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Highlights

Appellate Cases—Land Use

■ *OREGON SUPREME COURT CONSIDERS RLUIPA*

On May 5, 2005, the Oregon Supreme Court issued its first opinion considering the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5. In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 338 Or 453, 111 P3d 1123 (2005), the court was asked whether the City of West Linn's decision denying the church a conditional use permit to build a meetinghouse imposed a "substantial burden" on their religious practice. The finding of a substantial burden is an essential first step in finding a RLUIPA violation.

The bases for the denial were that the size of the meetinghouse would be inadequate to allow buffering to mitigate noise and visual impacts on the neighborhood, the site was not suitable for the proposed use in conjunction with the surrounding residential neighborhood, the roads were insufficient to handle the traffic generated from the use, and the scale of the structure proposed was incompatible with the structures on an adjoining site. During the proceedings below, LUBA concluded that the city's denial imposed a substantial burden on the church and its members by impairing the church's ability to build a meetinghouse. Once LUBA concluded that a substantial burden was imposed, it concluded that even if the local government did have a compelling government interest in denying the application, it did not use the least restrictive means of serving that interest; *i.e.*, conditions of approval could have been imposed to limit the size of the property or structure. 45 Or LUBA 77 (2003).

The city appealed and the court of appeals reversed. The court rejected LUBA's determination that the city had imposed an impermissible burden on the church by impairing its ability to build a meetinghouse. Instead, the relevant burden for RLUIPA purposes, the court held, was "the burden of being prevented from implementing the particular design proposal at issue along with the burden of submitting a new application for the modified proposal." The court concluded that the burden on the church was not substantial because its members were not turned away from services at locations outside West Linn, there was no reason to believe that the city would not approve a reconsidered application, and there was no evidence that the city was biased against the church. 192 Or App 587 (2004).

The Oregon Supreme Court began its analysis by summarizing the requirements of RLUIPA. The court highlighted that "substantial burden" is not defined in the Act, but it is clear from the use of this term of art and the legislative history that the drafters intended "substantial burden" to have the same meaning as applied in other Free Exercise jurisprudence. As such, the court considered the U.S. Supreme Court's Free Exercise cases. The court took the applicable standard from *Thomas v. Review Board*, 450 U.S. 707 (1981), and other cases where a substantial burden "'pressure[d] an adherent to choose between an article of faith and a government benefit." 338 Or at 465 (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140–41 (1987); Thomas, 450 U.S. at 717–18; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). The court stated that in all those cases, an adherent was "pressured . . . to forgo or modify the expression of a religious belief." *Id.*

The court also surveyed several other federal cases construing the "substantial burden" provision of RLUIPA in the land use context. From the Second Circuit, the court looked at *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183

(2d Cir. 2004), where the denial of a request to expand and restore a number of school buildings was not a substantial burden, given that the proposal could be modified and previously missing data could be submitted. From the Ninth Circuit, the court summarized *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), where the applicant's failure to submit a complete application, which resulted in a denial, did not impose a substantial burden. Finally, in the Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1295 (2005), the court held that requiring synagogues to relocate farther away from their congregants, thereby requiring congregants to walk extra blocks, did not constitute a substantial burden.

The court acknowledged that the city's denial of the conditional use permit had several adverse consequences on the church's effort to build a meetinghouse. However, based on the holdings from the Supreme Court and the other federal cases, the court concluded that the hardships did not constitute a "substantial burden." The church admitted that it would be possible to acquire more land to provide the necessary buffering space and the city council indicated it could approve a meetinghouse on a larger site with more buffering. The expenses associated with submitting a new application do not constitute a substantial burden, nor does the requirement of submitting a new application. Further, there was nothing in the record indicating that the city would not have approved the application if it met its concerns. There was no indication that the crowded conditions at the meetinghouse have forced the church to turn away anyone who wished to attend church or reduced the activities offered by the church. As such, there was nothing to suggest that redesigning the proposal and submitting a new application would pressure the church to forgo or modify the expression of religious belief.

Because the city's denial did not constitute a substantial burden, the court stated that it did not need to consider whether a compelling government interest was furthered or whether the denial provided the least restrictive means to further that interest. The supreme court thus affirmed the court of appeals decision.

Carrie Richter

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 388 Or 453, 111 P3d 1123 (2005).

■ *U.S. SUPREME COURT SAYS NO ATTORNEYS FEES FOR VIOLATION OF TELECOMMUNICATIONS ACT*

City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005), involved a request for attorneys fees and costs under 42 U.S.C. § 1983 for a violation of the Federal Telecommunications Act of 1996 (FTA). The plaintiff received a local approval for an amateur radio antenna in 1989 but unlawfully erected other antennas for personal and commercial use. When he later applied for another antenna, the violations were detected and the defendant city denied further applications on grounds of visual interference and not wishing to establish a precedent for the grant of such antennas. The plaintiff then sued in federal court over alleged violations of the FTA, and the court held that the denial was not supported by substantial evidence. The court found that the scenic qualities of the area were already affected by the existing lawful antenna and that the precedent ground would effectively prevent any antenna from being erected, thereby frustrating the purpose of the FTA. The court ordered issuance of the local permits but refused the plaintiff's damages claim. The Ninth Circuit reversed, holding that both damages and attorney fees were possible. The United States Supreme Court granted *certiorari*.

Justice Scalia wrote for the majority, noting that 42 U.S.C. § 1983 created a cause of action over the deprivation of constitutional or statutory rights under federal law. However, he went on to say that section 1983 concerns "rights" and not "benefits" or "interests." Thus, a legally enforceable right is required, and that right must have been intended by Congress to be enforceable under Section 1983. That intention must be either shown directly in an enactment or inferred through a comprehensive enforcement scheme incompatible with individual enforcement. The Court assumed that the FTA allows for enforcement rights by individuals, so the issue was whether the judicial remedy expressly authorized by the FTA was meant to coexist with a civil rights remedy.

The majority opinion noted two cases in which a parallel and more restrictive remedy in a statutory scheme was found to preclude use of section 1983 as an enforcement mechanism. Justice Scalia said that the existence of a private remedy might evince a congressional intent to supplant the section 1983 remedy with a statutory remedy. However, he said the mere existence of a private remedy did not conclusively establish that the section 1983 remedy was unavailable. The text of the FTA could explicitly or implicitly suggest that the remedy it created compliments the section 1983 remedy. In this particular case, the Court found it significant that the FTA requires proceedings to be filed within 30 days and cases to be heard "on an expedited basis," that it does not specifically provide for damages, and that it does not provide for attorney fees. In the face of the detailed requirements for the appeals scheme under the FTA, as well as the lack of a damage remedy and attorney fee provisions, the Court inferred that Congress had chosen not to allow recovery of attorney fees under section 1983. In doing so, Justice Scalia's opinion rejected the Ninth Circuit's view that 47 U.S.C. § 152, which states that the provisions of the FTA do not impair any federal law, created a cause of action under section 1983. The Court noted that the use of section 1983's longer statute of limitations would be inconsistent with the 30-day period for seeking a remedy under the FTA, and this indicated further that a section 1983 remedy was not contemplated by Congress in enacting the FTA. The decision of the Ninth Circuit was therefore reversed.

Justice Breyer wrote for himself and three other justices to emphasize rejection of the Department of Justice's proposed rule that the existence of a private remedy would preclude a section 1983 remedy. The concurring opinion also dwelled on the legislative history of the FTA, which it indicated must be examined in addition to the words of the legislation itself. This latter analysis was not compatible with Justice Scalia's approach to statutory construction.

Justice Stevens concurred in the judgment and made many of the same points about the presence of a statutory remedy not necessarily obviating a section 1983 remedy and the need to look at the text and context of the statute. Justice Stevens would find the foreclosing of section 1983 remedies to be the exception, rather than the rule, and would consider legislative history. He attached great significance to congressional silence regarding attorney fees in the adoption of the FTA.

This case was not even close. All of the Justices found that Congress did not intend to allow section 1983 remedies to enforce the FTA. Most of the decision centered on what was necessary to demonstrate that link.

Edward J. Sullivan

City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005).

■ NO SUPER SITING FOR HOSPITALS

In *Friends of Eugene v. City of Eugene*, 196 Or App 771, 103 P3d 643 (2004), the City of Eugene adopted an ordinance to allow hospitals as outright permitted uses in high-density residential and industrial zones. Previously, hospitals were conditionally allowed in high-density residential zones but not in industrial zones. The petitioner challenged the city's ordinance for its alleged inconsistency with the residential and industrial area provisions of the Metro Plan, a regional comprehensive plan adopted by Lane County and the cities of Eugene and Springfield.

Under the Metro Plan, an "auxiliary" use may occupy up to 32 percent of a high-density residential area. In *Jaqua v. City of Springfield*, 193 Or App 573, 589, 91 P3d 817 (2004), the court recognized that hospitals may qualify as auxiliary uses in these residential areas. However, hospital use must comply with the auxiliary use restrictions of the Metro Plan, including the limit to occupy no more than 32 percent of the area.

For residential land, the city's ordinance did not require consistency with the Metro Plan. Nor did it include any independent provision requiring the hospital use to remain auxiliary and/or limiting the use to 32 percent of the residential area. Accordingly, the court found that the ordinance was inconsistent with the Metro Plan, holding that because under *Jaqua* "an auxiliary use on residentially designated land under the Metro Plan must be 'supplemental' or must function 'in a subsidiary capacity' to the primary residential use, some mechanism to ensure that a proposed development complies with the Metro Plan is essential." 196 Or App at 778.

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With respect to industrial land, the city's ordinance allowed hospitals as outright permitted uses in all three of the city's industrial zones. The Metro Plan allows the establishment of "complementary" uses such as corporate office headquarters and commercial establishments supporting primary industrial uses. However, the city's ordinance did not consider whether a proposed hospital would serve a primary industrial use; it simply allowed it as an outright permitted use. There was no mechanism in the ordinance to evaluate whether a proposed hospital or related development would be consistent with the Metro Plan.

Based on the failure to assure consistency with the Metro Plan, the court of appeals reversed and remanded the city's ordinance adoption.

Peggy Hennessy

Friends of Eugene v. City of Eugene, 196 Or App 771, 103 P3d 643 (2004).

■ *SOME COOPERATIVE IMPROVEMENT AGREEMENTS QUALIFY AS LAND USE DECISIONS*

In *Rhodes v. City of Talent*, 197 Or App 169, 104 P3d 1180 (2005), ODOT appealed a LUBA decision remanding the City of Talent's decision regarding proposed improvements to Highway 99 within the city. The city adopted a resolution authorizing city officials to sign a cooperative improvement agreement between the city and ODOT and approving an "access management plan" (AMP). ODOT rules require access management plans to be consistent with the local government's comprehensive plan and to be consistent with and adopted into the local government's transportation system plan (TSP). LUBA ruled that the city's decision was a land use decision under ORS 197.015(10)(a) and remanded the decision because the city had not adopted the AMP into its TSP. ODOT appealed LUBA's decision, not to challenge the ruling on the TSP adoption issue, but rather to challenge LUBA's determination that the city's decision authorizing the AMP was a land use decision.

In response to ODOT's argument that LUBA had deemed the city's cooperative agreement with ODOT a land use decision, the court of appeals offered a different interpretation:

> At the outset, we do not understand that LUBA's discussion . . . indicates its understanding that an agreement between ODOT and the city about how to proceed with a highway improvement project, without more, is a land use decision under ORS 197.015(10). LUBA's discussion does not address the legal status of ODOT's agreement in isolation; rather, its decision is based on all the facts before it, including the fact that the city approved an AMP without adopting it into the city's TSP. Had LUBA intended to hold that an intergovernmental agreement about a construction project, by itself, is necessarily a land use decision, it could have said so with greater clarity than is evident in the text of its opinion.

104 Or App at 1182–83.

ODOT interpreted LUBA's decision as holding that all cooperative agreements in this context are land use decisions and based its challenge on that interpretation. In contrast, the court of appeals read the decision as stating that only the particular cooperative agreement at issue qualified as a land use decision because the challenged resolution simultaneously authorized entering into the cooperative improvement agreement and approved the AMP.

ODOT also challenged LUBA's determination that the cooperative agreement did not fall under the ORS 197.015(10)(b)(D) exception from the definition of "land use decision." However, the court of appeals summarily affirmed LUBA's determination, noting that LUBA had concluded the consistency of the proposed project with the city's TSP could not be determined without a decision supported by findings explaining how the project is consistent with the TSP.

The court of appeals therefore declined to rule on the question of whether an authorization to enter into a cooperative improvement agreement between a local jurisdiction and ODOT alone falls under the statutory definition of a land use decision. Instead, the court concluded only that such a decision may qualify as a land use decision, and ruled that this case presented such an occasion, because the city's resolution also adopted an AMP. The question of whether a cooperative improvement agreement, by itself, constitutes a land use decision was left for another day.

Until the courts determine whether cooperative improvement agreements, by themselves, are outside LUBA's jurisdiction, cities would be well advised to adopt them by themselves. The court of appeals avoided answering the question in this case simply because the resolution authorizing the cooperative agreement also adopted an AMP.

Editors' Note: this article was originally printed in the March 2005 issue of Local Focus, the newsletter of the League of Oregon Cities.

Pam Beery & Spencer Parsons

Rhodes v. City of Talent, 197 Or App 169, 104 P3d 1180 (2005).

Appellate Cases—Takings

■ *OREGON SUPREME COURT ACCEPTS REVIEW IN KEY CONDEMNATION APPRAISAL EXCHANGE CASE*

The February 2005 issue of the *RELU Digest* profiled a significant case of first impression in Oregon condemnation procedure, *State ex rel. Department of Transportation v. Stallcup*, 195 Or App 239, 97 P3d 1229 (2004). The court of appeals in *Stallcup* interpreted the word "appraisal" in the pretrial disclosure requirement in ORS 35.346(5)(b) to apply to "any written opinion by a qualified person regarding valuation of

the condemned property that a party obtains 'as part of the condemnation action.'" 195 Or App at 250 (quoting ORS 35.346(5)(b)). The court of appeals made it clear that this broad reading of the term "appraisal" extends to both drafts and reports that were unfavorable and not used by the party who commissioned them. In doing so, the court of appeals reversed a favorable condemnation judgment for a property owner who had not exchanged two written draft reports before trial.

On February 15, 2005, the Oregon Supreme Court accepted review of *Stallcup*. 338 Or 124. Although a decision is not likely for some time, the court of appeals' sweeping interpretation affects both sides of the condemnation bar and their relationships with appraisers. The supreme court's decision will be closely watched and will likely have significant practical effects on condemnation litigation in Oregon.

Mark J. Fucile

State ex rel. Dep't of Transp. v. Stallcup, 195 Or App 239, 97 P3d 1229 (2004), rev allowed, 338 Or 124 (2005).

Appellate Cases—Real Estate

■ JUDGMENT CREDITORS MAY EXECUTE AGAINST RESIDENTIAL PROPERTY THAT JUDGMENT DEBTORS HAVE CONVEYED TO THIRD PARTIES

Premier West Bank v. GSA Wholesale, LLC, 196 Or App 640, 103 P3d 1169 (2004), interpreted the judgment statutes with regard to the sale of residential property and homestead exemptions. The plaintiff obtained a judgment for nearly $500,000 against the defendant's father in December 2002. By operation of law, that judgment became a lien on all property owned by the defendant's father in Jackson County, where the judgment was entered. In February 2003, the defendant's father conveyed the residence to him. There was no consideration paid. However, the defendant did assume the mortgage on the property. In May 2003, the plaintiff filed a petition to sell the residence to satisfy the judgment.

The lower court held a hearing on the petition for sale, at which time the defendant argued that because the judgment debtor no longer owned the property, the court could not order the sale under ORS 18.536, and that only a separate fraudulent transfer action or a creditor's bill can reach the real property. The court rejected the defendant's position.

On appeal, the defendant also asserted that when the judgment was entered, the property was subject to the homestead exemption. Therefore, only the excess of the value over the homestead exemption is subject to levy. The defendant relied on *Clawson v. Anderson*, 248 Or 347, 434 P2d 462 (1967). The court of appeals rejected the defendant's argument and found that the legislature had enacted several changes that resolved the issues raised in *Clawson*:

> Thus, ORS 18.322 provides that, except for those claims governed by ORS 18.536, all claims of exemption are to be adjudicated at a hearing under ORS 18.322, which can be instituted "upon application of [the] plaintiff." . . . Accordingly, there can be no doubt that the legislature has provided a statutory method for determining, in the action in which the underlying judgment was entered, whether a leviable interest exists in real property that the judgment debtor conveyed to a third party after the judgment was entered. The only question is whether ORS 18.356 applies here."

196 Or App at 648–49 (alteration in original).

The essence of the defendant's argument was that ORS 18.536 applies only to real property still owned by the defendant judgment debtor. The court of appeals construed the statute, however, to apply to real property even though the judgment debtor no longer owned it. "In sum, the text and context of ORS 18.536 show that the statute applies when a judgment creditor seeks to execute against the residential real property or mobile home of any natural person, whether that person is the judgment debtor or not." *Id.* at 652–53.

In a second assignment of error, the defendant contended that the trial court had erred in failing to determine whether the homestead exemption applied and, if so, the amount of the exemption. The plaintiff did not dispute the assertion, but argued that the defendant had failed to preserve the error. The court of appeals agreed with the defendant "that, regardless whether he raised the issue, the trial court was required to include in its order findings regarding the homestead exemption. . . . On remand, the trial court shall enter a new order stating whether the homestead exemption applies to the subject property and, if so, the amount of the exemption." *Id.* at 654.

Alan K. Brickley

Premier West Bank v. GSA Wholesale, LLC, 196 Or App 640, 103 P3d 1169 (2004).

Appellate Cases—Landlord/Tenant

■ COURT OF APPEALS EXPLAINS ENTITLEMENT TO ATTORNEYS FEES UNDER ORLTA

LeBrun v. Cal-Am Props., Inc., 197 Or App 177, 106 P3d 647, *rev den*, 338 Or 488, ___ P3d ___ (2005), involved a dispute between two tenants (Rudnick and LeBrun) of a manufactured home park and their landlord, but the appeal focused on attorneys fees. The tenants sued their landlord for breach of a rental agreement and for unlawful entry under ORS 90.322, a provision of the Oregon Residential Landlord Tenant Act (ORLTA). The landlord successfully defended against these claims, except for LeBrun's unlawful entry

claim. The landlord also lost both its counterclaims: against Rudnick for late fees under the rental agreement and against LeBrun in *quantum meruit* for the cost of repairing a post that LeBrun had allegedly damaged. The trial court denied the landlord attorneys fees for its successful defense against the breach of rental agreement claims, but awarded the landlord enhanced prevailing party fees for those claims. It also awarded attorneys fees to both tenants: to LeBrun for successfully defending against the landlord's counterclaim for *quantum meruit* and to Rudnick for successfully defending against the landlord's claim for late fees.

In resolving the landlord's appeal and the tenants' cross-appeals, the court of appeals first answered the question whether LeBrun was entitled to damages under ORS 90.725(6) for the landlord's unlawful entry given that LeBrun had not also sought injunctive relief or termination of the lease. ORS 90.725(6) provides,

> If the landlord makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but that have the effect of unreasonably harassing the tenant, the tenant may obtain injunctive relief to prevent the reoccurrence of the conduct or may terminate the rental agreement pursuant to ORS 90.620(1). In addition, the tenant may recover actual damages not less than an amount equal to one month's rent.

The court concluded from a plain reading of the text of the final sentence of the provision, supported by the dictionary definition of "addition" and legislative history showing a 1985 amendment that substituted the words "[i]n addition" for "[i]n either case," that a tenant may seek damages under ORS 90.725(6) regardless of whether he or she also seeks an injunction or lease termination.

The next question for the court was whether to analyze each claim and award of attorneys fees separately or in the context of the other claims. The answer required a determination of whether the attorneys fees were governed by the parties' rental agreements or by statute. The court examined both the language of the parties' rental agreements and the fee provision of ORLTA, ORS 90.255. According to the court, the attorneys fees provision of the rental agreement warranted an award of attorney fees to the landlord as the prevailing party if the claims involved only the rental agreement. However, the parties had litigated claims for both breach of contract and violations of ORLTA. Thus, ORS 90.255 also applied. The court concluded that ORS 90.255 required consideration of *all* claims for fees—fees claimed under both ORLTA and the rental agreement. Further, when faced with the conflicting results under the rental agreement and ORLTA, the court concluded that the statute governed the issue of attorneys fees, because the purpose of the statute is to protect the public, and the statute's terms evince a legislative intent to "subsume all landlord-tenant contract disputes under [ORLTA]." 197 Or App at 184.

The court then endeavored to determine the meaning of "prevailing party" under ORS 90.255. According to the court, case law demonstrated that even when all parties prevail on some claims, if the final judgment is entered in favor of one party, that party has prevailed within the meaning of the statute.

Upon application of that logic to the case, the court concluded that the trial court did not err in denying the landlord's attorneys fees request in the dispute with LeBrun. While the landlord had successfully defended LeBrun's breach of rental agreement claim, it lost its counterclaim and the unlawful entry claim asserted by LeBrun, who won a net award. Thus, the court of appeals concluded, LeBrun was the prevailing party.

A different rule applied with regard to the dispute between the landlord and Rudnick, neither of whom won damages. The court looked to *Wilkes v. Zurlinden*, 328 Or 626, 984 P2d 261 (1999), for an interpretation of the term "prevailing party," and *Barlow Trail Mobile Home Park v. Dunham*, 189 Or App 513, 516, 76 P2d 1146 (2003), which explicitly adopted the *Wilkes* definition for purposes of ORS 90.255. That is, "when each of two parties successfully defends against the other's claims but neither is granted relief, both parties could be considered 'prevailing parties.'" 197 Or App at 186. Consequently, the court concluded, the landlord was a prevailing party as to Rudnick's breach of rental agreement claims under ORS 90.255, because it successfully defended against those claims.

On cross-appeal, the tenants challenged the trial court's award of enhanced prevailing party fees to the landlord on the breach of contract claims. ORS 20.190(3) provides that "in any civil action . . . in which recovery of money or damages is sought, the court may award to the prevailing party up to an additional $5,000 as a prevailing party fee." The court explained that the determination of who is a prevailing party for purposes of awarding an enhanced prevailing party fee does not differ from the determination of who is a prevailing party for the purposes of awarding fees under the pertinent statute or contract. Because the landlord was not the prevailing party, the court concluded that the trial court erred in awarding an enhanced prevailing party fee to the landlord with respect to the dispute with LeBrun.

Although the landlord prevailed against Rudnick's unlawful entry claim, the court of appeals remanded the award of attorney fees to the landlord on that claim for the trial court to consider and make findings under the factors in ORS 20.075 sufficient to explain the fee award. The trial court had offered what the court of appeals described as a "cryptic explanation" for the award that was an insufficient finding for review under the applicable standard of abuse of discretion. 197 Or App at 654.

Next, the court reversed the trial court's award of fees to Rudnick on her successful defense against the landlord's claim for late fees under the rental agreement. The court set out the text of ORCP 68 C(4) and stated that it was error to award fees to Rudnick in the absence of her filing a fee petition.

Finally, the court addressed whether it was error for the trial court to award attorney fees to LeBrun for her success-

fully defending against the landlord's counterclaims for *quantum meruit*. The landlord assigned error to the award because there was no contractual or statutory basis for it, and the court of appeals agreed. The court first rejected LeBrun's assertion that courts of equity have inherent power to award fees. It explained that courts of equity have inherent power to award attorney fees in very limited circumstances and that "by no stretch of the imagination" was this such a case. 197 Or App at 190. Nor was the award of fees on the *quantum meruit* counterclaim authorized by the rental agreement; it authorized an award only to the prevailing party in a dispute "under th[e] agreement." And finally, the court rejected LeBrun's argument that the fee award was warranted under ORS 36.425(4) and (5) due to a pleading defect. In her reply, which addressed the landlord's counterclaims, LeBrun requested attorneys fees and costs without specifying any statutory or factual basis for the fee request, contrary to ORCP 68 C(2)(a). Thus, the trial court lacked authority to make the award of fees for successfully defending the landlord's *quantum meruit* counterclaim, and the court of appeals instructed the trial court to deduct the amount of fees attributable to the *quantum meruit* claim from the fee award to LeBrun on remand.

LeBrun v. Cal-Am Properties, Inc. provides helpful guidance on entitlement to attorneys fees in multi-claim residential landlord tenant disputes involving rental agreements and ORLTA.

Susan N. Safford

LeBrun v. Cal-Am Props., Inc., 197 Or App 177, 106 P3d 647, *rev den*, 338 Or 488, ___ P3d ___ (2005).

■ *OREGON COURT OF APPEALS INTERPRETS ORLTA IN A NON-TRADITIONAL HOUSING SETTING*

Burke v. Oxford House of Oregon Chapter V, 196 Or App 726, 103 P3d 1184 (2004), provided the court of appeals with the opportunity to determine the applicability of the Oregon Residential Landlord Tenant Act (ORLTA) in a non-traditional housing setting. Oxford House, Inc. is a national organization dedicated to helping recovering drug and alcohol addicts transition to independent lives. To further this goal, Oxford House has established halfway houses for recovering addicts, such as Oxford House-Ramona.

The plaintiff lived in Oxford House-Ramona until she was evicted by a vote of her co-residents for violating rules regarding disruptive behavior. Her eviction followed fifteen minutes notice. Thereafter, the plaintiff sued, asserting that her eviction violated ORLTA. The trial court found for the plaintiff and the defendants appealed, arguing that (1) ORS 90.110 excludes the defendants from ORLTA's coverage and (2) even if ORLTA did apply to the defendants, the Act is preempted by the Federal Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-25 (2000). The court of appeals held that the defendants were excluded from ORLTA's coverage and reversed, expressing no opinion regarding the defendants' preemption argument.

The court noted that the ORLTA exclusions set forth in ORS 90.110(1)–(9) cover two different types of housing situations: (1) exemptions for short-term tenancies and (2) "housing where the primary relationship between the parties is something other than a traditional residential landlord-tenant relationship." 196 Or App at 730. The court found the latter category applicable to the defendants. Specifically, ORS 90.110(3) covers fraternal or social organizations and ORS 90.110(1) covers residences that are incidental to the provision of certain services, including counseling services.

ORS 90.110(3) exempts from ORLTA coverage "[o]ccupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization." The court concluded that there was no dispute that each defendant constituted an "organization." The issue was whether defendants constituted "fraternal" or "social" organizations.

Because neither term is defined by the statute, the court considered dictionary definitions of the words. Noting that fraternities are not limited to student groups, the court found that fraternities include "associated groups of people with the same pursuit." 196 Or App at 733 (citing *Webster's Third New Int'l Dictionary* 903 (unabridged ed 2002)). The defendants, the court surmised, constitute organized groups in pursuit of sober, independent living and, as such, constituted fraternal organizations. In addition, the court found that Oxford House residents enter into compacts for mutual support in battling their addictions and, as such, constitute a "confederation" that the court found equivalent to a fraternal organization.

The court also found the defendants fit the dictionary definition of "social" organizations, which include groups "'involving allies or confederates'" or "'concerned with the welfare of human beings as members of society.'" 196 Or App at 734 (quoting *Webster's* at 2161). The court referred to its previous discussion finding that the tenants of the defendants constituted a confederation. The court also noted that an organization formed to aid people with addictions was clearly concerned with the welfare of people as members of society and was serving a social purpose. Consequently, the defendants were social organizations under the statute.

Next, the court considered whether the plaintiff's room was a "portion of a structure operated for the benefit of the organization." ORS 90.110(3). The plaintiff argued that only the common areas of Oxford House-Ramona, and not the individual sleeping quarters, are operated for the defendants' benefit. The court rejected that argument on three grounds. First, the rent provided by the tenants benefited the defendants by allowing them to continue to operate. Second, the full-time residents created a community that promoted the defendants' goals of sober and independent living. Third, the court noted that it would be absurd for the plaintiff's sleeping quarters to fall within the protection of the statute while the remainder of the living areas (kitchen, bathroom, etc.) would be exempt. The court suggested that either all or none of Oxford House-Ramona was operated for the defendants' benefit, and held that all of it was.

The defendants further argued that they were exempt from ORLTA by ORS 90.110(1), which excludes residence at an institution that provides medical, geriatric, educational, counseling, religious, or similar services where the residence is incidental to the provision of the services. Because Oxford House, Inc. is an established corporation, the court easily concluded that the defendants constituted institutions under the statute. The court further found that the defendants provide the requisite services because members of Oxford House facilities provide to each other self-policing and mutual support that, combined with Oxford House's zero tolerance principles, amounts to services at least sufficiently similar to counseling services to fall within the statutory exemption. As the court concluded, "[m]embers of Oxford House provide to one another, within a safe environment, services analogous to those provided by professional counselors in the field of rehabilitation." 196 Or App 740.

Having concluded that the defendants provided services amounting to counseling, the court went on to address whether the housing provided by Oxford House-Ramona was "incidental" to the counseling services provided, as required by ORS 90.110(1). The term is not defined by statute, so the court again turned to *Webster's*, which defines "incidental" as "subordinate, nonessential, *or* attendant in position or significance [or] occurring as a minor concomitant." *Webster's* at 1142, *quoted at* 196 Or App 742 (emphasis added by court). The court agreed with the defendants' argument, ruling that "[r]esidence at Oxford House is merely attendant to defendants' institutional purposes" of helping members achieve "sobriety, self-governance, and self-support." *Id.* Residence at an Oxford House facility, the court reasoned, was analogous to residence at a college dormitory or nursing home in that the housing is attendant or secondary to the institution's primary purpose (college enrollment and geriatric care, respectively). In short, residence at Oxford House-Ramona is "incidental to the counseling-like services that residents receive." *Id.* at 743.

The final question addressed by the court regarding the exemptions provided by both ORS 90.110(1) and (3) was whether the housing arrangement between the plaintiff and the defendants was created for the primary purpose of avoiding application of ORLTA. The court found little to suggest that the purpose behind the non-standard rental agreement between the parties was to evade the protections afforded tenants by ORLTA. To the contrary, the plaintiff's rental agreement appeared to be geared toward aiding her recovery from addiction and not simply to avoid ORLTA requirements.

Pursuant to its findings, the court reversed and remanded the trial court's granting of summary judgment for the plaintiff. The court's ruling, however, was not unanimous. Judge Edmonds filed a strong dissent in which Judge Brewer and Judge Wollheim joined.

H. Andrew Clark

Burke v. Oxford House of Oregon Chapter V, 196 Or App 726, 103 P3d 1184 (2004).

Cases from Other Jurisdictions

■ COURT OF CLAIMS REJECTS TAKINGS CHALLENGE TO FEDERAL WETLANDS PROTECTION ACTIONS

Norman v. United States, 63 Fed. Cl. 231 (2004), involved damage claims based on multiple actions and theories, revolving around several United States Army Corps of Engineers actions requiring that the plaintiffs set aside 220.85 acres in return for a fill permit under section 404 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387, to assure no net loss of wetlands.

The plaintiffs proposed to develop residential, commercial, and office space near Reno, Nevada on a 2425-acre ranch property that had irrigation rights. The City of Reno approved the application with multiple conditions, one of which required the plaintiffs to obtain a field permit from the Corps. The Corps delineated the wetlands in 1988, but as a result of controversy, a second delineation (which found more wetlands to be involved) occurred in 1991. The plaintiffs undertook the development in phases. A 1995 fill permit was issued for the first phase with mitigation. For the second phase, the Corps advanced an alternative that it felt would be less environmentally damaging. The alternative included, in addition to mitigation, a fund to protect the mitigation and preservation areas and deed restrictions prohibiting development or destruction of vegetation in those areas. The mitigation and preservation areas were conveyed by the plaintiffs to a homeowners association that it controlled. The plaintiffs sued over the loss of these 220 acres as a result of the 1999 permit and alleged damages in the amount of $34,233,000 plus interest. The plaintiff's takings claims were based on three alternative theories: physical invasion, denial of all viable economic use of the 220 acres, and the three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The court found no physical taking, because the defendant had not occupied the property or otherwise taken physical possession. Rather, the Corps had required the plaintiffs to transfer certain property to a homeowners' association that the plaintiffs controlled in order to assure that the wetland areas would be preserved in perpetuity. Moreover, the Corps had not specifically required the transfers but only required that a maintenance funding mechanism be put in place. There was no required access to the area by the government or third parties. Mere restrictions on use, said the court, did not constitute a physical invasion. Unlike the lack of a nexus in *Nolan v. California Coastal Commission*, 483 U.S. 25 (1987), there was a relationship between the harm caused by the grant of the permit and the condition imposed in this case.

The court also rejected the plaintiffs' categorical taking claim, because making such a claim requires that 100% of the property be useless and because the *Penn Central* "parcel as a whole" rule determines that no taking exists if the parcel as a whole retains value. The 220 acres of affected wetlands were

scattered through the property and could not be viewed in isolation, because the land was developed as an integral whole and the wetlands were not separated from other development. Moreover, the land had value to the plaintiffs as flood control and drainage facilities, open space, and ponds. These factors enhanced the residential and commercial portions of the site and had been emphasized in the plaintiffs' commercial advertising of the development. The court concluded that there had been no categorical taking.

The court then applied the three *Penn Central* factors to respond to the last issue raised and began with the "reasonable investment-backed expectations" factor, which it described as an objective, but fact-specific, inquiry into what, under all the circumstances, the plaintiffs should have anticipated in the way of development. A plaintiff will usually lose on this factor if the regulation was already in place at the time of acquisition so that the plaintiff assumed the risk of economic loss. Moreover, in certain circumstances, a landowner in a highly regulated field could anticipate that the regulations would get more stringent over time. In this case, the plaintiffs were sophisticated real estate developers who had actual and constructive knowledge of the section 404 fill permit process and chose to hold off on a portion of their land purchase until they could obtain a Corps delineation.

The court then reviewed each wetland property claimed to be taken and found only one portion of 4.07 acres where there might be a justified claim under this factor. Other wetlands were rejected for a number of reasons, including inclusion in the first Corps delineation in 1988 (prior to the purchase of the property), inclusion in the area used for landscaping of the development, drainage and flood control, and purchase of some of the land after the 1999 delineation occurred.

Turning to the economic impact factor, the court looked at the fair market value of the property after the regulation was put in place under a comparable sales approach. The plaintiffs' expert did not use a before and after comparison, and did not appraise each wetland individually. The defendant's appraiser used the value of the parcel sold as the "after" portion and used a "subdivision" approach to evaluate the cost of the improvements as part of the appraisal process. The defendant's appraiser found the entire property to be more valuable after the issuance of the wetland permit. The court agreed with this analysis and with the use of the 1999 date for calibrating the takings claim. In that light, the court found that the plaintiffs did not meet the economic impact factor and that the plaintiffs had recouped their investment because the value of the project as a whole had increased from $117 million to $190 million. The court also rejected the plaintiffs' contention that the defendant was responsible for more than $90 million in lost revenues and profits, which it found was not a measurement used in Fifth Amendment claims.

Finally, the court looked to the character of the governmental action, which it described as follows:

> [C]ourts must inquire into the degree of harm crated by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented." The court must balance the liberty interest of the private property owner against the government's need to protect the public interest through imposition of a restraint.

63 Fed. Cl. at 281 (citations omitted) (quoting *Walcek v. United States*, 49 Fed. Cl. 248, 270 (2001)).

The plaintiffs did not challenge the government's welfare interest in the preservation of wetlands nor the Corps' authority to protect wetlands or the use of mitigation conditions to do so. The plaintiffs contended that the action went "too far" in requiring transfer of the 220 acres, but the court responded by saying that the plaintiffs were never denied a field permit nor treated unfairly. They were aware of the regulatory scheme and the use of mitigation conditions to minimize the effects of the fill, and were better off economically as a result. On weighing the *Penn Central* factors, the court found no taking, because there was no diminution of value to the parcel as a whole; rather, there was an actual increase in value and the mitigation condition was part of the fill permit process. The case was thus dismissed.

Although this was only a trial court decision, it is a fact-intensive case that provides a valuable *Penn Central* analysis.

Edward J. Sullivan

Norman v. United States, 63 Fed. Cl. 231 (2004).

■ *HOME RULE DOES NOT EXTEND TO DE-ANNEXATION, SAYS ILLINOIS APPELLATE COURT*

City of Chicago v. Village of Elk Grove Village, 820 N.E.2d 1158 (Ill. App. Ct. 2004), involved the defendant village's adoption of an ordinance imposing a fee to disconnect (de-annex) property from its territory, presumably to join a city. The ordinance also required affected property owners to report any attempt to disconnect their property from the village before undertaking such action. The village projected an average loss of value of $10,049 per acre for industrial lands and $3,384.00 per acre for residential lands. The village presumed that the effect would last for forty years, so it set the disconnection fee at $401,960 per acre for industrial lands withdrawal and $35,360 per acre for residential land withdrawal, and made the fee a lien if not paid.

The plaintiff city attempted to add land to its boundaries to expand O'Hare International Airport and sued the village, alleging the fee to be unconstitutional. The trial court held that home rule municipalities had no power to legislate on matters of disconnection and voided the ordinance. The village appealed.

The appellate court said that the Illinois constitution provides that a "home rule unit" may exercise any power or perform any function pertaining to its government and affairs. The court found disconnection to be a matter of state-wide concern because the legislature has the powers to fix and control the territories and boundaries of municipalities and their interrelationship. The court rejected the village's contentions

that it was not dealing with disconnection directly, but merely allocating costs of services through the fee schedule, answering that home rule villages do not have the power to tax through legislation that does not pertain to their government and affairs. The court cited a case that voided a county increase to a statewide surcharge on court filing fees for construction of law libraries. In that case, the state surcharge related to the need for a unified court system, a matter of statewide concern. Here, the village's ordinance changed the statewide statutory notice requirements for disconnection and imposed a fee that would apply even before a court would rule on a petition for disconnection. The effect of the ordinance was to frustrate state law.

Moreover, the court said that the village may not, under the Illinois Constitution, impose a tax that exceeds the amount needed for a particular purpose for the following tax year. Because the village's ordinance required a forty-year advance payment of expenses in the form of the disconnection fee, the court ruled it exceeded the village's taxing power and was void.

In land use, as well as in matters of revenue and taxation, local governments must remain within the boundaries of their authority.

Edward J. Sullivan

City of Chicago v. Village of Elk Grove Village, 820 N.E.2d 1158 (Ill. App. Ct. 2004).

■ *PENNSYLVANIA COURT UPHOLDS REVERSAL OF HEIGHT VARIANCES ON SKYLINE PROTECTION GROUNDS*

One Meridian Partners, LLP v. Zoning Board of Adjustment, 867 A.2d 706 (Pa. Commw. 2005), involved a development proposal for the construction of a fifty-story high-rise condominium project that required numerous height, floor area ratio, and other variances. The variances were originally denied by the building code official but granted by the defendant board. Plaintiff One Meridian Partners, an adjacent property owner, challenged the variances in an appeal.

The trial court heard the matter on the record and applied case law under which the applicant could be granted a variance if it would suffer an "unnecessary hardship" if required to comply with the ordinance and if granting the variance would be in the public interest. This standard requires analysis of multiple factors, including economic detriment to the applicant if the variance were denied, the financial hardship attributable to work necessary to achieve strict compliance with the code, and the characteristics of the neighborhood. The subject site is diagonally across from the Philadelphia City Hall. The trial court found that the defendant's reasons for granting the variance (that the site was "unique," that only traffic to and from the garage needed to be evaluated, and that an adequate amount of light and air to abutting properties would not be impaired) were not supported by substantial evidence. In particular, the trial court found that the city had enacted special height controls to protect views of the skyline in general and City Hall in particular.

On appeal, the court cited *O'Neill v. Zoning Board of Adjustment*, 434 Pa. 331, 338, 254 A.2d 12, 16 (1969), in which a variance to allow two and one-half times the floor space otherwise allowable was found not to be "a mere technical and superficial deviation" from the zoning regulations, but, in effect, a rezoning of the site, which was not available under the variance procedures. In the instant case, the developer requested three times the amount of floor space. It justified the additional space by stating that fewer of the units would be condominiums if the site had to be built within the dimensional requirements of the code and that the units would therefore not sell because of high condominium fees and the displacement of potential units by parking, retail uses, and mechanical areas. The appellate court said that its precedent must not be read to allow property owners to develop sites as they please so long as the underlying use is permitted. The court also stated that the unnecessary hardship standard must apply to all uses of site—not only the use desired by the applicant.

Finally, the court gave credence to the Philadelphia Code provisions establishing height limits in the city center skyline area, so that the view of City Hall and the sculpture of William Penn atop the building would not be blocked out and City Hall would not become a secondary building among others built taller than otherwise permitted.

The appellate court upheld the trial court, concluding its discussion with this excerpt from *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment*, 771 A.2d 874, 878 (Pa. Commw.), *petition for allowance of appeal denied*, 567 Pa. 733, 786 A.2d 992 (2001):

> [W]hile [precedent] eased the requirements . . . it did not make dimensional requirements . . . "free-fire zones" for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially "hurt" if it could not do what it wanted to do with the property . . . . If that were the case, dimensional requirements would be meaningless—at best, rules of thumb—and the planning efforts that local governments go through in setting them to have light, area, and density buffers would be a waste of time.

This case may well have come to the right conclusion. However, it is troubling to see courts making up standards through case law and not requiring local governments to establish those standards so that the courts may exercise their powers of judicial review.

Edward J. Sullivan

One Meridian Partners, LLP v. Zoning Bd. of Adjustment, 867 A.2d 706 (Pa. Commw. 2005).

■ SECOND CIRCUIT FINDS RLUIPA CHALLENGE UNRIPE IN CONNECTICUT CASE INVOLVING PRAYER MEETINGS

Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005), involved the defendant city officials' attempts to regulate large weekly gatherings at the plaintiffs' house and to limit them to no more than twenty-five family members. The federal district court granted an injunction and the defendant city and its officials appealed.

The plaintiffs own a single-family residence on a cul de sac with six other homes and had held prayer meetings of between ten and sixty people there since 1994. Because Mr. Murphy is disabled, the plaintiffs said that the Murphy home must be used for the meetings. Beginning in 2000, the city began receiving complaints of noise, traffic, and parking issues. After an investigation, the defendant zoning commission sent the plaintiffs a letter stating that their activities were inconsistent with single-family zoning on the site. The plaintiffs did not appeal a later cease and desist order limiting prayer meetings to the Murphys and fewer than 25 non-family participants or seek a variance from the zoning board of appeals. Rather, they went to federal court, claiming, *inter alia*, a violation of their First Amendment rights and of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, and its Connecticut statutory analogue.

The trial court found that the RLUIPA claim was ripe and the plaintiffs (unlike a church) were not required to file a land use application before resorting to federal court. The trial court also found a sufficient factual basis to issue a temporary restraining order and preliminary injunction preventing the city from enforcing the cease and desist order. Denying the defendant's motion to dismiss, the trial court found no need to use the local process for appealing the cease and desist order and deciding the variance because it determined that such steps were "remedial" and not required under RLUIPA. Ultimately, the trial court granted a permanent injunction on First Amendment, RLUIPA, and Connecticut statutory grounds, rejecting the city's claims that RLUIPA was unconstitutional and exceeded congressional powers. The defendants appealed, primarily on ripeness grounds.

The Second Circuit addressed ripeness first because it is jurisdictional. Ripeness required the plaintiffs to demonstrate that they had obtained a final, definitive position from the local government. The court reviewed the case *de novo* and determined that ripeness is rooted both in the Case or Controversy Clause of the Constitution and in prudential limitations on the exercise of judicial authority to avoid the premature adjudication of abstract controversies. Determining ripeness requires a review of the fitness of the issues for adjudication and the hardship to the parties of withholding court consideration. In the takings field, the United States Supreme Court has used *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), as its ripeness touchtone. *Williamson County* requires a final definitive decision on how a site may be used and that at least one meaningful application has been pursued. These requirements allow development of a full record, allow courts to see what uses, if any, are allowed, and allow alternatives (such as variances) to be pursued. Such actions avoid constitutional litigation, achieve final decisions on land use, and allow courts to resolve issues on non-constitutional grounds and avoid being super-zoning boards of appeals.

Applying *Williamson County* to the plaintiffs' First Amendment, RLUIPA, and Connecticut statutory claims, the court found that the plaintiffs had not sought a final definitive statement of how the defendant's zoning ordinance applied to their property. The court also looked to whether the plaintiffs had suffered an immediate injury from the city's action and whether the plaintiffs could have used further proceedings to define these injuries. The Second Circuit found no immediate injury by the cease and desist order, because there were no fines or imprisonment possible under Connecticut law—only a basis for a subsequent civil complaint, which would require the defendants to bear the burden of proof before a court. Moreover, the court found that the constitutional and statutory claims rested on factual allegations not yet developed, such as claims of discriminatory enforcement, numerical limitations on those participating in the prayer meetings, and the like. A zoning board of appeals is required under Connecticut law to find facts and apply zoning regulations or requirements to those facts and to make a record for subsequent judicial review. The court concluded, "Bypassing the zoning Board of Appeals and its hearing processes, which were statutorily designed for exploration and development of these sorts of issues, leaves the Murphy's alleged injuries ill-defined." 402 F.3d at 32.

The court concluded that it lacked jurisdiction under *Williamson County* because it had not received a final definitive position from the city as to how the Murphys' property may be used. The court also said that a variance is more than a remedial issue; rather it is a part of the decision-making that determines allowable uses, allows a factual record to be developed, and allows the zoning board of appeals to exercise its discretion. It also allows a case to be developed as to the constitutionality of RLUIPA and its Connecticut analogue. The court remanded the matter for dismissal without prejudice to allow the plaintiffs to bring a ripe claim.

This decision is not too extraordinary given the predisposition of federal courts not to consider constitutional or statutory claims without a developed record.

Edward J. Sullivan

Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005).

■ SIXTH CIRCUIT UPHOLDS BILLBOARD REGULATIONS AGAINST CONSTITUTIONAL CHALLENGES

Prime Media, Inc. v. City of Brentwood, Tennessee, 398 F.3d 814 (6th Cir. 2005), involved the appeal of a district court decision invalidating the city's billboard regulations, which prohibited off-premise signs and limited the height and size of billboards.

The city denied the plaintiff's application for a billboard under all three standards and the plaintiff filed suit on First and Fourteenth Amendment grounds. The city amended the ordinance to remove the off-premise sign prohibition and to add purpose and finding sections. The plaintiff amended its complaint to request damages and both parties moved for summary judgment. The district court found the ordinance was content-neutral but not narrowly tailored to promote the city's interest in aesthetics and traffic safety because it did not contain an analysis of alternatives. Further, the district court found the off-premise prohibition, now repealed, was content-based, and was also not the least restrictive means to secure the city's interests. The district court held that the plaintiff was entitled to damages.

On appeal, the city alleged that the district court had erred in invalidating the height and size requirements and that if these requirements were valid, the plaintiff was not entitled to damages. In addition, the plaintiff sought review of its facial First Amendment and Equal Protection claims, which had not been decided by the district court. The appellate court reviewed each claim on a *de novo* basis.

As to the height and size regulations, the court noted that these were content- and viewpoint-neutral, time, place, and manner restrictions and were permissible if narrowly tailored to serve a significant governmental interest and leave ample room open for alternative channels of communication. The issue was whether the regulations were narrowly tailored, *i.e.*, they do not burden more speech than necessary to further legitimate governmental interests. The court reviewed applicable precedent, including the total ban on affixing signs to telephone poles and cross wires that was challenged in *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 79 (1984), where the Supreme Court was satisfied that a complete ban on such signs directly advanced the city's aesthetic goals. The court also noted that exceptions allowed to an otherwise complete ban might render it unconstitutional, as occurred in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and that a flat ban must leave open adequate alternative channels of communication, *City of LaDue v. Gilleo*, 512 U.S. 43 (1998). The court concluded,

> Measured by the requirements of these cases, Brentwood's size and height restrictions satisfy the tailoring requirements for a content-neutral regulation of the time, place and manner of speech. The fit between the City's means and ends is a reasonable one. The agreed-upon evils of billboards are visual blight and traffic safety. And the City did not regulate "a possible byproduct" of this problem, *see Taxpayers for Vincent*, 466 U.S. at 810, but the problem itself—"the medium of expression," *id.* . . .
>
> Of course, unlike *Taxpayers for Vincent*, where the city banned all signs and billboards on utility poles, Brentwood did not ban all billboards, only those of a certain height and size. But that does not mean that the City has gone *further* than necessary to satisfy its ends; it means "it has stopped short of fully accomplishing its ends: It has not prohibited all billboards." *Metromedia*, 453 U.S. at 508 (plurality). . . . And the height and size restrictions directly advance this interest because billboards that are smaller and shorter are less apt to interfere with aesthetic or traffic safety concerns.

398 F. 3d at 822.

The court also noted that the ordinance's exceptions are not based on content or viewpoint and that it is acceptable to tolerate smaller objects of visual blight over larger ones. The Sixth Circuit stated that the district court's analysis tended to be closer to a "least restrictive means" analysis and that the court should instead have employed a "no greater than necessary" test. Moreover, by adoption of the purpose and intent provisions, the city demonstrated that it had considered alternatives. While a local government must consider the costs and benefits of legislation in this area, it is not required to calibrate them precisely to a certain height and size as opposed to other alternatives.

The court then turned to the damages claim. Because the denial was based not only on the since-repealed ban on off-premises signs, but also on the height and size requirements, which were upheld, the court found no basis for damages.

As to the plaintiff's facial First Amendment and Equal Protection claims based on other sections in the ordinance, many of which did not affect the plaintiff, the district court had not addressed them; consequently, the case was remanded for resolution of these matters in addition to the plaintiff's contingent attorney fee claim.

This case carefully analyzes complex (and sometimes divided and contradictory rationales and outcomes) in United States Supreme Court decisions regarding First Amendment rights and makes careful distinctions in the "further than necessary" and "adequate alternative channels of communications" areas. Until the United States Supreme Court takes up one of these issues again, analyses such as these are the best available.

Edward J. Sullivan

Prime Media, Inc. v. City of Brentwood, Tenn., 398 F.3d 814 (6th Cir. 2005).

LUBA Cases

■ LOCAL PROCEDURE

Local Jurisdiction

In *Rose v. City of Corvallis*, 49 Or LUBA ___ (LUBA No. 2004-221, Apr. 15, 2005), LUBA reaffirmed that a local government lacks jurisdiction to readopt or amend a land use decision while appellate review of the decision is pending.

The appealed decision was the city's second decision approving a zone change, major planned development modification, detailed development plat, and sign variance. LUBA remanded the first approval because the city's findings addressing the Transportation Planning Rule (TPR), OAR 660-012-0060, were inadequate. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004). Petitioner Rose appealed LUBA's decision in *Staus* to the Oregon Court of Appeals. While the appeal was pending, the city held remand proceedings and adopted a new decision, again approving the zone change and related land use approvals with supplemental findings addressing the TPR.

Rose appealed the city's second decision to LUBA and argued that the city lacked jurisdiction to adopt the decision because of the pending appeal in *Staus*. He relied on LUBA's decision in *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, r*ev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989) for the principle that "[w]here jurisdiction is conferred upon an appellate review body, once appeal/judicial review is perfected, the lower decision making body loses its jurisdiction over the challenged decision unless the statute specifically provides otherwise."

The city questioned the applicability of this principle, noting that it had challenged Rose's standing to appeal to the court of appeals in *Staus*. If the court agrees that Rose lacks standing, the court's jurisdiction to hear the appeal will evaporate. The city also argued that the principle articulated in *Standard* should be limited to allow a local government to modify a decision under appellate review as long as the modification does not involve the issue before the appellate review body.

LUBA sided with the petitioner and declined to alter its *Standard* ruling for several reasons. First, the city's decision in *Rose* did more than modify the decision on appeal in *Staus*; it reissued the decision with supplemental findings and effectively replaced the first decision. Second, LUBA rejected the city's premise that the second decision involved only the TPR issue and not issues concerning the comprehensive plan designation that had been raised in the *Staus* appeal. LUBA noted that "[t]he issue of the correct plan designation is inextricably bound up with the question of the proper zoning for the subject property, which in turn is an essential element in applying the TPR." 49 Or LUBA at ___ (slip op at 13). LUBA reversed the city's second decision, concluding that the city lacked jurisdiction to adopt it.

■ LOCAL ORDINANCE INTERPRETATION

In a unique ruling, LUBA held that a county counsel's factual stipulation, which led to dismissal of a circuit court mandamus proceeding, misinterpreted an applicable county ordinance and warranted reversal. *Flying J Inc. v. Marion County*, 49 Or LUBA ___ (LUBA No. 2003-192, Order, Mar. 3, 2005), is the latest ruling in a long-running dispute over the level of development allowed on 29 acres located adjacent to an I-5 interchange and referred to as the "Flying J property." The zoning history dates back to 1981, when the city adopted a Goal 3 exception and applied Interchange Development (ID) zoning to the property to allow development of a truck stop and other travelers' accommodations. Over the years, the county approved various partitions, lot line adjustments and zone changes, which resulted in designations of ID zoning for two acres of the property and Interchange Development Limited Use (ID-LU) zoning for the remainder. The ID-LU zone allows fewer outright permitted uses than the ID zone.

In 2001, the county adopted a community plan for the interchange as part of periodic review. The adopting ordinance stated that the ID-LU zoning applied to the Flying J property "shall remain in effect," which apparently maintained ID-LU zoning on 27 acres of the property. However, a map attached to the ordinance showed the entire 29-acre parcel zoned ID-LU.

In a subsequent circuit court mandamus proceeding, the county counsel stipulated that the ID-LU zone "applies to the entire 29-acre Flying J property, including the [two] acres that had previously been zoned [ID]." This stipulation was the subject of the *Flying J* appeal.

The substantive issue before LUBA was how to interpret the ambiguous 2001 ordinance, in which the text appears to maintain the ID zoning for two acres of the Flying J property and the map appears to rezone the two acres to ID-LU. Brushing aside the intervenor-respondents' argument that the petitioner's appeal was barred by issue preclusion, LUBA first addressed whether the county counsel's interpretation of the ordinance in the stipulation was entitled to any deference. LUBA concluded it was not, because deference is only accorded to the local governing body's interpretation of its ordinance and the county board had not adopted the interpretation expressed in the stipulation. Turning to the 2001 ordinance, LUBA reviewed the findings contained in the ordinance and the community plan adopted by the ordinance. Both documents expressed a clear intent to maintain the ID zoning on the two-acre piece of the Flying J property. Accordingly, LUBA ruled that the erroneous map could not control over the ordinance text and that the county had committed reversible error by stipulating otherwise in the mandamus proceeding.

Extra-Record Evidence

LUBA considered and rejected separate requests to consider extra-record evidence on issues involving the 120-day rule and bias in two Wal-Mart appeals, *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA ___ (LUBA No. 2004-075, Order, Mar. 17, 2005), and *Wal-Mart Stores, Inc. v. City of Oregon City*, 49 Or LUBA ___ (LUBA No. 2004-124, Order, May 4, 2005). As both cases illustrate, a party requesting to introduce extra-record evidence must make a compelling showing of likely error before LUBA will grant the request.

120-Day Deadline

In the *Central Point* appeal, Wal-Mart sought permission to depose city employees and the city council for the purpose of showing that the city took action to avoid the requirements of ORS 227.178. That statute requires the city to make a final decision on a permit application within 120 days of the date the application is complete and, if it does not, to refund half of the application fee.

Wal-Mart filed an application for site design approval for a proposed store in the city's C-4 zone and contended that the proposed store was an allowed use in that zone. The planning director took the position that the store was not a permitted use and required conditional use approval as well as site design review. Wal-Mart asserted that the planning director had taken the opposite position—that a large-format store was an allowed use—with another retailer, Home Depot, that had previously been interested in the site.

The city's planning commission held two hearings on Wal-Mart's application to determine whether the store qualified as a "community shopping center" and whether it required conditional use review. At the conclusion of the second hearing on March 30, 2004, the commission voted to approve Wal-Mart's application without requiring conditional use review. Before the planning commission held its hearings, the city realized it would have difficulty meeting the 120-day deadline in ORS 227.178 if the planning commission's decision was appealed to the city council. The city asked Wal-Mart to waive the deadline, which expired on April 16, 2004, and Wal-Mart refused. On March 25, 2004, the city council took action to schedule its review of the planning commission's yet-to-be-made decision on April 15, 2004, one day before the 120-day deadline expired. The city council held a public hearing on April 15 and voted to reverse the planning commission's decision and deny site plan approval for the proposed store. Wal-Mart appealed.

The issue before LUBA on Wal-Mart's motion for extra-record evidence was whether the city council's expedited decision was undertaken for the purpose of "avoiding the requirements of . . . ORS 227.178." If it was, LUBA would have to reverse the city's decision, order the city to approve Wal-Mart's application, and award Wal-Mart attorney fees. *See* ORS 197.835(10). The city contended that its decision was for the purpose of complying with, not avoiding, the 120-day deadline in ORS 227.178. Wal-Mart argued that the city's deviation from its normal appeal and review process was for the purpose of avoiding the 120-day requirement. Additionally, Wal-Mart asserted that the city's accelerated appeal process was undertaken to prevent Wal-Mart from pursuing a mandamus remedy in circuit court and to avoid the burden of defending a mandamus action.

LUBA's starting point for addressing the meaning of ORS 197.835(10) was its decision in *Miller v. Multnomah County*, 33 Or LUBA 644 (1997), *aff'd* 153 Or App 30, 956 P2d 209 (1998). In that case, LUBA reviewed the legislative history of the statute and concluded that the legislature "intended to discourage spurious, bad faith denials" in adopting the statute. *Id.* at 653. In the instant case, LUBA posited that the legislature must have realized that the mandamus remedy for violating the 120 day requirement would motivate cities to comply with this deadline in land use decision making. On the other hand, LUBA acknowledged that a *pro forma* denial that is made within 120 days is worthless to an applicant. Expanding its *Miller* holding, LUBA concluded that if a local government adopts a "spurious, bad faith" denial for the purposes of avoiding one of the statutory consequences for violating the 120-day requirement, such decision is an "action [taken] for the purpose of avoiding the requirements of . . . ORS 227.178" within the meaning of ORS 197.835(10)(a)(B).

Turning to the facts in the *Central Point* appeal, LUBA noted that Wal-Mart did not seriously contend that the city's decision was a bad faith denial made to avoid the consequences of violating the 120-day deadline. Even if Wal-Mart had advanced such an argument, the record would not support it and would not provide a sufficient basis for allowing the requested discovery. Additionally, LUBA noted that even if the city council had committed procedural error by expediting its appeal process, Wal-Mart did not argue that the expedited process denied it an adequate opportunity to present its case to the city council. Finally, to the extent Wal-Mart suggested that the city council was biased, the evidence in the record did not support that speculation. LUBA noted that a request like Wal-Mart's to depose city council members "can significantly slow LUBA's review and can easily be burdensome for local government decision makers if such requests are routinely allowed without a substantial showing that there is real reason to suspect that granting the request will lead to extra-record evidence of decision maker bias." 49 Or LUBA at ___ (slip op at 13). Neither the chronology of events leading to the city council's decision nor the facts in the record satisfied this standard. LUBA denied Wal-Mart's request for discovery.

Bias

In the *Oregon City* appeal, Wal-Mart appealed the city's denial of its second site plan approval to build a store on property owned by the Youngers. The city had denied a previous comprehensive plan amendment and zone change for the same property. The comprehensive plan map amendment was required because Wal-Mart proposed to build parking on a portion of the site zoned for residential use.

In its second site review application, Wal-Mart planned to build half of its parking underneath the proposed store, so no comprehensive plan map amendment was required. The planning commission and city council both denied the second application because it was substantially similar to the first application and it failed to comply with various transportation, site plan, and design review requirements in the city code.

Wal-Mart requested to introduce evidence designed to show that the city had expressed an interest in buying the Youngers' property for a city building and had architectural drawings prepared while Wal-Mart's first application was pending before the city. Wal-Mart argued that the city remained interested in buying the property while the second application was pending. It sought to introduce architectural drawings prepared for the city and internal communications among city staff members, and to depose planning staff members, city council members and the architect who prepared the drawings to show that the city council was biased and had prejudged Wal-Mart's second application.

The city asserted that the Youngers' property was only one of eleven potential sites for a city building and that the architect had prepared preliminary sketches and plans for a city building on each of the eleven sites. The city also submitted affidavits of the city engineer and public works director that (1) explained how the Youngers' property was identified as one of the potential sites for a city building and (2) indicated that discussions with the Youngers had terminated when the city learned of the Youngers' "continuing agreement" with Wal-Mart.

LUBA ruled that Wal-Mart had failed to satisfy LUBA's stringent standard for allowing extra-record evidence to support a bias claim. Under this standard, a motion seeking extra-record evidence must allege that "the decision maker was biased or that there is a reasonable basis to believe the decision maker was biased." 49 Or LUBA at ___ (slip op at 7). Wal-Mart's motion expressed its belief that the city had an interest in buying the Youngers' property while Wal-Mart's second application was pending and that the city had denied the application to enable the city to acquire the property. In LUBA's view, this amounted to speculation and was not a reasonable belief that the city council was biased. Because Wal-Mart had not demonstrated any reasonable likelihood of uncovering evidence of bias, LUBA denied the request for extra-record evidence.

■ *LUBA JURISDICTION*

In *Bonderson v. City of Ashland*, 49 Or LUBA ___ (LUBA No. 2004-201, Order, Apr. 14, 2005), LUBA denied the City of Ashland's motion to dismiss an appeal of a building permit, ruling that the permit was an appealable land use decision because the city had exercised legal or policy judgment in approving it.

The petitioner appealed the city's approval of a building permit to build a single-family residence. She argued that the city had exercised legal and policy judgment in deciding that (1) the permit was not subject to a Type I procedure, (2) the Site Design and Use Standards (SDUSs) did not apply, (3) the "driveway" ended 240 feet from the property's entrance, and (4) a Physical Constraints Review Permit was not required. The city moved to dismiss the appeal and argued that the building permit had been approved under clear and objective standards and was not a land use decision.

LUBA agreed with each of the petitioner's arguments and denied the city's motion to dismiss. Under the city's code, all new structures larger than 2,500 square feet are subject to the SDUSs and must be reviewed using a Type I procedure. Because the proposed home appeared to be more than 2,500 square feet and appeared to trigger the Type I review process, LUBA concluded that the city had exercised legal or policy judgment in reaching its contrary conclusion. Similarly, LUBA held that terms used in the definition of "driveway" are ambiguous and that the city had exercised legal and policy judgment in interpreting this definition. The city's code requires that a fire vehicle turnaround must be provided for any driveway longer than 250 feet. The code defines a "driveway" in terms of "travel distance in length." The petitioner argued that this phrase is ambiguous and that "travel distance" ends at the point a car cannot proceed forward, such as when it reaches the garage. In petitioner's view, the city had interpreted this term to mean "some arbitrary point significantly short of the garage or parking area." Citing *Tirumali v. City of Portland,* 169 Or App 241, 7 P3d 761 (2000), LUBA agreed with the petitioner that the terms "driveway" and "travel distance" are ambiguous and require the exercise of legal and policy judgment.

Finally, LUBA held that the city had exercised judgment when it concluded that a Physical Constraints Review Permit was not required. The city had determined that paving a driveway is not "construction" within the meaning of the city's code. The proposed driveway would be within a protected area in the city's Floodplain Corridor Lands, and the code required a Physical Constraints Review Permit for "development" in this area. The code definition of "development" included construction of a driveway. In LUBA's view, to reach the contrary conclusion that the driveway would not be "construction," the city had exercised legal and policy judgment.

LUBA's ruling offers a cautionary note to city officials and developers alike that building permit approvals requiring anything more than numeric decisions may be vulnerable to appeal as land use decisions.

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