highway for mobile home park residents trying to exit the park. After about a week, the dispute was resolved when the parties agreed to remove both the driveway barrier and the strategically placed mobile homes.

Use of the driveway by the Front Lot continued for nearly twenty years. The plaintiffs bought the front lot in 1985 and operated a motorcycle dealership on the property. The plaintiffs' customers used the driveway because it was the most convenient way of accessing the dealership. Eventually, the mobile home park residents began complaining about increased traffic on the driveway. The plaintiffs, owners of the Front Lot, brought an action seeking to establish the existence of a prescriptive easement across the driveway. The trial court found that the plaintiffs had established a prescriptive easement, reasoning that, although the defendants may have acquiesced in allowing use of the driveway, there had been no agreement in which the defendants granted outright permission.

The court of appeals held that the trial court erred in granting the plaintiffs a prescriptive easement. The plaintiffs had stipulated in their trial memorandum, "The evidence will be that [the] owners agreed that the roadway would be utilized for the mutual benefit and interests of the parties." Evidence of an express agreement is enough to rebut a presumption of adverse use arising from open and continuous use of a driveway. The court of appeals held that, because the use by the plaintiffs and their predecessors was permissive from the outset, it is presumed that the use continued to be permissive unless the plaintiffs can show that the use became adverse and that the defendant had knowledge of the adverse use. For the use to have become adverse, it would have had to be of a "new and different character." *Thompson v. Scott*, 270 Or App 542, 549, 528 P2d 509 (1974). The plaintiffs' argument that the use became adverse during the one-week-long feud failed because the use after the feud was not shown to be of a "new and different character" and because the feud ended only after a sort of agreement was reached: one party would remove the driveway barrier and the other would remove the mobile homes blocking the view of the highway.

In summary, the court of appeals held that use of the flagpole driveway by the owner of the Front Lot had been permissive because it was pursuant to an express agreement and, therefore, no prescriptive easement had been established.

Susan C. Glen

Martin v. G. B. Enterprises, LLC, 195 Or App 592, 98 P3d 1168 (2004).

■ *NINTH CIRCUIT UPHOLDS SAN FRANCISCO ANIMAL RIGHTS PROTEST*

In *Kuba v. 1-A Agric. Association*, 387 F.3d 850 (9th Cir. 2004), the plaintiff, a frequent animal rights protestor at the circus and other events at the Cow Palace in San Francisco, was faced with the defendant's new "First Amendment Policy," which limited protests to three "free expression zones," most of which were not near the entrances used by the public and did not allow for engaging in conversation or distribution of leaflets. The plaintiff challenged the policy on state and federal constitutional grounds, while the defendant

characterized the policy as a lawful time, place, and manner restriction. Both parties moved for summary judgment and the trial court granted summary judgment in favor of the defendant.

All of the free expression zones were located on the perimeter of the preferred parking lot and were approximately 200 and 265 feet away from the main entrances. Two of the zones were 18 feet by 18 feet in size and the third (and most distant) zone was 10 feet by 20 feet. The policy allows registration for the free expression zones on a first come, first served basis. Protestors may also rent exhibit space, but that space is allowed on a "seniority" basis and must relate to the event in question. Parking spaces may also be rented, but on the same seniority basis. When asked in deposition, the defendant's official said that the Cow Palace would not rent space to protestors of a sponsored event.

The defendant argued that it was immune from a federal suit under the Eleventh Amendment, but the court cited precedent to the effect that agricultural associations are not arms of the state, so that such immunity did not apply. Additionally, the court said the trial court had supplemental jurisdiction over actions arising under the free expression clause of the California constitution, and proceeded to evaluate the plaintiff's facial and as-applied free expression claims.

Turning first to the facial claims, the Ninth Circuit avoided addressing the federal Constitution by applying the California constitution, which provides somewhat broader protection for speech than the First Amendment. The court noted that under either constitution, regulations on expressions in a public forum must be content-neutral and narrowly drawn to serve an important governmental interest, and must leave open ample alternative channels of communication. Under California law, exteriors of public stadiums (including parking lots and pedestrian walkways) are public fora, where the public is free to come and go. Under such circumstances, mere annoyance or inconvenience of patrons or customers is not a valid reason to restrict protected activity, although reasonable time, place, and manner restrictions are permitted.

The defendant's policy was at least facially neutral, so the court turned to whether it was narrowly tailored to serve a significant governmental interest and left open ample alternative channels of communication. Both the trial court and the Ninth Circuit found a governmental interest in the safety of pedestrians and traffic control. However, those interests are not themselves sufficient to justify the restriction; there must be a showing that those interests are endangered by the proposed communicative activity. The trial court found that that burden was not met, and the Ninth Circuit agreed, noting that past protest history (with only one or a handful of protestors in attendance) did not justify the significant regulations at issue. The court also noted that commercial radio stations were able to hand out literature and other information without hindrance. Simply stated, the court found no showing that a few protestors would significantly exacerbate the congestion problem, at least in the absence of a traffic flow or public safety study. The arena may restrict people from blocking or impeding traffic circulation or pedestrian flows, but the court found the extent of the challenged regulations not justified.

The court said that the least restrictive means test need not be applied; however, the means must be narrowly tailored to advance the recognized governmental interest and not substantially burden more speech than necessary. While the "apron" in front of the main entrance to the Cow Palace is a bottleneck that may be restricted from protestors, there was no evidence to show that the decision to restrict expressive activity to the three free expression zones was narrowly tailored to relieve traffic and pedestrian congestion or was necessary to prevent a safety hazard. This was especially true in light of the restrictions on exhibit space and parking lot rental space.

Given that the defendant's rules restricted demonstrators to three peripheral zones without justification regarding pedestrian traffic concerns or public safety, the Ninth Circuit found the rules were not narrowly tailored and also burdened more speech than necessary. The court found no need to consider whether ample alternative avenues of communication had been left open in light of its disposition under the "narrowly tailored" criteria. The trial court decision was thus reversed.

This is a standard free expression case in which rules went further than was demonstrably necessary to restrict speech, and were therefore struck down. Drafters of such rules must take care not to go further than the evidentiary circumstances permit.

Edward J. Sullivan

Kuba v. 1-A Agric. Ass'n, 387 F.3d 850 (9th Cir. 2004).

Appellate Cases—Landlord/Tenant

■ TODAY'S TENANT TIP: HOW TO PAY FOUR CENTS ON THE DOLLAR FOR REPAIRS TO THE PREMISES

The defendants in *Schlabach v. Tollenaar*, 195 Or App 672, 98 P3d 1154 (2004), leased a restaurant and parking lot from the plaintiffs. The lease required the tenants to maintain the premises, and if they failed to do so, the landlord could make the needed repairs and add the cost to "the installment of rent next due."

The restaurant's business faltered, and the tenant cut corners. First, it filled potholes in the parking lot with gravel. The landlord found this unacceptable and resurfaced the entire parking lot at a cost of $11,000, but did not seek reimbursement of the $11,000 in the next rent payment.

A new parking lot did little to attract new business. The tenants contacted the landlord and informed him that business still was slow and they would not be able to afford necessary roof and sewer repairs to the building. Neither the landlord nor the tenants did anything about the repairs, and eventually the tenants closed the restaurant and terminated the lease, leaving a building with severe water damage, caused primarily by the roof and sewer problems. After the tenants vacated, the landlord obtained a repair estimate of $13,000 for the water damage. Then, he sued the tenants for breach of the lease, seeking the $11,000 for parking lot repairs, and for statutory waste under ORS 105.805, seeking the $13,000 needed to repair the water damage.

The court ruled for the tenants on the breach of lease claim, and the court of appeals affirmed. The court found it telling that the landlord had contracted for an $11,000 complete resurfacing despite the contractor's estimate that filling the potholes alone would cost only $3,500. The landlord also failed to seek reimbursement of the resurfacing costs from the tenant in the rent next due, despite the clear lease language entitling him to do so. These facts persuaded the court that at the time the landlord made the repairs to the parking lot, he had no intent that the repairs would be on the tenants' account.

The court ruled for the landlord on the waste claim, but only for $1,100 needed to clean the premises, and this too was affirmed on appeal. The court found that the tenant had promptly informed the landlord of the roof and sewer damage and had notified the landlord that it could not afford the repairs. With that information, the landlord could have, but did not, mitigate his damages by performing the repairs on the tenant's account. The resulting exacerbation of the problem caused by the lack of repairs by either party did not constitute "abuse or destruction" of the premises by the tenant and therefore did not constitute waste under ORS 105.805.

In the end, the landlord ended up with a nasty surprise, recovering only $1,100 out of $24,000 in repairs that the tenant was obligated to but had failed to make under the lease terms. The moral of the story for landlords with a tenant repair clause in their leases: act promptly and abide strictly by the terms of the clause, or risk unnecessary and unrecoverable repair expenses.

David J. Petersen

Schlabach v. Tollenaar, 195 Or App 672, 98 P3d 1154 (2004).

■ CLOSE, BUT NOT CLOSE ENOUGH: SUBSTANTIAL COMPLIANCE IS NO DEFENSE WHEN ABANDONED PROPERTY NOTICE IS DEFECTIVE

In *Tompte v. Stone*, 195 Or App 599, 98 P3d 1171 (2004), the Oregon Court of Appeals held that substantial compliance with the abandoned property notice provision of the Oregon Residential Landlord Tenant Act, ORS 90.425, is not sufficient to bar a tenant's claim for damages. The court overturned the trial court's ruling that the landlord had substantially complied with ORS 90.425 by giving the evicted tenants seven days notice instead of the required eight days to reclaim their personal property.

Although ORS 90.425(16) requires "complete compliance" with the provisions of ORS 90.425, the landlord argued that the doctrine of substantial compliance barred the tenant's claim for damages. The court turned to the Oregon Supreme Court's holding in *PGE v. Bureau of Labor & Industries*, 317 Or 606, 859 P2d 1143 (1993), to frame its interpretation of the statute. As directed in *PGE*, the court began its analysis by examining the plain language of the statute. Because 90.425 unambiguously requires eight days notice and the statute requires complete compliance, the court found no justification for the landlord's argument that only substantial compliance was required. To bolster its holding, the court cited several instances where the legislature has provided for substantial compliance in other statutes.

Glenn Fullilove

Tompte v. Stone, 195 Or App 599, 98 P3d 1171 (2004).

Cases From Other Jurisdictions

■ SIXTH CIRCUIT INVALIDATES OHIO INVESTMENT TAX CREDIT ON COMMERCE CLAUSE GROUNDS

Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004), involved a challenge in state court to tax credits under the Ohio tax code on grounds of discrimination against interstate commerce through granting preferential treatment to in-state investment and activity. The plaintiffs challenged the tax credit under the federal Commerce Clause and the Ohio state constitution's Equal Protection Clause. The case was removed to federal district court, which ultimately dismissed the case under the Federal Rules of Civil Procedure for failure to state a claim.

In 1998 the defendant auto company entered into an agreement with the City of Toledo to construct a new vehicle-assembly plant near its existing facility if it could get certain tax credits. The company's investment was approximately $1.2 billion and would have brought several thousand new jobs to the area. In return, the city gave the company a ten-year tax moratorium and an investment tax credit of 13.5 percent against the state corporate franchise tax, for a total tax incentive of about $280 million. The investment qualified under the Ohio corporate franchise tax credit scheme for depressed areas. The trial court found the scheme valid because, although an increase in Ohio activity could increase the credit and exemption amount, an increase in activity outside Ohio would not decrease the amount of the tax credit or exemption.

The Sixth Circuit reviewed the matter *de novo* and noted that states may structure their tax systems to encourage the growth and development of intrastate commerce, so long as they do not tax products manufactured or business operations performed in other states in a discriminatory manner. Such discrimination may include imposition of higher taxes on out-of-state businesses or allowing a tax credit for in-state businesses. If the credit discriminates, it is invalid, unless it advances legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives.

The investment tax credit is equally available to in-state and out-of-state businesses, but the plaintiffs claimed that its effect is to coerce in-state companies to invest further to reduce the overall tax burden. The plaintiffs contended that any advantage to in-state interests by giving a reason to invest further in the state violates the commerce clause, while the defendant argued that tax credits are permissible so long as they do not penalize out-of-state economic activity in a way that amounts to economic protectionism. Under the defendant's theory, protectionism would be found if there were a higher tariff on out-of-state goods or a penalization of out-of-state economic activities by relying on both the taxpayer's in-state and out-of-state activities to determine a tax rate.

The Sixth Circuit found that direct state subsidies to domestic industries are not prohibited under the Commerce Clause. However, tax credits go further, because they involve the state regulation of interstate commerce through its power to tax. Under this analysis, the investment tax credit could not be upheld.

The court then turned to the personal property tax exemption, which the plaintiffs claimed violated the Commerce Clause because it granted benefits in the form of lower taxes if they agreed to maintain a specified level of employment and investment in the state. The Sixth Circuit rejected that claim, finding the benefits related to the use or location of the property itself. So long as the exemption relates to the use and location of the property and allows the property owner to maintain the same form of business (in this case, car manufacturing), it does not violate the Commerce Clause. In this case, the conditions for the exemption were characterized as "minor collateral requirements" directly linked to the use of the exempted personal property. The Ohio statute at issue only requires an investment in new or existing property within the enterprise zone and maintenance of a level of employment. The statute contains no restriction on the individuals employed or served. Finally, the distinction between tax credits and exemptions is also an important one. The exemption at issue here does not reduce any existing property tax liability, but merely allows an employer to avoid taxes with a qualified new investment. Every qualified new investment, whether from an in-state or out-of-state source, would qualify. The Sixth Circuit concluded that the trial court's decision on the plaintiff's challenge to the state court exemption was correct.

As to the Ohio Equal Protection claim, the Sixth Circuit found the interpretation of this provision to be equivalent to that of the federal Equal Protection Clause and held that a rational basis standard was applicable. The court found the challenged provisions rationally related to a legitimate state interest (revitalizing economically troubled areas). The tax benefits at issue in this case are equally available to domestic and foreign entities and turn on investment in economically troubled areas. The court found no valid state constitutional claim under the circumstances.

This case deals with a new theme in the attraction of industry: whether benefits used to lure industry violate the Commerce Clause. This area is one to watch, especially in light of the Supreme Court's recent acceptance of review of a case on the nature of "public use," which is often the means by which property is acquired for redevelopment. *See Kelo v. City of New London*, *Conn.*, 268 Conn. 1, 843 A.2d 500, *cert. granted*, 125 S. Ct. 27 (2004). Because state tax policy is often used for the same purposes, one can expect additional attention to this area.

Edward J. Sullivan

Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

■ SIXTH CIRCUIT REMINDS PRACTITIONERS ABOUT ELEVENTH AMENDMENT BAR IN TAKINGS CASES

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004), involved a trial court dismissal of the plaintiff's takings claims on ripeness and *Rooker-Feldman* grounds. The plaintiff acquired a coal lease under state park lands through bankruptcy proceedings and sought to mine half the coal under its lease. After multiple submittals, the plaintiff asked the state to approve or deny its application "as is" and sought to litigate a takings claim in state court instead of seeking judicial review of the denial. The plaintiff reserved its federal claims in state court, but lost the state court claims on grounds of exhaustion of administrative remedies. The plaintiff did not seek *certiorari* from the United States Supreme Court but instead brought a takings claim in federal district court, which dismissed the same.

The *Rooker-Feldman* doctrine prevents federal trial courts from engaging in appellate review of state court proceedings and looks to the relief sought and to whether the plaintiff alleges that the state court judgment caused it injury, as opposed to a failure by the state court to redress a preexisting injury. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). If it is the former, it is barred. Another basis for *Rooker-Feldman* is whether the preexisting claim is "inextricably intertwined" with the claim asserted in the state court proceedings (*i.e.*, the federal court review is sought to be used essentially as an appeal of the state court decision).

The court determined that the plaintiff's claim was defeated at the state level because it was predicated on a possibly incorrect application of the doctrine of exhaustion of remedies, which does not apply in federal takings claims cases. The court assumed that *Rooker-Feldman* was not applicable.

The court then turned to whether the claims were based on a "final" state court determination under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186–91 (1985), and determined that finality was required, though administrative exhaustion was not required under Kentucky law. All the plaintiff needed to do was to seek compensation under state law, rather than get a determination on the merits in order to vindicate its federal claims. *Hamilton Bank* concerns itself only with ripeness, not abstention.

The court then turned to the plaintiff's claims under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), in which a plaintiff reserved its federal claims and the U.S. Supreme Court found that the effect of the state court judgment, which was adverse to the plaintiff, should prevail by the doctrine of *res judicata*. Here, the state court determination could potentially have a preclusive effect on all claims that were raised or could have been raised. However, the plaintiff was prevented from litigating its takings claim in state court and could raise the Fifth Amendment issues in the subsequent federal proceeding. Under *England*, if a plaintiff reserves its federal issues in state courts, claim preclusion will not operate. The Ninth Circuit in *San Remo Hotel v. San Francisco,* 364 F.3d 1088, 1094 (9th Cir. 2004), and *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995), determined that issue preclusion still applies. The Second Circuit found that issue preclusion did not apply in *Santini v. Connecticut Hazardous Waste Management Services*, 342 F.3d 118, 130 (2d Cir. 2003). Because the Kentucky Supreme Court did not decide any issue that might be the basis for issue preclusion, it was unnecessary to decide that matter in this case. In any event, *res judicata* based on claim preclusion did not apply.

The court then examined the other prong of *Hamilton Bank*: whether the state had made a final decision. The defendant argued that there may still be some permit that might issue. The Sixth Circuit noted that the plaintiffs in *Hamilton Bank* had not sought to establish the contours as to what degree of use the subject site may be put. Subsequent cases have focused upon whether there is no development that might practicably be allowed and whether pursuit of additional permits would be futile. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The trial court did not deal with this factual issue of futility, so the Sixth Circuit declined to do so either.

Rather, the court affirmed the trial court judgment only on Eleventh Amendment grounds. The state claimed that 42 U.S.C. § 1983 did not abrogate its immunity under the Eleventh Amendment. The court said the actual "stopper" is that the 42 U.S.C. § 1983 does not provide a remedy against the state that also applies in an inverse condemnation context for damages for alleged unconstitutional state action. Had the plaintiff brought both a state and a federal claim in state court, the state court would have been obliged to hear both sets of claims, because the Eleventh Amendment would not have been a bar in that circumstance. However, the amendment is a bar in these circumstances, where federal claims against the state were brought in federal court. The dismissal by the trial court was thus affirmed, but only on the Eleventh Amendment ground.

A concurring opinion by Judge Baldock agreed on the Eleventh Amendment grounds for dismissal but also would have construed *Rooker-Feldman* to preclude the plaintiff's claims, because he saw the claim as "inextricably intertwined" with the state court judgment. The concurrence also found that both prongs of *Hamilton Bank* (*i.e.*, a final decision and the use of state court claim procedures to vindicate the claim) must be satisfied. The concurrence further read the Kentucky Supreme Court decision to say that no final decision (and thus no legal injury) existed because a permit could have been issued for a less ambitious mining project. *Rooker-Feldman* exists, according to the concurrence, to avoid duplicative appeals and prescribed federal court review of state court decisions. Because the plaintiff sought federal court review of the Kentucky Supreme Court decision without attempting *certiorari*, it should not have a second "bite at the judicial apple." 381 F.3d at 531.

The concurrence also disagreed with the court's application of *res judicata* in dealing with the *England* reservation, which it would have limited to involuntary participation in state court proceedings caused by a federal court abstention order. Here, the plaintiff began in state court and attempted to segregate its federal claims under *England* for a later federal determination. The proper remedy would be to litigate state and federal claims in state court and to seek review of rejected federal claims by a petition for *certiorari* to the United States Supreme Court. To do otherwise is to undermine the purposes of *Hamilton Bank* and its ripeness requirements.

The Eleventh Amendment basis for this decision appears to be of sufficient disposition; however, both the ripeness and abstention issues are controversial, as illustrated by the two opinions in this case.

Edward J. Sullivan

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004).

■ *FIRST CIRCUIT SPLITS OVER APPLICATION OF FIRST AMENDMENT TO TRANSIT ADVERTISING*

Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1st Cir. 2004), involved challenges to the defendant's rejection of two sets of ads, one involving religious matters and the other involving drug policy. The trial court found against plaintiff Ridley (who proposed the religious ad) on all grounds. It also upheld the standards applied to plaintiff Change the Climate (which proposed the drug law ad). The court did conclude that the standard prohibiting ads that were demeaning or disparaging ads was "somewhat vague" and left room for arbitrary decision making. Thus, the court retained jurisdiction to modify the defendant's guidelines or the court's judgment later in view of a change in law or factual circumstance. Both plaintiffs appealed.

Both opinions centered on the nature of the forum under consideration and the lawfulness of the defendant's standards for accepting or rejecting ads as to whether they constituted viewpoint discrimination or were facially constitutional.

The defendant provides transportation to 1.2 million customers daily in a metropolitan area of 2.5 million. For many in the area, it is the only transportation option available and consists of 170 bus routes, four subway lines, a 13-branch commuter rail network and six ferry service routes. It also provides school bus transportation to 60,000 students of the Boston Public School system and distributes 15,000 to 20,000 bus passes, mostly to high school students. The objective of its advertising program (operated by a contractor) is to maximize revenue for the system. The defendant makes available to nonprofits unsold space at half the normal rate. Both the contractor and the defendant's staff vet proposed ads.

Change the Climate submitted three ads questioning national policy on marijuana. The ads were rejected as being in conflict with the defendant's policies on drugs and alcohol (which were really internal workplace rules on the subject, as the defendant had no other rules on illegal drugs). A later rationale was a policy against advertising illegal goods or conduct. Ridley also submitted three ads, all of which directly or indirectly criticized modern Christianity, and all of which were rejected as "demeaning and disparaging" of another's religion.

The court reviewed these actions de novo and reviewed whether transit advertising was a traditional or designated public forum, or a nonpublic forum. If it were a traditional public forum, strict scrutiny was assumed to apply, but for a designated public forum, "reasonableness" would be the standard. The defendant argued that a nonpublic analysis applied, while the plaintiffs said that a designated public forum was present. The court said that a public entity must have an affirmative intent to create a public forum. In this case the defendant expressly stated that it had created a nonpublic forum that was subject to viewpoint-neutral regulations, so the court looked to whether the defendant's conduct was consistent with these statements. Erratic enforcement does not convert a nonpublic forum into a public forum of some kind. The court cited the plurality opinion in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), to the effect that a public entity may reject political ads for candidates and issues, while still accepting commercial, as well as civic, religious, and public service ads, and without creating a designated public forum. This analysis has generally been followed by the Supreme Court and is a separate question from those of viewpoint neutrality or adequacy of standards. By allowing noncommercial advertising, and controlling the same, the defendant did not thereby create a public forum and call a strict scrutiny analysis into play.

The court then turned to the First Amendment viewpoint-neutrality question, under which a public agency suppresses speech where the real rationale is disagreement with the underlying ideology or perspective of the speech itself. While an agency may constitutionally reject ads that promote illegal activity, especially ads viewed by children, it also has a legitimate interest in not offending riders and thereby losing their patronage. The standard used here appeared to be constitutional, but the real challenge in this case was to the application of the standard to speech critical of existing governmental policy that purported to protect children. Standards like this may sweep too broadly, so that public debate is wrongly limited to that content that children may see and hear.

In this case, the defendant's justification was undermined by the statements of its own decision makers that the reason for the rejection of the ads was a distaste for Change the Climate's viewpoint and, moreover, that the rejection did not serve the purposes of child protection. The defendant's general manager said that he would have approved the ads if they supported existing drug laws.

Moreover, the court saw two of the ads as not aimed at children at all, but putting forth a sophisticated argument that criminalizing marijuana has worse effects on society than other alternatives and that the risk of inducing juveniles to try marijuana is probably nonexistent. While the defendant said it would run ads with a plain message that drug laws

should be reformed, this shows that it would be against ads that are more effective in conveying that message, which was another form of viewpoint discrimination. The court also pointed to a series of alcohol ads that were clearly more appealing to juveniles than the ads here. Change the Climate's ad aimed at juveniles explicitly disdained smoking pot, but also argued that it is not the same as use of other criminalized drugs. The ad was aimed at voters, or those who will soon be voters, to rethink drug laws. Even under the reasonableness standard for designated public fora, the rejections of these ads would fail over inconsistencies in accepting and rejecting ads. The rejection of the drug ad failed a First Amendment analysis.

As to the religious ads, the court found no viewpoint discrimination either in the standards themselves (prohibiting demeaning or disparaging ads, without setting forth specific protected groups) or in their application. The redrafting of the regulation to avoid naming protected groups was significant because *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), struck down a regulation prohibiting certain acts associated with terrorism because of their impacts on specific racial groups. The court rejected the notion that because some critical ads had been accepted, the defendant must accept others (including Ridley's denunciation of several named religious groups), saying that the agency may require a certain level of discourse. There was no evidence to show distaste for the message by the decision makers, and the defendant's decision was related to its stated purpose for its advertising program, *i.e.*, to maximize revenues for the system. The court upheld the rejection of the ads on grounds that they were disparaging and demeaning, as well as the standards themselves.

The court then turned to the facial validity of the standards in terms of vagueness and vesting of discretion. The court found the record adequate to review this challenge and noted that the vagueness inquiry involved concerns of fair notice (and thus chilling of expression) and excessive discretion. In this non-criminal context, the discretion issue was paramount, even though the regulations on their face did not involve viewpoint discrimination. Most of the cases in this area deal with traditional public fora or licensing schemes, which was not the case here. Instead, the exercise of judgment in a nonpublic forum must be reasonable in light of the characteristic nature and function of that forum. The court found that the denial of the religious ad was not unreasonably vague or overbroad in the light of the defendant's advertising program and its purpose of raising revenue without losing ridership.

The First Circuit upheld the trial court's determination that transit advertising was not a public forum, as well as the rejection of the challenges to the regulations on viewpoint discrimination grounds. While Ridley's as-applied challenge was rejected, Change the Climate's allegations of as-applied viewpoint discrimination were vindicated and the matter was remanded for further proceedings on attorney fees.

There was a dissent by Judge Torrulella, who agreed on the outcome of the Change the Climate appeal, but said that the Ridley ad had been improperly rejected for viewpoint discrimination. The dissent also felt that the standards were vague and subjective, regardless of the forum determination, and that the transit advertising in this case was a public forum to which strict scrutiny must be applied.

The defendant's applicable standard for prohibited advertising is "whether a reasonably prudent person, knowledgeable of the [defendant's] ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals." The dissent said the advertisements at issue were not a hate group defaming particular religions, but a religious group advising adherents of other, or no, religion, that they risked eternal damnation if they persisted following their course, which is what many religions preach in any event. The dissent concluded that the defendant's actions were content-based discrimination because the ads name other religions or may offend some of their adherents. The point of viewpoint neutrality is to allow choices of content that may be misguided or hurtful in the view of some recipients.

The dissent also found that a public agency opening up transit surfaces for advertising created a designated public forum, where the same rules as for public fora apply. The defendant's policy and practice were to accept almost all commercial and noncommercial advertising and the declaration that those surfaces were nonpublic fora is unavailing, especially in view of the defendant's frequent changes of policy and the apparently subjective nature of its ad approval process historically. The reasons for ad decisions appear to be related to regulatory, rather than proprietary, concerns and most related to the content of speech, unlike the situation in *Lehman*, where the reason for denying political ads was based on proprietary considerations, such as impacts on revenue. The dissent concluded, "Thus, the [defendant's] policy and practice regarding its advertising space, and the nature of that space as created and managed by the [defendant] demonstrates an intent by the [defendant] to create a designated public forum."

Additionally, the dissent concluded that transit surfaces are the modern analogue to a traditional public forum, so that a strict scrutiny test applied in any event.

This is a lengthy and scholarly examination of the vexed issues of public fora, viewpoint discrimination, and vagueness of speech regulations, all important First Amendment issues. The prolixity of the issues and the uncertainty of the analysis appear to mean that we will be struggling with both for the foreseeable future.

Edward J. Sullivan

Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65 (1st Cir. 2004).

■ EIGHTH CIRCUIT SAYS KKK CAN ADOPT A HIGHWAY

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004), involved an appeal by the defendant Missouri state transportation officials from an injunction prohibiting them from excluding the plaintiff, a nonprofit organization with racist views, and some of its members from participating in its "Adopt a Highway Program." Under that program, an applicant agrees to pick up highway litter at least twice in a six-month period and is recognized by a sign at either end of the portion of highway adopted. The plaintiff organization sought declaratory and injunctive relief and argued that the defendant had denied the plaintiff's application for unconstitutional reasons. The trial court agreed and granted summary judgment in the plaintiff's favor as well as injunctive relief.

The regulations on which the defendants originally relied to support the denial prohibited granting the application of any organization that discriminated on the basis of race, religion, color, national origin or disability, or had a history of unlawfully violent or criminal behavior. In a prior case, these regulations were declared unconstitutional because they violated the organization's right to political association, and because the denial of the application based on the association's history of unlawfully violent or criminal behavior was a mere pretense for unconstitutional discrimination. *See Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001) ("*Cuffley II*").

The state officials subsequently revised the regulations to allow a "judicial notice check" under which the fact that other courts have taken judicial notice that certain organizations have a history of violence and deny membership for reasons such as race were valid reasons for denial of an application. The district court in this case held that the defendant was collaterally estopped from further litigation on these grounds because the parties in this second case were functionally the same as in *Cuffley II*. The rationale for the court's decision in *Cuffley II* also applied to this case despite the slight changes to the text of the regulations. If collateral estoppel were not applicable, *stare decisis* would compel a like decision.

The Eighth Circuit held that the revised regulation may not apply to this organization, because the regulation was vague and without clear limits, and the state had failed to show that this particular branch of the Ku Klux Klan had violated the regulations, which the court felt had been used as a smoke screen to deny participation because of the organization's political views. The state contended that every Ku Klux Klan organization has been associated with a history of violence. The court said that the Knights of the Ku Klux Klan had, individually and organizationally, varying philosophies and proclivities towards violence and have not always been affiliated with other groups using the same name, either formally or informally. Because there had been no individualized inquiry to confirm a history of violence as to these applications, there was no evidentiary support for the defendants' conclusions. Thus, the court found it "manifest" that the denial arose out of a hostility for the political views of the applicant. 370 F.3d at 741.

The court further found that the denial was unconstitutional because it was based on the plaintiff's choice of a name, which expresses a choice as to its views and its political message. The court found analogous *Healy v. James*, 408 U.S. 169 (1972), where a university denied recognition to a local chapter of the Students for a Democratic Society because the national organization of the same name had a philosophy of "disruption and violence" that was contrary to college policy. *Id.* at 174–75. While unaffiliated, the local chapter used the national name to illustrate its political message. The United States Supreme Court said that recognition could not be denied under a theory of "guilt by association," which would be inconsistent with the First Amendment. *Id.* at 186.

The Eighth Circuit found the revised regulation was too broad and targeted the Ku Klux Klan on the basis of its views. A history of violence in the absence of a violation of laws would ban football and hockey teams and possibly labor unions, or, as the court noted, the Latter Day Saints because some of their members participated in the Mountain Meadows Massacre in the 1850s. Even Republicans and Democrats have had some violence associated with their history. The court concluded,

> In light of the substantial breadth of the regulation, the reasons advanced by the State in support of the regulation are insufficient to justify the restrictions on expression and association that it creates. Considering the purpose of the AAH program—"to provide volunteer community support for anti-litter and highway beautification programs with the potential for a cost savings to the Missouri Department of Transportation for use for other highway purposes,"—there is simply no rationale for excluding the diverse array of groups from the program that the regulation permits the State to bar from participation.

370 F.3d at 743 (citation omitted).

The court said that if the purpose of the regulation was to prevent people presently involved in criminal activity from participating, then the regulations were overly inclusive, because they were not limited to groups whose violent history is recent or criminal and the state may not censor the speech of applicants because of the potential responses of its recipients, despite the state's desire to prevent public backlash or road rage because of the applicant's unpopular beliefs. The state had created a nonpublic forum and may not discriminate on the basis of viewpoint.

The regulations were thus facially invalid and overbroad, and likely to be applied inconsistently or unequally. The history of the regulations and the fact that they had been applied only to exclude the plaintiffs in this case also strongly suggested that they were pretextual.

Finally, the court also rejected the state's claim that it was the speaker in this case because it composes and erects the sign identifying the adopter and thus may dictate its content.

While that rule might apply in a public broadcasting field, where the selection of content and sponsors loom large, it does not apply to the adopt-a-highway program. Participation in the program is expressive speech that may not be abridged, even if it is private in nature. The design of the sign is somewhat left to the state's discretion, but the value of the sign is participation in the community.

Notwithstanding the obvious nature of the KKK, the Eighth Circuit correctly determined that the organization has a role in the marketplace of ideas and affirmed the district court's ruling.

Edward J. Sullivan

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004).

LUBA Cases

■ LUBA JURISDICTION

The petitioners in *Cutsforth v. City of Albany*, 48 Or LUBA ___ (LUBA No. 2004-141, Dec. 1, 2004), challenged the Albany City Council's adoption of a resolution referring an annexation proposal to city voters. The proposed annexation area consisted of 97 parcels comprising 310 acres. Although the city attempted to mail notice of a public hearing on the annexation proposal to each property owner within the affected area, some of the individually addressed notices were placed in the wrong envelopes and sent to other owners within the affected area. At the conclusion of the public hearing, the city council voted unanimously to adopt the resolution referring the annexation proposal to the voters. The city did not mail notice of the decision to any participants at the hearing. The petitioners, many of whom testified at the public hearing, filed a notice of intent to appeal the resolution 35 days after it was adopted.

The city moved to dismiss the appeal on the grounds that it was not timely filed and that the annexation resolution is not a land use decision. LUBA agreed with the city that the appeal was untimely, and therefore did not address the other jurisdictional argument.

The timeliness issue involved whether the petitioners' appeal was subject to the filing deadline in ORS 197.830(3) (21 days from the date of actual notice or the date a person knew or should have known of a decision made without a hearing) or the deadline in ORS 197.830(9) (21 days from the date a decision becomes final). With respect to those petitioners who did not receive notice of the city's hearing, the petitioners argued that ORS 197.830(3) was applicable because the city's adoption of the annexation resolution was a quasi-judicial action and the petitioners were entitled to notice of the hearing on the resolution. Because at least one petitioner (Cutsforth) did not receive notice of the hearing, the petitioners argued that the resolution was a decision made without a hearing with respect to that petitioner and that ORS 197.830(3) supplied the applicable filing deadline for his appeal.

Unlike the petitioners, the city and LUBA characterized the annexation resolution as a legislative action under the three-part test articulated in *Strawberry Hill 4 Wheelers v. Benton County Board of Commissioners*, 287 Or 591, 602–03, 601 P2d 769 (1979), and subsequent LUBA decisions. Under that test, three factors are considered: (1) Is the process bound to result in a decision? (2) Is the decision bound to apply preexisting criteria to concrete facts? and (3) Is the action directed at a closely circumscribed factual situation or a relatively small number of persons? LUBA concluded that the city's resolution did not satisfy the first and third factors. As a result, adoption of the resolution was a legislative action and was not governed by statutory or local code provisions governing quasi-judicial hearings. Petitioner Cutsforth was not entitled to individual written notice of the city's hearing on the resolution and ORS 197.830(9) provided the applicable deadline for filing his appeal, which he did not meet.

With respect to those petitioners who appeared at the city's hearing on the annexation resolution, LUBA ruled that the city had "provided a hearing" to these petitioners and, therefore, the alternative appeal deadlines in ORS 197.830(3) did not apply. None of the petitioners had filed a timely notice of intent to appeal within the applicable appeal deadline in ORS 197.830(9), and LUBA therefore dismissed the appeal as untimely.

■ LOCAL PROCEDURE-IMPARTIAL TRIBUNAL REQUIREMENT

LUBA's decision in *Carrigg v. City of Enterprise*, 48 Or LUBA ___ (LUBA No. 2004-128, Dec. 28, 2004), emphasizes the importance of responding promptly to a local decision maker's disclosure of site visits and ex parte contacts during a quasi-judicial land use proceeding. The petitioner in *Carrigg* appealed the city's decision approving the location and design of a single-family home. Because of topographical constraints and the location of a city water line easement on their property, the applicants proposed to build a single-level house with vaulted ceilings and a steeply pitched roof in the northeast corner of their lot. The applicants' property is located directly south of the petitioner's house, and their proposed home will almost entirely block the petitioner's panoramic view of the Wallowa mountains.

During a July 7 *de novo* appeal hearing on the applicants' proposal, one city councilor (Hill) disclosed that he had visited the applicants' property and had an impression that the petitioner's view of the Wallowa mountains was blocked by trees. Following this disclosure, the petitioner presented his testimony without addressing the councilor's disclosure and the city council closed the evidentiary record at the end of the hearing. The council reconvened on July 19 to deliberate on the appeal. During the deliberations, the mayor and two

other councilors (Nuss and Shaw) stated that they had visited the applicants' site. The council voted 4-0 to affirm the planning commission's decision approving the proposed home and directed the city attorney to prepare findings. Ten days later, on July 29, the city council approved the applicants' proposal subject to conditions.

On appeal to LUBA, the petitioner, citing the *ex parte* contact provisions of ORS 227.180(3), argued that the city councilors had committed procedural error by failing to disclose their site visits in a timely way and by failing to give the petitioner an opportunity to rebut any information the councilors obtained during their site visits.

LUBA agreed with the city that the procedural rules applicable to the disclosure of site visits are governed by case law, not ORS 227.180(3). Turning to each of the disclosed site visits, LUBA concluded that the petitioner had an adequate opportunity to object to Councilor Hill's disclosure on July 7 and waived any claim of error by failing to do so during his own testimony immediately following the disclosure.

Somewhat surprisingly, LUBA also ruled that the petitioner had had an adequate opportunity to object to the disclosure by the mayor and Councilors Nuss and Shaw on July 19. According to LUBA, even though the evidentiary record had already been closed, the petitioner could have voiced his objection during the council's deliberations and could have submitted written objections at any time during the 10 days leading up to the council's final decision on July 29. LUBA acknowledged that there was no formal process for public input after the July 19 meeting, but stated that "we do not see that the availability or unavailability of a formal process is dispositive." 48 Or LUBA at ___ (slip op at 9). Accordingly, LUBA rejected the petitioner's claim of procedural error.

LUBA's decision carefully parsed its prior decision in *Angel v. City of Portland*, 21 Or LUBA 1 (1991), and the court of appeals' decision in *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 543 (1992). *Carrigg* is worthwhile reading for practitioners representing clients before local governments.

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