OREGON STATE BAR 1935

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 27, No. 3 • May 2005

Also available online

Highlights

■ *OREGON SUPREME COURT TO CONSIDER MEANING OF "GOOD CAUSE" IN OMIA SIGN REGULATIONS*

On December 3, 2004, in *Lombardo v. Warner*, 391 F.3d 1008 (2004), the U.S. Court of Appeals for the Ninth Circuit certified two state law questions to the Oregon Supreme Court, both relating to variance provisions for sign restrictions in the Oregon Motorist Information Act of 1971 (OMIA), ORS §§ 377.700–.840. The Oregon Supreme Court has the discretion to accept or decline the questions. If it accepts, it will make a binding interpretation of the OMIA with respect to the two issues certified. See ORS 28.200; ORAP 12.20. In certifying the questions through an en banc order, the court explicitly withdrew its earlier three-judge panel decision, published at 353 F. 3d 774 (2003).

The OMIA allows temporary signs on private property with certain restrictions. The questions certified to the Oregon Supreme Court pertain to an OMIA provision that allows the Oregon Department of Transportation (ODOT) to adopt rules that, "for good cause shown," allow a person displaying a temporary sign to obtain a variance from those restrictions, so long as ODOT does not consider the content of the sign in deciding whether to allow a variance. ORS 337.735(2). In its rules, ODOT provides,

> Good cause may include a showing that the content of the sign will not be visible to the public if the sign is 12 square feet or less, or a showing of hardship caused by the inability to use a previously-manufactured sign that complies with former size restrictions for temporary signs.

OAR 734-060-0175(2).

Lombardo claims that the variance provisions violate his rights under the First Amendment because they contain no time within which ODOT must act on a variance application. He also claims that the "for good cause shown" standard "leaves open the endless possibilities of what a government official may determine to be good cause" in violation of the First Amendment.

The questions certified to the Oregon Supreme Court are as follows:

1. What is the meaning of the phrase "for good cause shown," as it appears in § 377.735(2) of the OMIA? Is the interpretation and application of that phrase entirely within the discretion of the Department? Does the Department's regulation, § 734-060-0175(2), limit the Department's discretion in applying the "for good cause shown" provision? Does Oregon law otherwise limit the Department's discretion in interpreting and applying the phrase?
2. The OMIA does not contain any explicit time limitation on the Department's acting on an application for a variance under § 377.735(2). When a statute, such as OMIA § 377.735(2), contains no explicit time limitation within which an agency must act, does Oregon law otherwise supply any time limitation on such action?

391 F.3d at 1010.

Lombardo also challenges the OMIA's exception to its general prohibition on "outdoor advertising signs" for signs that pertain to on-premises activities. The Oregon Supreme Court is currently considering several cases challenging the con-

stitutionality of the "on-premises" exception in the OMIA under Article I, section 8 of the Oregon Constitution. *See, e.g., Outdoor Media Dimensions, Inc. v. Driver & Motor Vehicle Serv. Branch,* 184 Or App 495, 56 P3d 935 (2002), *review allowed*, 335 Or 504 (2003). A decision in those cases could obviate the need for the Ninth Circuit to reach the federal constitutional questions in *Lombardo*. The court will not issue its final decision in *Lombardo* until those Oregon cases have been decided and until the Oregon Supreme Court has issued its final response to the certification order.

Emily N. Jerome

Lombardo v. Warner, 391 F.3d 1008 (9th Cir. 2004).

■ YOU CAN'T RAISE IT IF YOU WEREN'T NOTIFIED

Morsman v. City of Madras, 196 Or App 67, 100 P3d 761 (2004), involves challenges to an annexation that was processed through the triple majority method of annexation. This was the second time that this case reached the Oregon Court of Appeals; the first decision is reported at 191 Or App 149, 81 P3d 711 (2003). Although seven assignments of error were raised, the court addressed only two: (1) a challenge to LUBA's waiver analysis under ORS 197.763 and (2) a challenge to the consents to annexation obtained by the city on the basis that those consents were obtained before the city reconfigured the areas to be annexed.

LUBA held that under the "raise it or waive it" principles applied in *Beck v. Tillamook County*, 313 Or 148, 153, n 2, 831 P2d 678 (1992), the Morsmans were obligated to have raised their constitutional challenge to the triple majority method of annexation in their first appeal prior to remand. The court rejected LUBA's analysis for two reasons. First, LUBA failed to account for a party named Shepard, who was a party to the present appeal, but not to the prior appeal. Shepard had not been given the statutorily prescribed notice until long after the city rendered the decision that resulted from the first appeal. Therefore, Shepard was excused from having to raise the constitutional issue the first time around. Second, the court held that the Morsmans cannot be deemed to have waived their constitutional challenge, because the city had failed to give notice of the hearing in accordance with ORS 197.763(1) prior to the first appeal, and therefore there had been no "final evidentiary hearing on the proposal" in compliance with the statute. In effect, the statutory "raise it or waive it" bar had not yet been triggered.

The court also distinguished *Beck* because in that case all of the parties had received legally adequate notice of the initial hearing. Further, *Beck* concerned an issue that had been raised and resolved in a previous LUBA appeal, whereas the constitutional issue in *Morsman* had not been raised, much less resolved in the first appeal. The court thus concluded that LUBA had erred in determining that the petitioners had waived their argument that the triple majority method of annexation is unconstitutional, and the court remanded the matter to LUBA to consider that argument.

Next, the court turned to the Morsmans' argument that the consents to annexation obtained by the city were invalid because they were obtained before the city reconfigured the area to be annexed. The crux of the Morsmans' argument was that the annexation ordinance that the city ultimately passed was invalid because it "is not the annexation consented to." The court disagreed for two reasons.

First, landowners do not consent to an annexation as a whole. Rather, they "consent in writing to the annexation of their land." ORS 222.170(1). Nothing in the statute or the written consents that were obtained by the city signified that the landowners had conditioned their consent on the annexation of any property other than their own. Thus, reconfiguration of the annexed area did not alter the validity of the consents.

Second, ORS 222.170(3) states that the city must set the final boundaries of the area to be annexed by resolution or ordinance. The court thus concluded that ORS 222.170 does not require a governing body to seek renewed consents to annexation when it alters an annexation plan before the ultimate passage of a resolution or ordinance annexing the land.

The court remanded the case to LUBA for consideration of the constitutional issue, but otherwise affirmed.

Steve Morasch

Morsman v. City of Madras, 196 Or App 67, 100 P3d 761 (2004).

■ MUNICIPAL ORDINANCES MUST BEND TO DISABILITIES

In *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004), plaintiff Richard McGary brought an action against the City of Portland, alleging that the city discriminated against him on the basis of his disability in violation of the Fair Housing Act Amendments (FHAA), the Americans with Disabilities Act (ADA), and parallel state and local laws, when it denied his request for additional time to clean his yard in order to comply with the city's nuisance abatement ordinance. The District Court dismissed McGary's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The court of appeals reversed and remanded the case to the district court.

McGary, an individual with AIDS, owned and lived in a home in Portland. McGary's illness impaired his ability to perform major life functions, including the upkeep of his property. An inspector from the city's Office of Planning and Development Review (OPDR) inspected McGary's home and determined that the amount of trash and debris in his yard constituted a nuisance in violation of city rules. *See* Portland City Code 29.20.010 ("It is the responsibility of the owner of any property . . . to maintain the outdoor areas of the property [including] . . . [r]emoving, and keep[ing] removed . . . [a]ccumulations of litter, glass, scrap materials (such as wood, metal, paper, and plastics), junk, combustible materials, stagnant water, or trash . . . ."). Approximately one week later, OPDR sent a notice to McGary directing him to remove all trash and debris from his yard.

A patient advocate from the Cascade AIDS Project (CAP) left a message with OPDR, asking what CAP could do to help McGary meet OPDR's requirements. OPDR did not return the call. CAP partially cleaned the yard with volunteers on several visits. A CAP patient advocate spoke with an OPDR inspector, who informed the advocate that the only way to stop a warrant from issuing was for McGary to fully clean the yard. McGary was hospitalized during this time. A CAP advocate asked the OPDR inspector to not issue a warrant compelling the cleaning, but the request was denied. The city then hired a contractor to clean the yard and charged McGary through liens on the property of approximately $1,800. McGary then sold his home and paid the liened sums.

McGary alleged that the city violated the FHAA by denying his request for a "reasonable accommodation" allowing him additional time to clean up his yard. Under the FHAA, unlawful discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). The Ninth Circuit has repeatedly interpreted this language as imposing an affirmative duty on landlords and public agencies to reasonably accommodate the needs of disabled individuals.

The court set forth the standard under the FHAA by which the public agency must evaluate all claims arising under section 3604(f)(3) and what a successful plaintiff must allege. "In order to state a discrimination claim under the FHAA for failure to reasonably accommodate, McGary must allege that (1) 'he suffers from a handicap as defined by the FHAA;' (2) the City 'knew or reasonably should have known of' McGary's handicap; (3) 'accommodation of the handicap "may be necessary" to afford [McGary] an equal opportunity to use and enjoy [his] dwelling;' and (4) the City 'refused to make such accommodation.' 386 F.3d at 1262 (quoting *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 1994)).

Frequently, the issue for the government agency is whether the third "may be necessary" requirement is satisfied. Sometimes the plaintiff fails to expressly request an accommodation under the FHAA and other times the government fails to recognize that a request has been made under the FHAA. In this case the city argued that McGary had failed to allege that any accommodation was necessary to afford him an equal opportunity to use and enjoy his home. The Ninth Circuit was not as demanding as the city. The court held that "while McGary's claim may not present a paradigmatic discrimination claim arising under the FHAA, it satisfies the liberal pleading requirements established by Supreme Court and Ninth Circuit precedent." *Id.* While the allegation might not assure McGary of a verdict, it was sufficient to survive a motion to dismiss.

The city argued that McGary had to plead that he had been effectively deprived of his home by the action of the city. The city alleged that because it had "neither excluded [McGary] from the neighborhood or residence of his choice,

Oregon Real Estate and Land Use Digest

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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nor ha[d] it created less opportunity for [McGary], as a handicapped person, to live in his neighborhood," that McGary had failed to state a claim under the FHAA. The Ninth Circuit disagreed, restating its previous position that it was incorrect for the district court to assume that the "impairment of the 'use and enjoyment' of a dwelling under 42 U.S.C. § 3604(f)(3)(B) is limited to a complete denial of the use of a home. This constricted reading of the FHAA flouts a long line of cases 'recognizing the FHA's "broad and inclusive" compass' and instructing courts to accord 'a "generous construction" to the Act's complaint-filing provision.'" 386 F.3d at 1262 (quoting *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995)).

The Ninth Circuit narrowed the inquiry for this accommodation and those similar to it to the financial burden of facially neutral rules or laws. Accommodations to neutral policies may be mandated by the FHAA when disabled persons' disability-linked needs for alterations to the policies are essentially financial in nature. The Ninth Circuit did not reach the merits of the FHAA claim: "Rather, we merely conclude that McGary should be given an opportunity to establish, based on a fully developed record, that the City failed to reasonably accommodate him in violation of the FHAA." *Id.* at 1264.

As for the ADA claim, the district court similarly dismissed for failure to state a claim, but the Ninth Circuit reversed. To plead a claim for relief, "McGary must allege four elements: (1) he 'is an individual with a disability;' (2) he 'is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities;' (3) he 'was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity;' and (4) 'such exclusion, denial of benefits, or discrimination was by reason of [his] disability.'" *Id.* at 1265 (quoting *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (per curiam), *cert. denied*, 538 U.S. 921 (2003)).

McGary was allowed to proceed because the Ninth Circuit determined that he had pled facts indicating all four elements. McGary alleged that the city's nuisance abatement policy burdened him in a manner different from and greater than it burdened non-disabled residents, solely as a result of his disabling condition. The facts pled alleged that McGary had AIDS, was physically impaired from meningitis at the time the city demanded he clean his yard, and was hospitalized when the city contractor cleaned the yard for him. McGary claimed that the city's denial of a "reasonable time accommodation" prevented him from complying with the ordinance.

The district court tried to require that McGary show that the nuisance ordinance had been applied to a neighbor in a manner different than it was to him. The Ninth Circuit repeated its standard for pleading such claims, which does not require a disparate treatment allegation, as follows: "We have repeatedly recognized that facially neutral policies may violate the ADA when such policies unduly burden disabled persons, even when such policies are consistently enforced." *Id.*

The city advanced before the Ninth Circuit the position, among others, that the financial ability to pay someone to clean his yard was not something the ADA required the city to accommodate. However, McGary did not allege that he had sought exemption from complying, but instead that he had sought more time. The city's failure to provide more time allowed the ADA claim to proceed forward.

The Ninth Circuit found support for its position in several resources that may not be readily available or apparent to attorneys not regularly practicing in this field. For example, the Department of Justice's Technical Assistance Manual interprets its regulations and uses municipal zoning as an example of a public entity's obligation to modify its policies, practices, and procedures to avoid discrimination.

This opinion opens the door to more advocacy in the field of municipal ordinance enforcement, similar to that experienced by landlords in rules accommodation cases. The court stated that "[i]n reversing the district court's dismissal we also recognize that McGary's claim raises some novel issues within this circuit with regard to the extent of a public agency's obligation to accommodate an individual's disabilities in its enforcement of municipal codes." 386 F.3d at 1270.

The court concluded by remanding for further proceedings on all claims, including the state and local law claims (which the district court had interpreted in the same manner as the federal claims).

Robert Simon

McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004).

■ *NINTH CIRCUIT UPHOLDS LICENSING REQUIREMENTS FOR ADULT ENTERTAINMENT, BUT STRIKES DOWN CERTAIN OPERATING RESTRICTIONS UNDER FIRST AMENDMENT*

In *Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004), Dream Palace, a nude dancing establishment, challenged a Maricopa County, Arizona ordinance imposing licensing requirements and operating restrictions on adult entertainment establishments. For the most part, the prior restraints imposed by the ordinance survived the challenge. However, the court found that the section of the ordinance that defined prohibited acts to include "sexual activity" limited expressive speech in the form of dancing and ordered that provision severed. In addition, because public records laws would not protect the confidential personal information demanded in the license applications required for working in adult entertainment businesses, the court enjoined the application procedure on privacy grounds.

Maricopa County Ordinance P-10 is a comprehensive scheme for licensing and regulation of adult businesses. Under the ordinance, business managers and employees of adult businesses are required to obtain a license or permit prior to operating or working at an adult business. The ordinance also contains operating restrictions. To support the ordinance, the planning department prepared a four-page report for the Maricopa County Board of Supervisors address-

ing the negative effects of adult-oriented businesses. The report included a discussion of the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), and other decisions and cited seventeen studies documenting negative secondary effects of adult-oriented businesses. The report concluded that adult-oriented businesses are associated with "unlawful and unhealthy activities" and generally lead to "illicit sexual behavior, crime, unsanitary conditions, and the spread of sexually-transmitted diseases if not properly regulated." Copies of studies from Phoenix and Los Angeles documenting secondary effects, along with a summary of eleven other studies, were also provided.

Appended in full to the decision, Maricopa Ordinance P-10 defines adult-oriented business as "adult arcades, adult bookstores or adult video stores, cabarets, adult live entertainment establishments, adult motion picture theaters, adult theaters, [and] massage establishments that offer adult service or nude model studios." The ordinance required business managers and employees to obtain a license or permit to operate or work at an adult entertainment business and included numerous operating restrictions.

Once the ordinance took effect, Dream Palace, including its manager and employees, filed suit in federal district court challenging the ordinance on First Amendment and state law grounds. Shortly thereafter, the Arizona legislature provided counties with the authority to regulate new or existing adult oriented businesses and to impose work permit requirements on nude dancers and business managers. Subsequently, the county adopted clarifications to its ordinance. Eight additional secondary effects studies were made available to the board.

On September 30, 1999 the district court granted summary judgment in favor of the county on all but two issues. The court held that the procedural safeguards in place were insufficient because there was no guarantee that preexisting businesses like Dream Palace could continue to operate pending the outcome of an appeals process. The district court also held that the identification requirement for nude dancers was invalid under *Renton*. The court abstained from addressing the state law claims, and the county did not appeal the ruling. Dream Palace filed a motion to amend the judgment, asking the district court to explain its decision to abstain on the state law claims. The court denied the motion on the grounds that the various motions for summary judgment had resolved all of the federal constitutional claims and the "remaining state law claims raise delicate issues involving the interpretation and application of Arizona law." Dream Palace appealed.

Before addressing the merits of the arguments, the Ninth Circuit turned to whether the plaintiffs, as a preexisting business, had standing to appeal the licensing requirements for new businesses. Dream Palace's refusal to apply for permits raised the possibility of prosecution, thereby meeting the "injury in fact" component for standing. However, Dream Palace must still show a continuing stake in the outcome to survive a mootness challenge. The county conceded in its brief that rather than challenging the district court's ruling with respect to preexisting businesses, it was in the process of amending the provisions applicable to preexisting businesses. Therefore, the court reasoned, "Dream Palace will soon be subject to the provisions it now seeks to challenge and consequently, there is a 'live controversy.'" 384 F.3d at 1001 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)).

Turning to the merits, the Ninth Circuit stated that because the licensing provisions are prior restraints, they would be upheld only if they provide the opportunity for a prompt judicial decision during which the status quo is maintained. The Ninth Circuit explained, "A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials." *Id.* Although prior restraints are not necessarily unconstitutional, Supreme Court precedent requires licensing schemes regulating adult entertainment businesses to "contain two procedural safeguards: First, 'the licensor must make the decision whether to issue the license within a specified and reasonable period during which the status quo is maintained.' Second, 'there must be the possibility of prompt judicial review in the event that the license is erroneously denied.'" *Id.* (citations omitted) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)).

Dream Palace claimed that the ordinance was invalid because it placed the burden of proof in the administrative appeals process on the applicant. The court dispensed with this argument, relying on the Supreme Court's reasoning in *FW/PBS* that the government does not exercise discretion by passing judgment on the content of protected speech but rather engages in a ministerial act that is not presumptively invalid. In addition, the applicant may challenge a license denial in court. Because the license is the key to operating a business, the court found, the plaintiffs would have an incentive to vigorously pursue administrative review of an adverse decision.

Next, the court turned to the second requirement, prompt judicial review, articulated in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 124 S. Ct. 2219 (2004). *Littleton* stands for the proposition that state courts function quickly enough with regard to First Amendment license applicants to avoid undue delay in judicial review, because state courts have the tools to expedite proceedings if necessary, the courts are willing to use such procedures, and federal remedies (such as 42 U.S.C. § 1983) provide additional safety valves. According to the Ninth Circuit, the *Littleton* presumption that state court review is adequate applied equally to Ordinance P-10. Arizona courts would be solicitous of the First Amendment rights of license applicants, federal remedies are available if state procedures are insufficient, licensing decisions depend on reasonably objective factors, and the county may rely on state law procedures that are constitutionally adequate.

Satisfied that the ordinance license requirements provided an opportunity for access to judicial review and a prompt judicial decision, the court next examined whether procedural safeguards were adequate to uphold the prior restraints in the manager and dancer work permit requirements. Ordinance P-10 restrains adult-oriented business managers

and adult service providers from working in adult entertainment establishments unless they secure permits in the same manner as an adult business license. The same safeguards for a speedy decision, administrative appeals, and judicial review apply to work permit applications, with one additional safeguard: once an application is filed, the county is required to issue a temporary permit which remains in place until an applicant has exhausted administrative and judicial review of a denied permit.

Reiterating its earlier analysis, the court rejected the argument that placing the burden of proof on managers and dancers in administrative proceedings violated the First amendment. It also rejected the argument that the requirement to exhaust administrative remedies prior to seeking judicial review constituted a prior restraint. The ordinance guarantees a reasonable time for an administrative decision, and the applicant may continue to work pending the outcome of administrative and judicial review. "[R]equiring applicants to exhaust administrative remedies prior to seeking judicial review does not violate the First Amendment, so long as an administrative decision is rendered within a specified, reasonable time 'during which the status quo is maintained.'" 384 F.3d at 1009 (quoting *FW/PBS*, 493 U.S. at 228)).

The court then analyzed the disclosure requirements for work permit applications, including the requirement in section 6 of the ordinance for information regarding full true names, aliases or stage names previously used, and current residential address and telephone number. Dream Palace argued that the disclosure requirement was invalid under the First Amendment and in the alternative, sought injunctive relief against public disclosure. In a prior case, the court found that a requirement to disclose name, addresses, and telephone numbers did not discourage a dancer from performing and was a valid license requirement. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986). Because the ordinance's "confidentiality" provision stated that it was subject to state public records laws, however, the exception swallowed the rule. The Ninth Circuit discussed the potential danger to entertainers from the disclosure of personal information and concluded on the basis of affidavit information that there would be a chilling effect. The court determined that the district court had abused its discretion and remanded the decision for that court to grant an injunction.

Finally, the court applied the three-part secondary effects test from *Renton* to certain operating restrictions, including a prohibition on adult services between 1 a.m. and 8 a.m. on Monday through Saturday and between 1 a.m. and noon on Sunday. Generally, restrictions on hours of operation pass constitutional muster so long as the predominant concerns of the ordinance are the secondary effects of adult speech. Finding that the ordinance was not a complete ban, the court analyzed it as a time, place, and manner regulation subject to intermediate scrutiny determination of whether it serves a substantial government interest and whether reasonable alternative means of communication are available. The court relied on the face of the ordinance, its effect, a comparison to prior law, the facts surrounding adoption, the stated purpose, and the record of proceedings, and found that the ordinance was aimed at the secondary effects of adult oriented business that are detrimental to public health, safety and welfare, specifically including prostitution, drug abuse, health risks associated with HIV/AIDS, and the infiltration of organized crime in drug- and sex-related business activities. The court also found that the government's objective would be achieved less effectively without the restriction on hours of operation, which satisfied the narrowly tailored requirement. Finally, because businesses could still operate seventeen hours per day on Monday through Saturday and thirteen hours on Sunday, ample alternative channels for communication were available and the restrictions on hours of operation were therefore valid.

Dream Palace also challenged the requirement for managers to obtain work permits, claiming that nothing in the record showed that licensing managers aided efforts to combat secondary effects. However, the legislative record on secondary effects, including organized crime and money laundering, supported the effort to screen out potential managers with a criminal history. Other secondary effects, such as sex and drug offenses and health risks "can all be controlled to some extent by management-level employees." 384 F.3d at 1017. The county met its burden of demonstrating a connection between the manager identification and permit requirements and the substantial government interest in ameliorating secondary effects.

The last but most difficult of the plaintiff's challenges was the ban on "specific sexual activity" as defined in the ordinance. The definition of sexual activity includes "sex acts . . . actual or simulated." Section 13(e) provides that an "adult service provider, in the course of providing an adult service, may not perform a specific sexual activity." An adult service includes "dancing, . . . modeling, posing, . . . singing, reading, talking, listening or other performances or activities . . . by a person who is nude or seminude."

According to the court, in prohibiting dancers from engaging in simulated sex acts, the county proscribed activity, including particular movements and gestures that a dancer may make in performance, that comes under First Amendment protection. The ordinance forbade certain expressive activity only within adult-oriented businesses, but not elsewhere. In effect, the ordinance defined adult entertainment business by referring to the presentation of adult live entertainment, which it then prohibited. Dream Palace could not comply with the ordinance unless it ceased to engage in protected expression. According to the court, "[t]his is a total ban on nude . . . dancing in everything but name." *Id.* at 1018. The county cited several cases in support of a police power argument, but the court found that they did not apply. The court also found that section 13(e) was not supported by *Renton*, which does not "give carte blanche to the government to proscribe absolutely certain types of adult entertainment" but rather "effects a common-sense balance between the government's undoubted interest in curbing the effects such businesses have on surrounding communities on the one hand, and the enjoyment of . . . protected expression

on the other." *Id.* at 1019.

The court found that the prohibition was not facially content-neutral nor a content-discriminatory time, place, and manner regulation. The court then applied strict scrutiny to section 13(e): the regulation must be tailored to serve a compelling state interest and be narrowly drawn to achieve that interest. The county failed to explain how the restriction would ameliorate secondary effects, and a variety of less restrictive means were available to ameliorate those effects. The court found that by defining establishments by reference to that which it prohibits, the ordinance was an absolute ban on expressive speech in violation of the First Amendment.

The court severed the invalid provisions, including the prohibition on specified sexual activity, and instructed the district court to enjoin the disclosure of personal information provided by permit applicants. The licensing scheme and multiple operating restrictions withstood scrutiny.

Because the Oregon Public Records Law is similar to Arizona's, a licensing requirement in Oregon to submit confidential information might raise privacy concerns similar to those the court found compelling in this case. Also, restrictions on expressive activity similar to those in the Maricopa County ordinance could violate Article 1, section 8 of the Oregon constitution, which contains broader free speech protection than under the First Amendment tests analyzed in *Dream Palace*.

Joan S. Kelsey

Dream Palace v. County of Maricopa, 384 F.3d 990 (9th Cir. 2004).

Appellate Cases—Real Estate

■ DEED RESTRICTION RENDERED UNENFORCEABLE BY CHANGE IN CIRCUMSTANCES

RealVest Corp. v. Lane County, 196 Or App 109, 100 P3d 1109 (2004), pitted property owner Lane County and its lessee against the adjoining property owners, including RealVest. In 1946, "an 80-foot right-of-way" was sold to Lane County. In 1952, the county purchased additional land on both sides of the 80-foot strip, "subject to the restriction that no building shall ever be erected thereon." At that time, the area was rural. The sellers, the Hendersons, lived and farmed next door, and there was evidence that Mr. Henderson had stated that the restriction was put in the deed because "he didn't want a building next to him."

The area has since become urban. The county parcel now lies at the intersection of two major roads and all the property surrounding the parcel is now zoned commercial. Realvest and its predecessors have constructed a large apartment complex and a motel on adjacent lots. Presumably in anticipation of the county or its lessee developing the county property, Realvest sought a declaratory judgment that the 1952 deed restriction was still enforceable. In response, the county and its lessee sought a declaration that the restriction was no longer valid, and the county also sought to enjoin the plaintiffs' continued use of a driveway from their apartment complex to one of the roads. The circuit court held that the restriction against buildings was no longer enforceable, and that the plaintiffs had the right to use the driveway. The court of appeals affirmed on both issues.

A preliminary question was whether the 1952 deed restriction could possibly apply to the 80-foot strip conveyed in 1946. The plaintiffs argued that it did, on the theory that the 1946 deed only conveyed an easement, because it used the term "right-of-way." If so, the fee interest in the strip was not conveyed until the 1952 deed, and therefore that area was also subject to the restriction. After discussing the 1946 language, and pointing out that conveying a "right-of-way" to the government is not the same as conveying a "right-of-way" to another party, the court held that the 1946 deed conveyed the 80-foot strip in fee, and therefore the 1952 restriction did not apply to it.

The court also held that the deed restriction was not enforceable against the property conveyed in 1952. It cited the established rule that such a building restriction will be enforced "unless the effect of the change on the restricted area is such as to 'clearly neutralize the benefits of the restrictions to the point of defeating the object and purpose of the covenant.'" *Albino v. Pacific First Fed. S & L*, 257 Or 473, 479, 479 P2d 760 (1971) (quoting *Ludgate v. Somerville*, 121 Or 643, 651, 256 P 1043 (1927)). In this case, it seemed clear to the court that the Hendersons' intention was "to protect the rural environment in which they lived." 196 Or App at 119. Fifty years later, that rural environment no longer existed. Because the object of the restriction had been defeated, it would no longer be enforced.

On the counterclaim, the circuit court refused to enjoin the plaintiffs' use of the driveway across the county property on the basis that the evidence established an implied dedication of the driveway to public use by the county. As its starting point, the court stated the general rule: "For an implied dedication of land to the public to occur, there must be a clear and unequivocal manifestation by the owner of the property of an intent to devote it to public use." *Id.* at 121. In this case, the court found a clear manifestation of intent based on the fact that when the county improved the road in the 1980s it constructed a driveway apron and drainage improvements to the plaintiffs' property, and based on a 1982 county engineering report that talked about reserving an easement for the plaintiffs' apartment buildings. Perhaps more important was the court's expressed concern that because the driveway would provide access for police and fire vehicles, closing it might cause irreparable injury to the public.

Michael E. Judd

Realvest Corp. v. Lane County, 196 Or App 109, 100 P3d 1109 (2004).

■ REDEMPTION ONLY KNOCKS ONCE

In *Mason v. Piedmont Properties, Inc.*, 196 Or App 255, 100 P3d 1136 (2004), a series of judicial foreclosures left the defendant mortgagor, Piedmont Properties, Inc., without a second chance to redeem the foreclosed property.

Piedmont purchased the subject property from the Masons in 1991 and secured the balance due with a promissory note and a trust deed to the property. Later, Piedmont borrowed additional funds from third parties, also backed by promissory notes secured by trust deeds to the property. Piedmont fell behind in its payments, and the Masons obtained a judgment of foreclosure. This first foreclosure judgment was withheld from execution so long as Piedmont adhered to a payment schedule set forth in the judgment. Piedmont failed to make the payments, and the Masons obtained a final judgment of foreclosure. The third-party lenders holding junior trust deeds also obtained a stipulated judgment of foreclosure on their cross-claims in the foreclosure action. The stipulated foreclosure judgment in favor of these lenders provided that "*all interest* which the applicable defendants have in the subject property shall be sold by the sheriff" (emphasis added).

In April 2000, the sheriff executed the stipulated foreclosure judgment by selling the property. The purchaser was Lone Pine Ranch of Southern Oregon. In July 2000, Lone Pine filed for bankruptcy. The Masons obtained relief from the automatic stay of bankruptcy so that a sheriff's sale could occur on the Masons' foreclosure judgment. The sheriff then sold the property again in July 2002. The Masons purchased at the sheriff's sale "subject to redemption, all of the interest the within named Defendant(s) had on or after 04/09/91." The court issued an order confirming the sale of the property to the Masons in August 2002, and ordered the redemption rights of the judgment debtor to expire on January 22, 2003.

On January 7, 2003, Piedmont filed a notice of intent to redeem, and the Masons moved to quash the notice. The trial court ruled in favor of the Masons, and the court of appeals affirmed. Piedmont was a mortgagor with rights of redemption after the first sheriff's sale to Lone Pine. However, Piedmont failed to redeem within the first statutory 180-day period. Therefore, the only interest Piedmont had in the property after the first sheriff's sale was a right of redemption, which had previously terminated. Piedmont had no interest left in the property at the time of the second sheriff's sale.

Christopher Schwindt

Mason v. Piedmont Props., Inc., 196 Or App 255, 100 P3d 1136 (2004).

■ RECREATE AT URBAN PARKS AT YOUR OWN RISK

In *Waggoner v. City of Woodburn*, 196 Or App 715, 103 P3d 648 (2004), the plaintiff was injured when using a swing set at a public park owned and maintained by the defendant city. The plaintiff sued the city for negligence. The city successfully moved for summary judgment under the state's recreational use statute, which provides immunity to landowners who open their land free of charge to the public for recreational purposes. ORS 105.682.

The plaintiff appealed, claiming that immunity under the statute is limited to rural and undeveloped land that is used for recreation only incidentally. In rejecting this argument, the Oregon Court of Appeals focused on the plain language of the statute, which covers the recreational use of "*all* public and private lands." ORS 105.688(1)(a) (emphasis added).

The court noted that the original version of the statute, enacted in 1979, defined "land" as "agricultural land, forest land, and lands adjacent or contiguous to the ocean shore." Or Laws 1971, ch 780, § 1(2). In 1995 the legislature broadened that definition to cover "*all* real property, whether publicly or privately owned." Or Laws 1995, ch 456, § 1(3) (codified at ORS 105.672(3)) (emphasis added). The court determined that the plaintiff's interpretation "robs the 1995 amendments of any significance." 196 Or App at 722.

The court examined cases from other jurisdictions in which similarly worded statutes were construed, noting that in some of them (*e.g.*, Utah, New Jersey, and Pennsylvania), the statutes were held to not apply to urban or developed land, but in others (*e.g.*, Michigan, Washington, Massachusetts, and Hawaii), the opposite conclusion was reached. The court stated that this split of authority was not helpful in determining the intent of the Oregon legislature.

The plaintiff also argued that the types of activities to which immunity applies were intended to be limited to "vigorous recreation conducted in rural settings," not activities like swinging on swing sets. The court easily disposed of this argument, noting that the statute expressly covers activities like "picnicking," "outdoor educational activities," and "viewing or enjoying historical, archeological, scenic or scientific sites." ORS 105.672(5) (definition of "recreational purposes").

Nathan Baker

Waggoner v. City of Woodburn, 196 Or App 715, 103 P3d 648 (2004).

Appellate Cases—Landlord/Tenant

■ LANDLORD'S ACCEPTANCE OF RENT AS WAIVER UNDER ORS 90.415

The Oregon Court of Appeals interpreted the waiver provision of ORS 90.415 in *Housing and Community Services Agency of Lane County v. Long*, 196 Or App 205, 100 P3d 1123 (2004). The court ruled that the landlord had waived its right to terminate the tenant's rental agreement based on the tenant's default by repeatedly accepting rent with knowledge of that default.

The defendant had been a tenant in federally subsidized housing for several years. The month-to-month lease agreement provided that the plaintiff landlord could terminate the lease upon 30 days' notice if the tenant gave false information regarding any material fact. The tenant lived in the premises with his children and listed himself and his children as tenants. In 1999, the landlord began to suspect that the tenant was allowing another person—specifically, Alma Ronquillo, the mother of the tenant's children—to reside at the premises without authorization. The landlord took no action because it believed it did not have sufficient evidence of the breach of the lease.

In January 2003, in an affidavit made in support of a restraining order under the Family Abuse Prevention Act, Ronquillo alleged that she had resided at the tenant's apartment during his tenancy. About a month after the landlord obtained a copy of the affidavit, the landlord gave notice to the tenant of eviction for fraudulently hiding Ronquillo's unauthorized presence. An administrative law judge subsequently found that the tenant had violated the terms of his lease and the landlord had a right to evict him. The landlord gave the tenant until May 7 to vacate the premises and began an FED proceeding on May 3. On May 7, the tenant delivered a check for $10.00 (which represented five months of prepaid rent) to the landlord's rental office, and the check was deposited the next day. On May 15, the landlord sent a check for a full refund to the tenant.

At the FED trial, the tenant's request for a continuance to obtain counsel was denied and the court found that the tenant had breached the lease agreement by failing to disclose Ronquillo's presence. The landlord was awarded possession of the premises and a judgment against the tenant for costs and attorney fees.

On appeal, the tenant contended that the landlord had waived its right to terminate his lease by accepting many months of rent while knowing that the tenant was in violation of his lease. In support of his claim of waiver, the tenant relied on ORS 90.415(1), which states that a landlord waives the right to terminate a rental agreement for a particular breach if the landlord "[d]uring two or more separate rental periods, accepts rent with knowledge of the default by the tenant." The landlord's employees testified that between 1998 and 2003, the landlord had received information from a number of state agencies indicating that Ronquillo lived with defendant at his rental. The tenant argued that this testimony showed that the landlord had knowledge of the default during several rental periods when the landlord accepted rent from the tenant.

In response, the landlord countered that before receiving the affidavit from Ronquillo, the landlord had only suspicion of the default by the tenant, not actual knowledge. Given that only one rental period had elapsed between the landlord's receipt of the affidavit and the eviction notice, the landlord claimed that no waiver had occurred.

However, the court did not focus on state of the landlord's knowledge prior to receiving Ronquillo's affidavit, because "[e]ven if [the landlord] is correct a waiver has occurred." 196 Or App at 209. To the court the important fact was that the landlord admitted that after receiving the affidavit, the tenant had paid rent and the landlord had accepted it. In effect, the landlord accepted one month's rent with knowledge of the tenant's concealment of Ronquillo's presence.

The court then considered the advance payment of five months rent tendered by the tenant and subsequently refunded by the landlord. The court found that the landlord's attempt to refund the payment was ineffective because it was not timely. For the purposes of ORS 90.415(1)(a), a landlord has not accepted rent if the landlord refunds the rent within six days of receipt. ORS 90.415(2). However, the landlord took eight days to issue a refund.

The court noted that the fact that one of the rental periods occurred after the landlord served the notice of termination was not relevant for the purposes of ORS 90.415(1)(a). The facts of this case did not fit either of the two exceptions for advance payments that may occur when a landlord accepts rent for a period extending beyond the termination date. See ORS 90.415(12), (13). The court reasoned that the "necessary implication . . . is that, when an advance payment does not fit one of the exceptions, accepting it can count as waiver." 196 Or App at 210. The landlord's acceptance of advance rent from the tenant counted as the second rental period in which the landlord had accepted rent with knowledge of the tenant's default. The court concluded that the landlord had waived its right to terminate the rental agreement and reversed the trial court decision.

In this case, the landlord's acceptance of $10.00 in advance rent was the pivotal factor in the decision of the court of appeals. Obviously, this sum is inconsequential in light of what the landlord lost by accepting it. This decision makes clear that it is crucial for landlords to be fully aware of the possible ramifications of accepting rent from a breaching tenant if that landlord intends to evict the tenant based on that default. Two days late and ten dollars short was all it took to reverse the outcome in this case.

Raymond W. Greycloud

Housing & Cmty. Servs. Agency of Lane County v. Long, 196 Or App 205, 100 P3d 1123 (2004).

■ *DOUBLE TROUBLE FOR LANDLORD WHO UNLAWFULLY WITHHELD TENANT'S SECURITY DEPOSIT*

In *Waldvogel v. Jones*, 196 Or App 446, 103 P3d 124 (2004), the Oregon Court of Appeals held that when a landlord wrongfully withholds any portion of a security deposit and the tenant asserts the statutory right to recover double damages, courts do not have discretion to award anything less than twice the amount wrongfully withheld.

As provided in ORS 90.300(10), a landlord may withhold part or all of a tenant's security deposit if the landlord provides a written accounting within 31 days of the termination of the tenancy. The written accounting must support the rea-

son(s) for withholding part or all of the security deposit. The trial court found that the landlord had withheld the tenant's security deposit and failed to make a timely accounting. The court also held that it was within the court's discretion to award the tenant with less than the statutorily required amount in damages because the statute uses the term "may" to describe the tenant's right to recover. However, the Oregon Court of Appeals held that the district court misconstrued the meaning of the term "may."

The pertinent language of ORS 90.300(14) reads, "[t]he tenant may recover the money due in an amount equal to twice the amount" of the portion wrongfully withheld. The appellate court held that the tenant (and not the trial court) is clearly the subject of the term "may." Thus, the legislature intended to give the tenant the ability to seek double damages. The appellate court reversed and remanded with instructions to the trial court to award the tenant $800 in damages because the tenant's $400 security deposit was unlawfully withheld.

Glenn Fullilove

Waldvogel v. Jones, 196 Or App 446, 103 P3d 124 (2004).

■ NINTH CIRCUIT VALIDATES LOW-INCOME TENANTS' OBJECTIONS TO CITY EVICTIONS

Price v. City of Stockton, 390 F.3d 1105 (9th Cir. 2004), deals with the obligations of local governments under the federal Housing and Community Development Act (HCDA) and the enforceability of some, but not all, of its provisions under 42 U.S.C. § 1983.

The trial court granted a preliminary injunction against the defendant city and its officers to prevent eviction of tenants from various single resident occupancy (SRO) hotels for safety violations. The trial court found that federal funds were used in the city's code enforcement program and enjoined the evictions under the HCDA until the city adopted and implemented anti-displacement regulations that would apply to all emergency evictions. The trial court later modified the injunction to allow emergency evictions, but with safeguards such as providing adequate notice to displaced persons of their right to relocation assistance.

The appellate court began its analysis by considering whether the plaintiffs had an enforceable right to benefits under section 104 of the HCDA alone or under 42 U.S.C. § 1983. The court said that it would look to whether Congress had intended such a right to be created, and that the asserted right could not be so vague or amorphous that its enforcement would strain judicial competence. There were two provisions of the HCDA at issue: section 104(d), which requires each federal block grant recipient to certify that it is following a residential anti-displacement and relocation assistance plan; and section 104(k), which requires each grantee to provide for "reasonable benefits to any person voluntarily and permanently displaced as a result of the use of assistance" to acquire or substantially rehabilitate property.

The court avoided the question of whether section 104(d) applied by determining that section 104(k) applied and that its language is sufficient to create enforceable benefits that are spelled out in other portions of the Act and its implementing regulations. The court concluded that some, but not all, of the statutory provisions at issue conferred rights and are enforceable under section 1983.

Turning to the preliminary injunction, the trial court found that the plaintiffs were likely to succeed on their claim because the defendant had improperly used its block grant funds for code enforcement and demolition of housing instead of acquisition or rehabilitation of such housing. The Ninth Circuit found that none of these findings were clearly erroneous and that they were supported by the record. After closing two of the targeted hotels, the defendant city had proceeded to acquire them, but had not provided for replacement housing as federal law required. The court agreed with the trial court that this was a "budgetary sleight of hand" that conflicted with federal law. Moreover, the Ninth Circuit agreed that the balance of hardships favored the plaintiffs, who were otherwise without housing.

As to the scope of the injunction, the court found the trial court's injunction justified in terms of producing relocation assistance for individuals whose rights had been violated, but rejected the trial court's ruling that the city had to provide one-for-one replacement of affected units prior to vacation, demolition, or conversion.

Because the trial court order could be sustained on the federal Housing Community Development Act claims, the court declined to consider an alternative state law basis for the claims. The trial court decision was thus affirmed in part and reversed in part and remanded for further proceedings.

Edward J. Sullivan

Price v. City of Stockton, 390 F.3d 1105 (9th Cir. 2004).

Cases from Other Jurisdictions

■ COUNTY VIOLATES COMMERCIAL FREE SPEECH RIGHTS BY PROHIBITING THE USE OF RAINCOATS ADORNED WITH COMMERCIAL ADVERTISEMENTS, SAYS WASHINGTON COURT

In *Kitsap County v. Mattress Outlet,* 153 Wn. 506, 104 P.3d 1280 (2005), the Washington Supreme Court dismissed an action by Kitsap County to enforce its off-site advertisement regulations. In this as-applied challenge, the majority of a divided court found that the county's regulations violated constitutional free speech protections.

As part of an advertising scheme, Mattress Outlet paid independent contractors to wear raincoats that displayed the company's name, phone number, and address, and included

notice of a "1/2 PRICE MATTRESS SALE." The raincoats were reinforced, making them rigid and flat under the advertisement, and hence easier to read. The contractors were paid to stand on public sidewalks and wave to passersby.

The county sign regulation prohibits off-site signage and requires permits for non-exempt signs. Exempt signs include, among other things, traffic, street, and legal signs; "for sale," "for rent," and "help wanted" signs, garage and yard sale signs; and A-board signs. Mattress Outlet did not seek a permit for its raincoats, and the county sought to enforce the prohibition.

The Washington Supreme Court held that the raincoats qualified as signs under the ordinance. The court then proceeded to evaluate the county ordinance under the federal and state constitutions as applied to the facts of this case.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The Washington Constitution protects the right of every person to "freely speak, write and publish on all subjects." Art. I, § 5. Under the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the courts gauge restrictions on commercial speech by examining four factors: (1) whether the speech involves a lawful activity and is not misleading, (2) whether the government has a substantial interest in restricting the speech, (3) whether the government's interest is directly and materially served by the restriction, and (4) whether the restriction is no more extensive than necessary.

Relying heavily on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the *Mattress Outlet* court held that the enforcement action failed under the third and fourth prongs of the *Central Hudson* test. Under the third prong, the *Mattress Outlet* court found an absence of evidence that prohibiting raincoat-clad workers from sidewalks would materially advance the county's asserted interests in aesthetics or safety. Under the fourth prong, the court found that "[t]he total ban of offsite advertising . . . does not reflect any method of narrowly tailoring the restriction to meet the specific goals of increased safety and aesthetics." 104 P.3d at 1286.

In a concurring opinion, Justice Chambers argued that the ordinance may also fail on vagueness grounds. Noting that his "mother's ball cap, sweat shirt, and windbreaker are all portable signs," Justice Chambers stated that he was concerned about the application of such regulations to labels on clothing—a common advertising practice of clothing manufacturers and retailers. *Id.* at 1287.

Keith Hirokawa

Kitsap County v. Mattress Outlet, 153 Wn. 506, 104 P.3d 1280 (2005).

■ *DECISION MAKERS MUST PAY ATTENTION, SAYS CALIFORNIA COURT*

Lacy Street Hospitality Service, Inc. v. City of Los Angeles, 22 Cal. Rptr. 3d 805 (Cal. Ct. App. 2004), involved the plaintiff's application for an extension of hours and modifications to other conditions placed upon the previous owner of an adult cabaret. The city's zoning administrator granted the request, but the neighbors appealed to the city council. After referring the matter to its planning and land use management committee for review, the council held a hearing on the committee's recommendation to reverse the administrator's decision and reinstate the conditions. The council adopted the committee's recommendations and the plaintiff, Lacy Street Hospitality Service (LSHS), sought an administrative mandate challenging that decision. The trial court upheld the council's decision and the plaintiff appealed.

On review, the court said that it would assess the council decision, as opposed to the trial court review of the same, especially because the council claimed to exercise *de novo* powers of review.

The court then observed,

> A picture is worth a thousand words, and here the picture was a videotape. LSHS recorded the city council hearing, slowly moving the camera's gaze back and forth from one end of the council table to the other, at times lingering on particular council members, capturing their behavior at that moment. The tape shows that when the council president summoned LSHS to the speaker's lectern to present its case, eight council members—three of whom were absent—were not in their seats. Only two council members were visibly paying attention. Four others might have been paying attention, although they engaged themselves with other activities, including talking with aides, eating, and reviewing paperwork.
>
> One minute into LSHS's presentation, a council member began talking on his cell phone and two council members, one of whom had been paying attention when the hearing opened, started talking to each other. A minute later, two other council members struck up their own private conversation. Three minutes into his presentation, LSHS's counsel complained "it doesn't appear that too many people are paying attention," an observation the videotape verifies, as only a few council members were sitting in their seats not talking to others.

22 Cal. Rptr. 3d at 808. The council's behavior did not change during the opponent's presentation.

The court noted that the council was sitting as a quasi-judicial body and recited the fundamental axiom of administrative law that "he who decides must hear." *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 276 (1990). In order for an adjudicatory body to meet due process standards, it is obligated to pay attention, and the distractions of various members during the hearing was especially troubling because that body reversed the zoning administrator's decision, which had

been the product of a good deal of research. On the basis of the record and arguments, the court could not find that the council had made a reasonable decision and remanded the matter to the council "for a hearing that satisfies [the plaintiff's] due process right to be heard." 22 Cal. Rptr. 3d at 809.

This is an interesting case in which procedure was everything. The case illustrates the need for a fair hearing, and demonstrates the potential importance of videotaping the proceedings for an appellate court to review.

Edward J. Sullivan

Lacy St. Hospitality Serv., Inc. v. City of Los Angeles, 22 Cal. Rptr. 3d 805 (Cal. Ct. App. 2004).

■ *THE LAWS THAT VEST: NO MORE PICKING AND CHOOSING*

In *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), Division II of the Washington Court of Appeals ended the practice of picking and choosing which laws to vest in development application review. The court held that developers may take advantage of more favorable, later-enacted development regulations only when they withdraw and resubmit their applications, thereby waiving any vested rights.

In 1989 and 1991, East County Reclamation Company (ECRC) filed an application to build a landfill over an alluvial aquifer in eastern Clark County, Washington. At the time the application was filed, the County's Solid Waste Management Plan (SWMP) prohibited privately owned, special use/limited purpose landfills. However, in 1994, the SWMP was amended, and privately owned landfills were no longer prohibited. Of course, by that time, the county had also adopted concurrency and critical aquifer recharge regulations.

The hearing examiner dealt with the question of applicable law, finding that the vested rights doctrine favored the applicant's development interests, even where those rights were selectively waived and asserted over a five-year period. The hearing examiner allowed ECRC to take advantage of 1994 SWMP amendments removing the private landfill provisions. However, the hearing examiner also found that the application vested in 1989 and 1991, and hence was exempt from subsequently adopted development regulations, including the County's concurrency and critical aquifer recharge regulations.

The appellate court reversed this holding. The court did not dispute the purpose of the vested rights doctrine to favor development interests; rather, the court found that vested rights were not intended to work in a piecemeal fashion. The court reasoned that the "doctrine does not allow a developer to file an application for an impermissible use and then to selectively waive its vested rights so it can benefit from parts of newly-enacted regulations allowing the use without having to comply with other parts of those same new regulations." 105 P.3d at 97. The court concluded that "[i]f an applicant wishes to take advantage of a change in the law allowing a previously prohibited land use, it may do so by withdrawing its original application and submitting another. But it may not select which laws will govern his application." Id. at 98.

Keith Hirokawa

East County Reclamation Co. v. Bjornsen, 125 Wn. App. 432, 105 P.3d 94 (2005).

■ *FEDERAL CIRCUIT FINDS ESA CLAIM UNRIPE*

Morris v. United States, 392 F.3d 1372 (Fed. Cir. 2004), involved a dismissal of a regulatory takings claim by the United States Court of Federal Claims because the National Marine Fisheries Service ("NMFS") had discretion over the cost of compliance with the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544, and the plaintiffs had never sought to obtain a permit.

The discretion involved the approval of a habitat conservation plan in conjunction with an incidental take permit (ITP). The ITP was required for the harvesting of old-growth redwoods on the property because of potential effects on listed fish in the adjacent Eel River. The plaintiffs investigated the cost of compliance and found that it would exceed the profit for harvesting the trees. The plaintiffs brought a regulatory takings claim instead.

The defendant moved to dismiss because the plaintiffs had never applied for an ITP and the claim was therefore unripe. The Court of Federal Claims agreed and the plaintiffs appealed.

The Federal Circuit affirmed, stating that there must be a permit denial or futility that amounts to constructive denial. A process that is complex, arduous, or expensive does not obviate the need for an application for permits. The plaintiffs argued that they could decide whether the cost of the process would be greater than the economic benefits of the harvesting, but the court answered that the cost of the process was not the issue. The plaintiffs failed to show an agency restriction on use, and must attempt to secure a permit before bringing a claim. A final agency decision is normally required for such a claim to be ripe. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). In order to determine whether regulations effect a taking, there must be reasonable certainty about what the agency will allow on the property. When an agency decision makes clear that pursuing remaining administrative remedies will not result in a different outcome, such remedies would be futile and the impact of the regulation on the property is reasonably certain.

The court rejected the idea that the speculative cost of compliance with the agency process itself worked a taking, especially because NMFS's guidance for an HCP commits the agency to collaborating with landowners, and the cost of preparation of an HCP was not known. In such circumstances, an agency must be allowed to exercise its discretion. The dismissal was thus affirmed.

This case again illustrates the requirement that a regulatory taking claim must be ripe and that a final agency decision is necessary before a takings claimant may proceed to court.

Edward J. Sullivan

Morris v. United States, 392 F.3d 1372 (Fed. Cir. 2004).

LUBA Cases

■ EXCLUSIVE FARM USE ZONES

In *Emmons v. Lane County*, 48 Or LUBA ___ (LUBA No. 2004-111, Feb. 10, 2005), LUBA reaffirmed that property that is part of a "farm unit" is "agricultural land" within the meaning of Statewide Planning Goal 3 and its implementing rules, even if the property is not actively used for farming. In *Emmons*, the county approved a comprehensive plan amendment redesignating a 30-acre parcel from "Agricultural Land" to "Nonresource" and rezoning it from "E-30/Exclusive Farm Use" to "RR-5/Rural Residential." Approximately 80% of the property is rated as Class III soil under the Natural Resources Conservation Service (NRCS) soil survey and has a forest productivity rating of 182 cubic feet per acre per year. The property was part of tax lot 700 and was adjacent to tax lot 600, which was owned by the intervenor/applicant's parents, and to tax lot 1100, which the intervenor leased. Over the years, the intervenor grew mint and sugar beets on portions of the rezoning site as well as on tax lot 600.

On appeal, the petitioners argued that the rezoning site is "agricultural land" within the meaning of Goal 3 and its implementing rules and that the county erred by redesignating and rezoning the property for nonresource use without taking an exception to the goal. The petitioners pointed to Goal 3's definition of "agricultural land" and additional language in OAR 660-033-0020(1)(b) that includes other land that is "intermingled with lands in capability classes I-IV . . . within a farm unit . . . even though this land may not be cropped or grazed." LUBA phrased the dispositive legal question as "whether the subject property is part of a 'farm unit'" and, therefore, agricultural land. 48 Or LUBA at ___ (slip op at 6). LUBA concluded that it was agricultural land because the intervenor had made a profit from growing filberts on the property up to a year before seeking the rezoning, and the filbert orchard extended onto adjacent lands owned or leased by the intevenor. Additionally, the rezoning site contained the barn and farmhouse; LUBA treated this as evidence that the property was part of a larger farm unit. Because the property was adjacent to and intermingled with soils that fall in the Class I through IV range and was part of a farm unit as a matter of law, LUBA concluded that the county had erred in approving the redesignation and rezoning. Accordingly, LUBA reversed the county's decision.

■ JURISDICTION

A city decision that grants a "temporary land use approval" is a land use decision within LUBA's review jurisdiction, LUBA decided in *Curl v. City of Bend,* 48 Or LUBA ___ (LUBA No. 2004-163, Feb. 10, 2005). The applicant/intervenor in *Curl* originally obtained conditional use approval to expand existing transmission and reception facilities. That decision was appealed to LUBA and was ultimately remanded to the city. While the LUBA appeal was pending, the intervenor decided to proceed with construction of one of the towers that was the subject of the conditional use. The intervenor signed a memorandum of understanding with the city under which the city agreed to issue a building permit and the intervenor agreed to assume the risk that the conditional use permit could be reversed or remanded by LUBA.

In response to neighbor concerns that the proposed tower and, in particular, one of the anchored cables supporting it, would be built outside the area authorized by the conditional use decision, the city issued a building permit as a "temporary land use approval" under its city code. The code allows the city to issue a temporary approval administratively and without notice or hearing before the city has approved a discretionary land use approval if the city finds, among other things, that the applicant has demonstrated "good and sufficient cause" for the approval. In granting the building permit, the community development director allowed one of the anchored cables to be located outside of the six-acre area where the city had previously approved the conditional use, noting that the conditional use decision is ambiguous and that the intervenor had sought a declaratory ruling to clarify that decision.

On appeal to LUBA, the petitioners argued that the temporary land use approval was a discretionary permit within the meaning of ORS 227.160(2) and that the city erred by failing to hold a public hearing before issuing the approval. LUBA agreed, noting that the "good cause" standard in the city's code required the community development director to exercise "significant discretion." The only remaining issue before LUBA was whether the temporary approval was a nonfinal interlocutory decision or a final and appealable land use decision. LUBA concluded that under the procedural circumstances of multiple pending appeals and actions concerning the underlying conditional use permit, the temporary approval was the only discretionary approval that authorized the proposed tower and was a final land use decision. The temporary approval was reduced to writing, signed by the decision maker and not subject to any further local appeal, all of which supported LUBA's view that it was a final decision. Because the city had failed to provide either a public hearing before issuing the temporary approval or notice and an opportunity for a *de novo* appeal of the decision, LUBA remanded the city's decision.

■ LOCAL ORDINANCE INTERPRETATION

LUBA's decision in *Friends of the Metolius v. Jefferson County*, 48 Or LUBA ___ (LUBA No. 2004-119, Feb. 2, 2005), is the latest in a lengthy dispute over whether cabins to be added to an existing recreational complex are "tourist rental cabins" or "single-family dwellings" under the county's code. The county originally issued a site plan approval for the renovation of an existing lodge and cabins, the addition of twenty-three 1,350-square-foot cabins, and construction of a meeting hall and other facilities, all located in the Camp Sherman Vacation Rental (CSVR) Zone. As proposed, both the renovated and new cabins would be sold as condominiums and owner occupancy would be limited to a maximum of 90 consecutive days per year. As conditioned by the county, each unit would have to be available for rental for a minimum of 185 days per year. Single-family dwellings, lodge complexes, tourist rental cabins, and accessory rental facilities are all allowed in the CSVR zone, subject to siting standards. In a prior decision, LUBA held that the county erred in characterizing the cabins as tourist rental cabins and in interpreting its code to allow more than *de minimus* residential use of the cabins by the owner-occupants. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509, 519–20 (2004) (Friends I).

On remand, the county board held a limited evidentiary hearing and again issued site plan approval for the proposed renovation and new construction. The board imposed a condition requiring the cabins to be available for rental at least 245 days a year and allowing owner-occupancy up to 120 days per year. As so conditioned, the county board approved the cabins as "tourist rental cabins."

The petitioners appealed to LUBA and argued that the county board repeated its mistake when it characterized the cabins as tourist rental cabins rather than single-family dwellings. In essence, the petitioners argued that the board had merely made cosmetic changes to its prior decision by increasing from 180 to 245 the number of days the cabins must be available for tourist rental and by decreasing the consecutive number of days of permitted owner occupancy to 30 days per quarter. In the petitioners' view, these limits were still inconsistent with treating the cabins as "tourist rental cabins."

LUBA agreed with the petitioners, relying heavily on a series of 1994 LUBA and appellate decisions that analyzed the history of the relevant county code provisions and the level of owner-occupancy that is consistent with the status of "tourist rental cabins." *See Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411, *aff'd*, 123 Or App 256, 860 P2d 278, *adhered to on reconsideration*, 125 Or App 122, 866 P2d 463 (1993), *rev den*, 318 Or 582, 873 P2d 321 (1994). At issue in those cases was the county's determination that a *de minimus* amount of owner-occupancy (36 days per year) is consistent with approval of a dwelling for "travelers accommodations" under an earlier version of the county's code. LUBA noted that the court of appeals had approved the county's interpretation under the very deferential *Clark v. Jackson County* standard of review, although two concurring judges expressed doubts about the sustainability of the county's interpretation in the absence of this review standard. As a result, LUBA concluded that "[i]t is reasonably clear that had the court reviewed the interpretation at issue in that case . . . under a less deferential standard of review, at least two of the three members of the panel would have rejected the interpretation." 48 Or LUBA at ___ (slip op at 5). LUBA characterized its holding in the 1994 case as following these precedents and as concluding only that "more than *de minimus* owner occupancy *does* disqualify a dwelling as a 'tourist rental cabin.'" *Id.*

In the instant case, LUBA again concluded that the county had erred in approving the cabins as tourist rental cabins. LUBA noted that its decision in *Friends I* and the *Metolius* cases found that a use can be characterized as a tourist rental use only if owner occupancy is *de minimus*. The county failed to explain how or why allowing 120 days of owner-occupancy would be *de minimus*. Absent such an explanation, LUBA remanded the county's decision.

■ LUBA PROCEDURE

Evidentiary Hearing

LUBA's order in *Grabhorn v. Washington County*, 48 Or LUBA ___ (LUBA No. 2004-125, Feb. 16, 2005), is a rare example of the circumstances under which LUBA will grant an evidentiary hearing in an appeal. The petitioner in *Grabhorn* appealed a county hearings officer's decision approving the intervenor-applicant's application to verify the nonconforming use status of an existing landfill. The focus of the intervenor's motion for a special evidentiary hearing was a series of alleged ex parte contacts between the hearings officer and various county officials before issuance of the appealed decision. The hearings officer e-mailed a draft of his decision to the county planning director and the staff to allow them to raise "questions or identify errors" in his decision. In response, the planning director called the hearings officer and asked him to clarify certain points. The hearings officer modified his draft decision and issued a decision granting nonconforming use status for the landfill.

After the petitioner appealed to LUBA, he also wrote to the hearings officer and identified ambiguities in the hearings officer's decision. The county subsequently withdrew the decision for reconsideration and the assistant county counsel e-mailed the hearings officer a two-page list of "tentative questions" to be addressed on reconsideration. The planning director also called the hearings officer to discuss procedural issues and the scope of issues to be addressed on reconsideration. The petitioner subsequently filed a motion requesting a hearing to address the scope of reconsideration and to allow additional evidence to be presented. Although the hearings officer was initially inclined to hold a hearing, after additional communications with the planning director, staff, and assistant county counsel, he declined to do so. He again e-mailed a draft order on reconsideration to the planning director and staff. The planning director called the hearings officer to point out some perceived errors. The hearings officer again

amended his draft order and issued his decision on reconsideration, which granted nonconforming use status for the landfill and modified a condition of approval in the previous decision. The order also explained why the hearings officer denied the petitioner's motion for a new hearing on reconsideration.

On appeal of the reconsidered decision, the petitioner filed a motion for an evidentiary hearing and sought to depose the hearings officer, planning director, planning staff, assistant county counsel, and board of commissioners; file interrogatories; and request production of documents. Among other things, the petitioner alleged that the procedural facts underlying the appealed decision indicated that the hearings officer had had undisclosed ex parte contacts with the planning staff, county counsel, and board of commissioners and indicated that the hearings officer was biased against the petitioner.

Although LUBA's preference and practice is to address motions for evidentiary hearings after the parties have filed their briefs, LUBA agreed to allow the petitioner to depose the hearings officer concerning the scope and substance of contacts between the hearings officer and county staff and the issues of bias and prejudgment. LUBA noted that ORS 215.422(4) states that contacts between county staff and the planning commission or governing body are not ex parte contacts for purposes of complying with the ex parte contact disclosure requirements of ORS 215.422(3). However, ORS 215.422(5) expressly exempts hearings officers from these disclosure requirements.

Expressing some uncertainty about how or whether ORS 215.422 applies to hearings officers, LUBA assumed that the hearings officer's undisclosed contacts with the county staff constitute potential error. Whether they are likely to lead to reversal or remand of the county's decision depends on the purpose and substance of the contacts. If the hearings officer asked staff to proofread his decision for typographical or grammatical problems or discussed with staff the scope of the remand proceedings, LUBA indicated this was likely not reversible error, if it is error at all. If, however, the hearings officer asked for staff's views on the merits or substance of his decision, this is more likely to constitute reversible error. Because nothing in the record enabled LUBA to determine which type of contact the hearings officer had had with staff, LUBA concluded that allowing the petitioner to depose the hearings officer on a limited basis was appropriate to resolve these questions. Viewing the issues of ex parte contacts and bias as intertwined, LUBA also allowed the petitioner to depose the hearings officer about any bias or prejudgment he may have had concerning the petitioner.

LUBA's order in this case is a useful reminder to local government attorneys, planning staffs, and hearings officers to observe appropriate boundaries during the decision-making process on a land use application.

Filing By Mail

Under LUBA's rules, a document may be filed by "[m]ailing on or before the date due by first class mail with the United States Postal Service." OAR 661-010-0075(2)(a)(B). The issue before LUBA in *Mason v. City of Corvallis*, 48 Or LUBA ___ (LUBA No. 2004-152, Order on Motion to Dismiss, Feb. 10, 2005), was whether a document is mailed when it is deposited in a post office deposit box or when it is postmarked by the post office. In this appeal, the petition for review was due on January 11, 2005 and, according to an affidavit from the petitioner's attorney, was placed in a post office deposit box shortly before midnight on that date. LUBA received the petition on January 13 in an envelope that was postmarked January 12. The respondents moved to dismiss the appeal on the grounds that the petitioner had filed the petition for review one day late.

After carefully parsing previous jurisdictional decisions, LUBA concluded that the petition was "mailed" within the meaning of its rules when it was deposited into the postal service deposit box on January 11. LUBA noted that in *Bollinger v. City of Hood River*, 46 Or LUBA 602 (2004), it rejected the notion that a postmark is the only conclusive evidence of the filing date. There, LUBA held that undisputed evidence that a document was handed to a postal clerk on the due date may be sufficient to show that a document was mailed on the due date for purposes of LUBA's rules. LUBA expressly disavowed two cases that suggested the postmark is determinative evidence of the date of mailing. *See Martin v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 95-259, April 24, 1996); *Wolfe v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 96-038, April 24, 1996). Instead, LUBA relied on *Greenwood v. Polk County*, 11 Or LUBA 408 (1984), where it held that depositing a petition for review in a postal service box was sufficient to mail—and to file—the document on the date under the predecessor of the current rule on mailing.

Finally, LUBA deflected the respondents' argument that even if the petition was deposited in the mail on January 11, the mail wasn't collected by the postal service until January 12, and therefore January 12 was the actual mailing date. LUBA stated, "we do not see that the schedule by which the postal service collects mail from deposit boxes is significant. Rather it is the 'date,' the 24-hour period from midnight to midnight, on which the petition is deposited with the postal service that is significant." 48 Or LUBA at ___ (order at 6). Because it was undisputed in this appeal that the petitioner's attorney had deposited the petition in a postal mail box on January 11, LUBA concluded that the petition was timely filed and denied the respondents' motion to dismiss.

In this appeal, as in the cases LUBA analyzed, the facts are critical. In circumstances where the mailing date for a document may be questioned, the filing party should be prepared to offer affidavits and other relevant documentary evidence to prove the date of mailing. Failure to do so may be fatal to the appeal.

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