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Highlights

Appellate Cases—Takings

■ *FIFTH AMENDMENT DOESN'T BAR CONDEMNATION FOR ECONOMIC DEVELOPMENT, SAYS U.S. SUPREME COURT*

Kelo v. City of New London, 544 U.S. ___, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), involved the defendant city's creation of an economic development corporation to redevelop Fort Trumball, a former military base, and the surrounding area. The development corporation and city entered into an agreement with Pfizer, Inc. to develop a research facility covering much of the site. The city adopted a plan with the objectives of providing one thousand new jobs, increasing tax and other revenues, and transforming the city's status as an economically depressed area.

The issue before the Court was whether the development corporation could use the power of eminent domain to implement the plan by assembling the necessary land under the Public Use Clause of the Fifth Amendment to the federal Constitution. The plan included use of a portion of a former military base (the remainder to be designated as a park), a hotel/conference center, and a new "urban village." Nine landowners declined voluntary sale of their properties and brought a state court action challenging future condemnation actions as violating the public use clauses of the Connecticut and federal constitutions as well as state statutory law.

A trial court judge gave relief for two of the sites, but a divided Connecticut Supreme Court reversed, deeming these actions both constitutional and consistent with state law. A dissent would have required a higher level of scrutiny when eminent domain is used for economic development purposes. The United States Supreme Court granted certiorari.

Justice Stevens wrote the Court's opinion, which was joined by four other justices, beginning with "[t]wo polar propositions" (162 L. Ed. 2d at 450): that, even with just compensation, eminent domain may not be used to transfer property from private party A to private party B (*See Calder v. Bull*, 3 Dall. 386, 388 (1798)), and that eminent domain can be used if it is for a "public use," including a use by a public utility. The Court, like the Connecticut Supreme Court, found no misuse of eminent domain to aid a private person or corporation. The issue was thus whether the proposed purpose of economic development constituted a public use.

Court precedents said that the property acquired need not be used by the public, but there must be a public purpose for the acquisition. In particular, the Court looked to *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawai'i Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *Berman* involved a landowner whose property was not blighted, but was located in a blighted area where an overall development plan was adopted to revitalize the neighborhood. He failed to convince the Supreme Court to focus on his property, as opposed to the overall redevelopment plan, which the Court found justified for a public welfare purpose. In *Midkiff*, eminent domain was used to broaden land ownership, and its use was also upheld, notwithstanding the fact that, as in *Berman*, the land was transferred to other private persons.

The Court stressed the respect that federalism accords to the judgments of state legislatures and courts in determining local needs, adding that the Court's

"public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." 162 L. Ed. 2d at 453–54. Even though the city council in this case had not determined that the area was blighted, it had found a need for economic rejuvenation and had adopted an economic development plan as allowed under state law. The Court stated that it would look only at that plan as a whole, rather than at the acquisition of individual properties thereunder. If such a plan serves a public purpose, an acquisition thereunder constitutes a public use under the Fifth Amendment.

The Court noted that the plaintiffs sought a bright-line rule that economic development may never qualify as a public use. The Court rejected this proposed rule as supported by neither precedent nor logic, and stated that economic development has long been recognized as a valid function of government and is indistinguishable from other public purposes.

The Court also rejected the plaintiffs' contention that the use of eminent domain for economic development blurs the line between public and private takings, noting that eminent domain often involves benefits to private parties, such as the purchaser of the cleared lands in *Berman* and the lessees purchasing freeholds in *Midkiff*. The Court added that public ownership is not the sole method of realizing a public purpose in redevelopment. The Court also rejected the contention that the transfer of property to generate additional public revenues violated the Public Use Clause, noting that this was not an issue on which the Court had granted certiorari, and that this case involved, as in *Berman*, an integrated development plan.

The Court further rejected the plaintiffs' proposed test under which there must be a "reasonable certainty" that public benefits would accrue from the condemnation, because such a test would allow federal courts to substitute their judgment for state and local authorities over the wisdom of acquiring individual sites. Citing *Berman* and its recent decision in *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074 (2005), the Court stated that so long as the purpose is legitimate and the means not irrational, the courts will not engage in empirical debates over the wisdom of socioeconomic legislation. Postponing implementation of economic development plans to enable courts to conduct a trial over their feasibility would impose significant impediments to their realization. Similarly, the Court rejected the notion of second-guessing governmental decisions to acquire certain properties pursuant to an overall economic development plan, because once the public purpose issue is decided, the amount and character of land to be taken lies in the legislative discretion of the relevant authority.

The Court said it did not minimize the private hardship that accompanies the use of eminent domain, but added that these hardships are within the abilities of the people and their elected representatives to address through adoption and amendment of state constitutions and laws. These matters are not within the supervisory powers of federal courts under the Fifth Amendment.

Justice Kennedy joined the Court's opinion, but made some additional observations. While he agreed that a deferential rational basis review under the Due Process and Equal Protection Clauses was appropriate, he also added that transfer of property from one private party to another through eminent domain "with only incidental or pretextual public benefits" is forbidden under the Public Use Clause. 162 L. Ed. 2d at 458. If a "clear showing" of such a transfer is made, a court can strike it down under *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446–47, 450 (1985). Where such an issue is raised, a court presumes the acquisition action valid, but must review the record to assure that the standard is met. In this case, he noted, such an inquiry had been made and the action survived lower court scrutiny. Justice Kennedy believed that there had been meaningful review under both *Berman* and *Midkiff* and that no new rule of *per se* or presumptive invalidity of the use of eminent domain for economic development was needed. However, he left open the possibility of a higher standard, citing the Court's use of such a standard in his concurring opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549–50 (1998).

Justice O'Connor dissented, joined by the Chief Justice and Justices Scalia and Thomas, beginning with a quotation from *Calder v. Bull*, and suggesting that the Court was abandoning that principle in this case by allowing eminent domain to be used for a private use. Justice O'Connor said the Takings Clause of the Fifth Amendment provides two substantive checks on public bodies in its public use and just compensation elements. While deferring to public agencies, courts still provide an "external . . . check" on their actions. 162 L. Ed. 2d at 463.

According to Justice O'Connor, public use cases fall into three categories: ownership by the public, ownership by public utilities, and transfers to private parties. The first two are relatively uncontroversial, but the third is allowed only if it serves a public purpose, as in *Berman* and *Midkiff*. The dissent saw this case as one of first impression, *i.e.*, whether eminent domain may be used for economic development purposes, and concluded it could not. She distinguished *Berman* and *Midkiff*, because in those cases the purposes were public. *Berman* and *Midkiff* held out judicial review for conformity with the Public Use Clause and involved the elimination of a public harm as the ground for upholding the action. The instant case significantly expanded approval of the Public Use Clause, because nearly every acquisition could be said to have some incidental public benefit to justify it, so that the clause was rendered meaningless. The references to deference to the legislative or police power in *Berman* and *Midkiff* were dicta. The dissent suggested that the Court had conflated the police power with public purpose. Justice O'Connor also suggested that the Court (especially Justice Kennedy) had wrongly stated that the lower courts could ferret out pure private takings, without detailing how the courts are to conduct this inquiry, and if reasons are given by a halfway decent staffer, it will be impossible to disaggregate public and private benefits in such a review. Justice O'Connor also suggested that public purpose is not equivalent to public use, and asked how the Court could

both defer to public authorities in evaluating their predictions of future public benefits and also provide for rational basis review at the same time, concluding that there can be no effective review at all. Conceding that there were benefits to the public, Justice O'Connor nevertheless concluded,

> [b]ut none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advance is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Id. at 467.

Justice O'Connor also characterized the Court's suggestion that state constitutional or legislative provisions could be more restrictive as an abdication of the Court's responsibility, ending with a rhetorical flourish that, under the Court's decision, no property is safe from public acquisition by agencies influenced by the rich and powerful, which she contended, was not a result contemplated by the Framers.

Justice Thomas also wrote for himself in dissent, focusing on the public use standard and terming the city's adopted plan "suspiciously agreeable" to the Pfizer Corporation. *Id.* at 468. He said the effect of the Court's decision was to render the Public Use Clause a nullity by straying from its original meaning, which was that the public agency acquiring the property must use it. He also contrasted this standard with the general-welfare-type standard used by the Court in equating public purpose with public use. He said his construction of the Public Use Clause was consistent with the common law background in which the Constitution was written, concluding, "The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] *property* from A. and giv[ing] it to B.'" *Id.* at 471 (quoting *Calder v. Bull*, 3 Dall. at 388) (alteration in original).

Justice Thomas also asserted that the Court's conflation of public use and public purpose violated the Fifth Amendment, which limits, rather than grants, powers. The federal government may only take property for use by the government under the Fifth Amendment and the Necessary and Proper Clause. Any other result, he said, would subvert the principles of constitutional design. He supported his thesis by pointing to early cases decided under state law, in particular those applying various mill acts, which allowed mill owners to dam rivers and flood adjacent property so that the mills could operate. Compensation was owed to the landowners of the flooded property, but the use was considered to be public in nature. This was the forerunner of the grant of eminent domain powers to public utilities. He conceded the existence of statutes allowing private corporations the power to build public or private roads via eminent

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domain proceedings, but said these exercises had been "hotly contested" and not uniformly upheld. *Id.* at 473.

Besides arguing that the Court had departed from the history and original meaning of the Public Use Clause, Justice Thomas suggested that the Court had erred in deferring to public agencies in determining the nature of a "public use" and in equating it with a "public purpose" so that most condemnations would be valid. The wrong turn in the Court's public use jurisprudence, according to Justice Thomas, occurred in 1896 in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161–62, in which a condemnation to enable construction of an irrigation ditch was stated to be a public use. According to Justice Thomas, the statement in *Bradley* was dicta, and was improperly relied on in future cases granting public utilities broad authority to acquire land for their use, followed by the broad grants in *Berman* and *Midkiff*. Justice Thomas said it is inappropriate for state and local governments to determine the limits of their constitutional authority without meaningful court supervision and noted that deference regarding other constitutional rights, such as freedom from unreasonable search and seizure, is not acceptable.

More fundamentally, Justice Thomas suggested that *Berman* and *Midkiff* had erred in equating the eminent domain and legislative (or "police") powers. A public body may regulate, but may not acquire, land without compensation and may not acquire without a public use. Lacking a coherent limiting principle on the use of eminent domain and conceding the Court's inability to weigh the wisdom and predictive public judgments of the actions of public bodies, Justice Thomas found the majority's constitutional test too deferential. He found it far easier to weigh whether a taken property will be used by the government than whether it was actually acquired for the sole benefit of a private person.

Justice Thomas concluded with his own rhetorical flourish that, even if the landowner whose land is taken is fully compensated, the relation of people and lands has a "subjective value" and that the "poor communities" often suffer nonmonetary injuries by the powerful and politically connected, so that deference to public agencies is "deeply perverse." 162 L. Ed. 2d at 478. Justice Thomas also urged more searching review of public condemnations, because eminent domain affects "discrete and insular minorities" who are recognized as protected from adverse socioeconomic legislation under *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938), which effectively ended the era of substantive due process.

If *Berman* and *Midkiff* correctly interpret the Public Use Clause, then the opinion of the Court in this case is correct. Yet the dissents must be taken seriously, if only because of potential changes in the membership of the Court. Justice O'Connor's dissent would categorically isolate public land acquisitions for economic development from other recognized public use takings, some of which would allow transfers of land from A to B. That dissent asserts that a judicial mind can separate "good" exercises of eminent domain from "bad" ones. Moreover, O'Connor's rationale of the elimination of a public harm appears to suffer from the rejection of that ground in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). Nevertheless, her dissent has a point that landowner challenges on public use grounds will largely be frustrated, because the Court has equated that term with public benefit or purpose. Yet why should expectations be any better in such cases than for those involving land acquisitions by the public for roads or sewage treatment plants?

Justice Thomas's dissent is logically consistent, especially if one believes his version of constitutional history. Justice Thomas insists on actual public use of condemned property, but his view would nullify the slum clearance efforts of *Berman* and the land ownership redistribution of *Midkiff*, which the O'Connor dissent implicitly would permit. Justice Thomas's tears shed for the powerless and minority communities facing well-connected interests obscures the fact that adherence to Justice Thomas' version of "original meaning" would strengthen the position of land oligopolies and monopolies in the face of public need, whether for economic development or otherwise. Those who have followed this debate, including the Michigan Supreme Court decision in *Wayne County v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004), know how difficult it can be to assemble large tracts of land for economic development purposes solely from willing sellers.

Justice Thomas's account of history and "original meaning" are controversial. It must be said that Justice Thomas's dissent in this case visits on adherents of originalism, such as his colleague, Justice Scalia, the mixed blessings of this school of constitutional interpretation, for if this dissent is correct, then not only are *Berman* and *Midkiff*, as well as most other public use cases since 1896, incorrectly decided, but the picking and choosing of legitimate objects of the Public Use Clause in the O'Connor dissent is also incorrect. This selective use of originalism may yet prove to be the undoing of this school of constitutional interpretation.

Edward J. Sullivan

Kelo v. City of New London, 544 U.S. ___, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

■ *UNITED STATES SUPREME COURT DITCHES FIRST PRONG OF* AGINS

In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ___, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), a unanimous United States Supreme Court reversed itself and cleared up one of the major outstanding issues in takings jurisprudence: whether the takings clause of the Fifth Amendment to the Federal Constitution requires a showing that a regulation "substantially advances" a legitimate state interest. This test was one of two formulated by the Supreme Court in *Agins v. City of Tiberon*, 447 U.S. 255 (1980) and had been repeated in a number of the Court's later opinions. In *Lingle*, the test had been used to strike down a Hawai'i statute that limited the rents an oil company may charge its lessee-operators.

Hawai'i's legislature perceived that both dealers and consumers would benefit by the limitation, but the legislature's decision was controversial. Chevron had often bought or leased property from a third party, built a gas station, then leased the facility to an operator. It charged the operator a monthly rent based on a margin on the sale of fuel and other products, and required the operator to buy all its products from the company at a price the company set unilaterally. The legislation set a rent limitation at no greater than 15% of gross profits from fuel sales and 15% of profits from other sales. In 1997, Chevron sued under the Takings and Due Process Clauses of the Constitution and moved for summary judgment.

In 1998, the Federal District Court granted summary judgment in favor of Chevron, finding that the statute would not substantially advance the state's interests in preventing concentration of the market or lowering retail gas prices, and would allow incumbent lessees to gain a premium on the transfer of their lease interests to others, also resulting in no consumer savings. The court also found that oil companies would simply raise fuel prices to offset reductions in rental income. *Chevron U.S.A. Inc. v. Cayetano*, 57 F. Supp. 2d 1003 (1998).

In the first appeal to the Ninth Circuit, which was decided in 2000, that court found that the district court had correctly applied the relevant legal standard, but that there was a question of material fact as to whether the legislation would benefit consumers, and sent the matter back for trial on that issue. 224 F.3d 1030 (2000). On remand, the district court held a one-day bench trial and again ruled against the state, finding Chevron's expert testimony "more persuasive" than that of the state's expert and adopting the same reasoning it and the Ninth Circuit had used previously. 198 F. Supp. 2d 1182, 1187–89 (2002). The Ninth Circuit affirmed with one dissent, finding that the state was barred by its previous decision from challenging the validity of the "substantially advances" test or arguing for a more deferential standard of review. 363 F.3d 846 (2004). The United States Supreme Court granted *certiorari*.

Justice O'Connor, writing for the Court, traced the history of government actions considered to be takings. The opinion discussed two main types of categorical regulatory takings: cases involving a required physical occupation (as was the case in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), and cases involving a denial of all viable beneficial use of land (*e.g.*, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992)). The court also noted possible exceptions, such as when background principles of property or nuisance law dictate otherwise. The opinion went on to say that, outside of those two relatively narrow categories, the three factors of *Penn Central Transportation Co. v. New York City*, 433 U.S. 104 (1978), apply to regulatory takings cases. Those three factors are (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with "distinct investment-backed expectations," and (3) the character of the governmental action (*i.e.*, it is easier to uphold a regulation that adjusts values through regulation for economic or social purposes than if it effects a physical invasion). The Court added,

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

125 S. Ct. at 2082 (citations omitted).

The Court's opinion went on to discuss the role of *Agins* in takings jurisprudence, in which the "substantially advances" test was stated in the disjunctive ("or") as an alternative to a taking based on complete deprivation of all viable economic use. As such, this test became a freestanding criterion. The Court took this opportunity to consider whether this was indeed a separate criterion for takings, concluding that the test "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Id.* at 2083. In doing so, the Court noted that the test had been derived from substantive due process cases, such as *Nectow v. Town of Cambridge*, 277 U.S. 183 (1928), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which were cited as support in *Agins*. The Court also noted the "commingling" of takings and due process strands from the few previous land use cases it had decided and found its selection of language in *Agins* "regrettably imprecise," because it suggests a means-ends test that purports to test the efficacy of legislation to achieve its stated purpose. 125 S. Ct. at 2083.

According to the Court, the "substantially advances" test may be viable in a due process inquiry, but "is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment," *id.* at 2084, because it does not inquire into the magnitude or character of the burden on private property, nor how that burden is distributed (*i.e.*, whether "in all fairness and justice," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the burden should fall on the public at large or on property owners). The test thus does not identify those regulations that are

functionally equivalent to government appropriation or invasion of private property. The efficacy of a regulation is not the focus of the Takings Clause, which is concerned with appropriation of property "for public use." The Court made the distinction between takings and interference with property rights as follows:

> [I]f a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

125 S. Ct. at 2084.

The Court noted that it was unclear just how the Hawai'i statute would affect Chevron's property rights, because the company still made enough money from its rentals to satisfy any constitutional standard, so it is difficult to see how the company had been singled out to bear a severe regulatory burden. The gist of Chevron's claim was that the legislation was not particularly effective in achieving its stated ends, which did not sound under the Takings Clause. The Court also noted that Chevron did not seek money compensation, but rather an injunction against the regulation, which it contended was arbitrary and irrational (and which sounded in substantive due process). As a practical matter, use of the test would require the courts to scrutinize the wisdom of any number of regulatory exercises and second-guess the legislative judgments underlying adoption of these regulations. In this case, the test would require a court to decide which expert was "more persuasive" with regard to economic regulation. The Supreme Court has avoided the use of such tests under a substantive due process examination, where it has deferred to legislative judgments. Because Chevron had argued only a "substantially advances" basis for its takings claim, it was not entitled to summary judgment on that claim.

The Court said that its decision in this case did not disturb its previous use of the test, noting that in no previous case had the test been used to find a taking, though the test had been used in dicta. The Court distinguished *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as based not on the "substantially advance" language of *Agins* (although that case was used for that proposition), but rather on "Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition for obtaining a development permit." 125 S. Ct. at 2086. In those "unconstitutional conditions" cases, *Dolan*, 512 U.S. at 385, the government demand would have been a taking if there had been no relationship to the use of the property or if that relationship were not "roughly proportional." *Id.* at 391. Despite the use of the "substantially advances" language in *Nollan* and *Dolan*, those cases retain their constitutional vitality under the Fifth Amendment, said the Court. The Court concluded,

> Twenty-five years ago, the Court posited that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interes[t]. *Agins*, *supra*, at 260. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. Because Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim.

125 S. Ct. at 2087 (alteration in original). The Court reversed and remanded the Ninth Circuit's judgment.

Justice Kennedy concurred, emphasizing his influential vote and opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998), in which he distinguished due process from takings claims, noting that Chevron had chosen to dismiss its due process claims in this case. Chevron was thus left with no basis for its claims at all.

This is a significant case. It materially changes the rules for takings by eliminating the "substantially advances" test. It leaves that type of challenge to a due process claim, where it will likely fail if it involves economic or social legislation, because the courts will usually not second-guess the legislatures. While the deprivation of all viable economic use, the appropriation of property, and the physical invasion of property remain classic takings tests, other regulatory takings are subject to the uncertain calculus of the three *Penn Central* factors, which require a trial in most cases.

Two other things are notable about this decision. First, the Court apparently perceived an equivalency between the deprivation of economic use and the appropriation of property. Second, the Court emphasized its discussion in *Dolan* of the "doctrine of unconstitutional conditions," which forbids the government from requiring a person to give up a constitutional right in exchange for a discretionary government benefit, such as a building permit, where the benefit has little or no relationship to the property. Under this doctrine, conditions involving property improvements and exactions of fees will often withstand Fifth Amendment challenges.

Edward J. Sullivan

Lingle v. Chevron U.S.A. Inc., 544 U.S. ___, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

The author participated in the amicus brief of the American Planning Association in this case in support of the position of the State of Hawai'i.

■ UNITED STATES SUPREME COURT REJECTS SECOND BITE OF THE TAKINGS APPLE

San Remo Hotel, L. P. v. City & County of San Francisco, California, 544 U.S. ___, 125 S. Ct. 2491 (2005), involved the plaintiffs' efforts to have a takings claim relitigated in federal court, following an adverse decision in a California state court.

The plaintiffs were individuals and a hotel corporation wishing to convert their single room occupancy (SRO) facility to a tourist commercial use. The defendant required a "conversion fee" of $560,000 to offset the loss of the transient occupancy capacity. The plaintiffs' challenge was unsuccessful in state court, and they then asked a federal court to exempt the case from the "full faith and credit" requirements of 28 U.S.C. § 1738 so as to allow the federal constitutional claims to be heard anew.

The case involved an argument that arose after *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), in which the Court found that a takings claim is not ripe until a state fails to provide adequate compensation for the taking. The plaintiffs argued that they had no realistic chance of their federal claim ever being heard by a federal court on the merits. The plaintiffs relied heavily on a Second Circuit decision in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2003).

The plaintiffs originally filed a state court action, and then stayed it pending resolution of their federal court challenge, *inter alia* on facial and as-applied takings grounds. The defendant obtained summary judgment in the federal district court. The plaintiffs then appealed the summary judgment to the Ninth Circuit, but asked that that court abstain on the federal claims so that the state courts could resolve them. The Ninth Circuit abstained on the facial, but not the as-applied takings claim, and affirmed the district court's adverse decision against the plaintiffs. The district court had found that the as-applied claim was not ripe because the plaintiffs had not sought compensation in state courts, but suggested that the plaintiffs reserve their federal claims in state court. The plaintiffs tried to do just that but also raised other takings claims: that the ordinance failed to substantially advance a legitimate state interest and was not roughly proportional to the impact of the conversion.

The state trial court found for the plaintiffs on the "rough proportionality" ground, but the California Supreme Court reversed in a split decision. That court also analyzed the takings claims under the California constitutional provisions involving takings. The court found that California courts interpret the similar wording of its state constitutional provisions on takings consistent with the federal takings clause.

The California Supreme Court found that the fee had been imposed legislatively and was thus not subject to the heightened scrutiny of N*ollan* and *Dolan*, and that the fee passed a "reasonable relationship" test. The plaintiffs did not seek *certiorari* to the United States Supreme Court of this decision, but instead returned to the federal district court, amending their original complaint to include various takings arguments. The federal district court found that both the statute of limitations and issue preclusion doctrines barred most of the new claims, especially under the full faith and credit statute noted above, as the California Supreme Court had interpreted the California takings clause co-extensively with the Fifth Amendment. The Ninth Circuit affirmed.

The full faith and credit statute follows Article IV, section 1 of the federal Constitution and has the effect of issue preclusion; *i.e.*, issues may not be raised in federal court following a final judgment in state court on the merits between the same parties if those parties could have raised the issue in state court. The narrow question for which *certiorari* was granted was whether the Court should create an exception from the statute to provide a federal forum to litigate unripe claims before a state court has acted. The plaintiffs asserted that they may reserve their federal claims under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), and that federal courts must decide such claims *de novo* regardless of the state court outcome.

Justice Stevens's majority opinion holds that *England* involved situations in which a federal constitutional claim may be avoided if a state court construes a statute in a particular way. A condition for reserving a federal claim in federal court is that the parties not attempt to broaden the state court proceeding beyond the state law issues. Abstention by federal courts allows state courts to determine the law in sensitive policy areas such as land use, which was why the federal courts abstained in the facial claim in this case. In broadening their state court claims to include the federal constitutional claims, the "petitioners effectively asked the state court to resolve the same federal issues they asked it to reserve." 125 S. Ct. at 2503. The Ninth Circuit did not abstain from the as-applied claim, but found it unripe and affirmed dismissal of this claim, which then never came before the Ninth Circuit to reserve in the first place.

The Court also rejected the Second Circuit's dicta in *Santini*, because the Court found no inherent right to litigate these federal claims in a federal forum. In the instant case, a state court had actually decided both the facial and as-applied claims adversely to the plaintiffs. In this context, the fact that the plaintiffs had originally filed in federal court was of no significance. Moreover, the Court said it could not create exemptions to federal statutory law by judicial fiat, especially where comity and finality interests dictated otherwise. Finally, the Court stated that the plaintiffs had overstated the requirements of *Williamson County*, which never required that facial claims be presented to state courts first. Those claims could have been raised in federal court or the plaintiffs could have reserved them in federal court and litigated them in state court. The court added that the plaintiffs "did not have the right, however, to seek state review of the same substantive issues they sought to reserve. The purpose of the *England* reservation is not to grant plaintiffs a second bite of the apple in their forum of choice." *Id.* at 2506.

For claims requiring ripeness, the Court said that *Williamson County* does not prevent federal claims from being presented to state courts so that one may simultane-

ously raise claims for compensation under both state law and the Fifth Amendment, which helps avoid piecemeal litigation. The Court noted that most takings cases that come to the United States Supreme Court are from state rather than federal courts and that state courts have much more experience in the land use planning area. The Court concluded,

> At base, petitioners' claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead *required* in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum. The Court of Appeals was correct to decline petitioners' invitation to ignore the requirements of 28 U.S.C. § 1738. The judgment of the Court of Appeals is therefore affirmed.

125 S. Ct. at 2507.

Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas concurred in the judgment, expressing concern over the holding in *Williamson County* that a final state or local government decision on the use of the property must be secured before a takings claim may go to a state court, finding this outcome to be neither a constitutional nor a prudential requirement. The concurring opinion notes that the majority opinion relies to some extent on the bar on challenges to state taxation laws in federal courts under the Tax Injunction Act, 28 U.S.C. § 1341, as an analogy, but adds that there is a history of federal non-intervention in state tax matters that does not find a parallel in takings cases. The concurring opinion notes that there are strong federal interests in allowing federal courts to determine other federal issues involving states or their subdivisions, *e.g.*, First Amendment cases. The opinion also expresses unease over the viability of some litigants to be heard in federal court under preclusion law and the *Rooker-Feldman* doctrine. Chief Justice Rehnquist concluded that he would reconsider *Williamson County* in a future case; however, under the facts of this case, the Ninth Circuit decision was correct.

The decision in this case was unanimous, probably because all of the members of the Court were satisfied that the plaintiffs had been fully heard and did not warrant the court's sympathy because of their maneuvering in the lower courts. There remains an issue that must be resolved in some future case over the viability of the second prong of *Williamson County*: whether there is a right to have a federal takings claim stemming from a state or local judgment resolved for the first and only time by a federal court. The fault line over this issue runs through the current Supreme Court and may become more pronounced when the personnel on the Court change.

Edward J. Sullivan

San Remo Hotel, L. P. v. City & County of San Francisco, Cal., 544 U.S. ___, 125 S. Ct. 2491 (2005).

Appellate Cases—Real Estate

■ ADVERSE POSSESSION, MISTAKEN BELIEF, AND HOSTILITY UNDER ORS 105.620

The Oregon Court of Appeals interpreted the "honest belief" requirement for adverse possession claimants under ORS 105.620 in *Clark v. Ranchero Acres Water Co.*, 198 Or App 73, 108 P3d 31 (2005). The court of appeals held that pure mistake could still establish the element of hostile possession under the statutory codification of adverse possession, notwithstanding the new requirement of an honest and objectively reasonable belief of ownership. The court also held that an accurate deed description of a boundary did not make an inconsistent belief of ownership unreasonable as a matter of law.

The subject tax lots in this case were originally part of the same parcel and under common ownership. In the 1970s, the owner constructed a duplex on the north lot with a driveway that ran onto the south lot. A fence, running directly south and parallel to the driveway, was located approximately 55 feet south of the boundary between the lots. The lots were later separately sold to the defendant and the plaintiffs' predecessor in interest.

In 1990, the plaintiffs' son purchased the north lot as part of a larger five and one-half acre parcel. He assumed, based on the physical appearance of the property, that the fence was the southern boundary of the north lot, and the prior owner confirmed his assumption shortly after the sale. Between 1990 and 1997, the plaintiffs' son and his duplex tenants regularly used the driveway, mowed the grass up to the fence, and used a portion of the disputed area for outside storage.

In 1997, the plaintiffs purchased the north lot from their son and were told that it extended to the fence line. The plaintiffs regularly used and maintained the disputed area without complaint from the defendant until 2000. When the plaintiffs added fill to the disputed area in 1998, the defendant warned the plaintiffs not to allow the fill to spill over to the south side of the fence.

During this same period of time, the defendant mowed the grass south of the fence only when necessary to eliminate fire hazard. The defendant did not use the property north of the fence line, and never complained about the plaintiffs' or their predecessors' use of that property until September 2000. After notifying the plaintiffs that they were using the area north of the fence without permission, the defendant built a fence on the actual lot line and fenced off the driveway.

The plaintiffs responded with an action for adverse possession of the entire disputed area between the actual boundary and the original fence. The trial court held that the plaintiffs had established sufficiently regular use only of the area between the driveway and the actual boundary, a relatively small portion of the disputed area. The trial court found that the plaintiffs' use of the balance of the disputed area was not

sufficient to put the defendant on notice that title was being challenged. However, the trial court did find that the plaintiffs were entitled to an easement by implication for use of the driveway.

The plaintiffs appealed the trial court's decision that the plaintiffs had not established their claim for adverse possession of the entire disputed area. The defendants appealed the award of any of the disputed area, contending that the plaintiffs' mistaken belief of ownership was insufficient to satisfy the hostility element for adverse possession. The defendants also argued that the plaintiffs had failed to establish their honest and reasonable belief that they were the owners of the disputed area.

In order to determine whether the plaintiffs had established their claim of adverse possession, the appellate court analyzed the text of ORS 105.620 (which applies to all such claims that vest after January 1, 1990):

(1) A person may acquire fee simple title to real property by adverse possession only if:

(a) The person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;

(b) At the time the person claiming by adverse possession or the person's predecessor in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property and that belief:

(A) By the person and the person's predecessor in interest, continued throughout the vesting period;

(B) Had an objective basis; and,

(C) Was reasonable under the particular circumstances; and

(c) The person proves each of the elements set out in this section by clear and convincing evidence.

(2)(a) A person maintains 'hostile possession' of property if the possession is under claim of right or with color of title. 'Color of title' means the adverse possessor claims under a written conveyance of the property or by operation of law from one claiming under a written conveyance.

The court first considered the defendant's argument that the common law doctrine of pure mistake as a means of establishing hostility had been eliminated by the added requirement under ORS 105.620(1)(b) of an honest and objectively reasonable belief of ownership. Noting that the statute precisely tracked the common-law rule of "hostile possession," the court observed that under the common law, a "claim of right" may be established by proof of a mistaken belief of ownership. "Presumably, therefore, when the legislature referred to the element of hostility in ORS 105.620, and when it defined hostility in terms of the common-law concepts of 'claim of right' and 'color of title,' the legislature intended the element of hostility to retain its common-law meaning." 198 Or App at 80. Therefore, the plaintiff could prove hostile possession by pure mistake, which "'exists where a deed correctly identifies the boundaries of the land conveyed, but the person taking property under that deed actually occupies other property that he mistakenly believes is covered by the deed.'" *Id.* at 80–81 (quoting *Faulconer v. Williams*, 327 Or 381, 390, 964 P2d 246 (1998)). Applying this standard to the record in this case, the court found that the parties were mistaken as to the location of the boundary and maintained the boundary as if it were actually located at the fence and ditch line. The court concluded that the plaintiffs had established the element of hostile possession by evidence of pure mistake.

The court also rejected the trial court's determination that the plaintiffs' use of the disputed area was insufficient to be deemed "open and notorious" because the defendant was not making much use of its property and would not have noticed the plaintiffs' use. "The test of open and notorious use . . . is whether the adverse possession claimant is making use of *the disputed area* in ways that are consistent with the ordinary use of *that property*. It does not concern whether defendant's use of its own property is such that it might notice . . . ." *Id.* at 82.

The court then considered whether the plaintiffs had established an honest and objectively reasonable belief of ownership, as required by ORS 105.620(1)(b). The defendant asserted that the accurate boundary descriptions in the deed given to the plaintiffs made their belief of ownership unreasonable as a matter of law. The court noted that it had rejected a similar argument in *Manderscheid v. Dutton*, 193 Or App 9, 88 P3d 281, *rev den,* 337 Or 247 (2004). "We concluded [in *Manderscheid*] that an accurate description in a deed does not necessarily make a mistaken belief as to boundaries unreasonable; whether a mistaken belief is reasonable will depend on the circumstances of each case." 198 Or App at 83. The reasonableness of the belief must be judged in light of the size of the property in relation to the discrepancy, the nature of the land, the experience of the parties, and what they have been told about the boundaries. The court found that in this case all of these factors weighed in favor of the plaintiffs and held that the plaintiffs were entitled to the entire disputed area of the south lot.

It should be noted that the defendant could have avoided the result in this case by carefully inspecting the south lot when purchasing it in 1980. The discrepancy between the size of the lot of record (100 by 177 feet) and the actual site would have been obvious given that the apparent lot bounded by the fence and driveway was 30% smaller than it was supposed to be. It is not surprising that equity did not favor a defendant who was apparently unaware of what land it actually owned for twenty years.

Raymond Greycloud

Clark v. Ranchero Acres Water Co., 198 Or App 73, 108 P3d 31 (2005).

■ REAL ESTATE BROKER PERSONALLY LIABLE FOR EMPLOYEE'S FHA VIOLATION

In *Holley v. Crank*, 400 F.3d 667 (9th Cir. 2005), the court held a licensed real estate broker personally liable for the actions of his employees and identified relevant factors to be considered for piercing the broker's corporate veil.

Broker Meyer was president and owner of Triad Inc., which held a corporate real estate broker's license. Meyer was licensed as its designated officer/broker. Agent Crank and all other Triad agents were salespersons, not brokers. The plaintiffs were an interracial married couple who made separate inquiries to Triad and the home owner about purchasing a home listed by Triad. A Triad agent and the owner expressed to the plaintiffs that their offer was fair, and directed them to make their offer through Triad. Another Triad agent, Crank, felt that the plaintiffs' offer was insufficient and never presented it to the owner. The owner later asked Crank about the plaintiffs' offer, and Crank allegedly responded with explicit racial slurs and said that he would not deal with the plaintiffs. The owner later sold his house for $20,000 less than the plaintiffs' offer.

The court considered two potential bases for personal liability of the broker for Fair Housing Act (FHA) violations: (1) whether a designated officer/broker of a corporation may be held personally liable for the actions of the corporation's employees that violate the FHA, and (2) whether a designated officer/broker may be held personally liable for corporate violations of the FHA through piercing of the corporate veil.

The district court dismissed Meyer in his capacity as an officer of Triad, and then granted summary judgment in favor of Meyer. The Ninth Circuit reversed through a vicarious liability analysis accompanied by a holding that the duty to obey the laws relating to racial discrimination under the FHA is not delegable. *Holley v. Meyer*, 258 F.3d 1127 (9th Cir. 2001). The U.S. Supreme Court vacated and remanded, holding that the FHA is governed by traditional vicarious liability rules and tort principles whereby an employee acts on behalf of the corporation, not its shareholder(s) or officer(s), and therefore the duties of the FHA are delegable. *Meyer v. Holley*, 537 U.S. 280 (2003). However, the Supreme Court left to the Ninth Circuit the application of the traditional rules—specifically, whether other aspects of California law would establish the necessary nexus to warrant liability. The Supreme Court declined to review the veil-piercing theory, but held that the Ninth Circuit was free to consider whether liability may be imputed.

On remand, the Ninth Circuit did not apply the traditional vicarious liability rules, but rather a California statute that renders the designated real estate broker of a real estate corporation personally responsible for the supervision of the corporation's salespersons. The court reasoned that because Meyer was Triad's designated real estate broker, he was personally responsible for the supervision of the corporation's salespersons. When Meyer delegated responsibility to Crank, he created an agency relationship between himself and Crank, which made Meyer vicariously liable as the principal for the discriminatory actions of Crank as his agent. The officer/broker's direct personal duty to supervise his agents is independent from the normal responsibilities of a corporate officer or the corporation itself because it will better assure compliance of real estate brokers with state and federal laws.

In reviewing the piercing the corporate veil theory of liability, the Ninth Circuit held that the district court had erred in dismissing Meyer as an individual because the allegations and evidence indicated that (1) Meyer was the sole shareholder of Triad, (2) Meyer was Triad's president and designated officer/broker, (3) Meyer failed to treat the corporation as a distinct entity on his tax return, (4) the corporation was very thinly capitalized, and (5) Meyer did not follow corporate formalities. The court concluded that Meyer may not have viewed his corporation as an entity distinct from himself.

The court remanded to the district court for further proceedings on (1) Meyer's liability as a principal for the actions of his agent, and (2) whether Meyer was in fact the sole owner at the time of the alleged events, which would help determine (3) Meyer's liability based upon a piercing of the corporate veil.

Mary W. Johnson

Holley v. Crank, 400 F.3d 667 (9th Cir. 2005).

Justin Martin, law clerk, assisted in preparing this article.

■ OREGON COURT OF APPEALS REFUSES TO ALLOW HOMEOWNERS ASSOCIATION TO RECOVER ATTORNEY FEES FOR DEFENDING A DERIVATIVE CLAIM

Since 2002, all new non-condominium homeowners associations (HOAs) must be organized as nonprofit corporations at the time of their creation. ORS 94.625(1)(a) (2003). Additionally, most older HOAs have also incorporated as nonprofit corporations because nonprofit corporation status provides board members with limited liability and allows the association to continue indefinitely under the same name even though board members routinely change. However, incorporation can create interesting procedural issues when HOA members bring derivative claims on behalf of the association. In some instances, the HOA feels compelled to support the defendant in a derivative action to further the HOA's own best interest. As a result, the HOA may provide financial support to the defendant in claims brought on behalf of the HOA.

One Oregon HOA recently learned that funding a defendant in a derivative action does not necessarily lead to recovery of attorney fees if the defendant prevails. In *Morgan v. Goodsell*, 198 Or App 385, 108 P3d 612 (2005), the Oregon Court of Appeals held that under ORS 94.719 and 94.780, parties are entitled to attorney fees only if legal expenses are incurred in an action to enforce compliance with (1) ORS Chapter 94 or (2) the homeowners association's declaration or bylaws.

Morgan, the plaintiff, owned a lot in Eagle-Air Estates and was a member of the Eagle-Air Estates Homeowners Association (Association). The Goodsells, the defendants, developed Eagle-Air Estates, which is adjacent to the airport in Sisters, Oregon. A key feature in this development is an airstrip that allows homeowners to taxi aircraft directly from their homes to the adjoining airport. Morgan purchased a lot with the understanding that the Goodsells would convey the adjoining airstrip to the Association. Subsequently, Morgan learned that the Goodsells retained a reversionary interest in the airstrip.

Morgan filed suit against both the Goodsells and the Association. Two of the claims brought against the Goodsells were derivative actions on behalf of the Association. The claims against the Goodsells included breach of fiduciary duty and breach of contractual obligations. In addition, Morgan brought two claims against the Association for failure to comply with ORS Chapter 94 and the Association's bylaws. The trial court entered judgment for the Goodsells and the Association on all claims. Additionally, the trial court awarded the Association attorney fees in the amount of $41,105.50 for the expenses incurred in defending claims against *both* the Association and the Goodsells.

First citing to *Bennett v. Baugh*, 164 Or App 243, 246, 990 P2d 917, 920 (1999), *rev den*, 330 Or 252 (2000), the court of appeals noted that attorney fees are proper when (a) the party is *entitled* to attorney fees and (b) the requested fees are *reasonable*. In *Morgan*, the court of appeals never assessed the reasonableness of the attorney fee award, instead resolving the matter under the entitlement prong. Second, pursuant to *Domingo v. Anderson*, 325 Or 385, 388, 938 P2d 206, 207 (1997), a prevailing party is only entitled to attorney fees if such fees are provided by either a contractual agreement between the parties or by statute. In *Morgan*, the court of appeals relied on ORS 94.719 and 94.780, because the parties did not have a contractual provision that entitled the prevailing party to recover attorney fees.

The court found that the Association was not entitled to attorney fees for the expenses it incurred in defending the Goodsells, because ORS 94.719 and 94.780 do not authorize attorney fees for claims of common law breach of fiduciary duty and breach of contract. The court explained that any derivative interest the Association felt obligated to protect in the derivative action was irrelevant here because ORS Chapter 94 does not provide an award of attorney fees "in any action that *might implicate* the interests of a homeowners association or property owner in a planned community." 198 Or App at 389, 108 P.3d at 614 (2005). Rather, an award of fees under ORS Chapter 94 is limited to actions that are brought to enforce either the provisions of ORS Chapter 94 or the bylaws or other rules and regulations adopted by the association to govern the planned community. The claims against the Goodsells, derivative or not, did not fall into either of those categories.

In contrast, the court permitted the Association to recover attorney fees attributable to its own defense because the claims against the Association sought compliance with ORS Chapter 94. The court of appeals remanded the case for apportionment of the entitled attorney fees.

Although the court refused to decide whether the HOA was entitled to attorney fees for defending a derivative action based on the theory that the HOA's interest was implicated by the claims, the court's ruling does not foreclose the possibility of HOAs recovering attorney fees for defending derivative actions in other cases. The court's ruling applies only in the narrow context of claims not based on the failure to comply with ORS Chapter 94 or the HOA declaration or bylaws.

The court's holding in *Morgan* will most significantly impact attorneys who draft HOA declarations and bylaws. HOAs can avoid a result similar to *Morgan* by including an express provision in the declaration or bylaws that contractually entitles the HOA to attorney fees in the event it pays legal expenses in a derivative action. Moreover, the *Morgan* holding emphasizes the plaintiff's responsibility to properly plead claims that authorize an award of attorney fees. Pursuant to *Morgan*, HOAs should base claims against a developer on either a failure to comply with ORS Chapter 94 or failure to comply with the HOA's declaration or bylaws.

If the plaintiff in *Morgan* had alleged that the developer retained a reversionary interest in the airstrip in violation of ORS 94.616(3)(b), it is more likely that the HOA could have recovered attorney fees for expenses related to the Goodsells' defense. In all new planned communities established under the Oregon Planned Community Act, ORS 94.550–.783, the developer has a duty to convey to the HOA a deed to all common property at the turnover meeting, unless the HOA declaration indicates otherwise. *See* ORS 94.580(2)(s), 94.616(3)(b).

A. Richard Vial

Morgan v. Goodsell, 198 Or App 385, 108 P3d 612 (2005).

The author received assistance from Christopher M. Tingey, associate, and Haley B. Bjerk, law clerk, of Vial Fotheringham LLP.

■ *BUT MY MOM PROMISED*

In *Mukai Living Trust v. Lopez*, 199 Or App 341, 111 P3d 1150 (2005), the plaintiff trust held fee title to a single-family residence in Lake Oswego in which the defendant resided. The sole trustees and beneficiaries of the trust were the defendant's mother and stepfather. After the defendant's mother died, the trust brought an action to eject the defendant and to collect back rent.

The defendant contended that he was the beneficiary of an oral conveyance of a life estate with a right of survivorship in the home. He testified that, at the request of his mother and stepfather, he had, *inter alia*, located the house, contributed to the down payment, and performed maintenance. He had lived in the house rent free for ten years.

The court of appeals affirmed the trial court's decision, holding that the defendant could not avoid the application of the writing requirement in the statute of frauds embodied in ORS 93.020(1). The statute requires that an interest in real property other than a lease for one year or less must be documented by a writing. Here, the fee title to the house was in the name of the trust, and no writing evidenced the purported life estate or the right of survivorship.

The defendant argued that the statute did not apply because of the doctrine of part performance. The court agreed that the doctrine of part performance is an exception to the statute, but held that to prove part performance, the defendant would have to prove that the terms of the alleged agreement were "'so precise that neither party could reasonably misunderstand them.'" 199 Or App at 347 (quoting *Pion. Cem. Ass'n v. Spencer Butte Lodge*, 228 Or 13, 43, 363 P2d 1083 (1961)). The evidence before the trial court allowed for multiple interpretations, so the defendant failed to meet his burden. The court further held that the doctrine of part performance subsumed the doctrine of equitable estoppel and that neither doctrine had been met.

Tod Northman

Mukai Living Trust v. Lopez, 199 Or App 341, 111 P3d 1150 (2005).

■ *NINTH CIRCUIT REJECTS NORTHERN MARIANA ISLANDS' EFFORTS TO TAKE TITLE TO SUBMERGED LANDS*

In *Northern Mariana Islands v. United States*, 399 F.3d 1057 (9th Cir. 2005), the Ninth Circuit affirmed a lower court ruling quieting title to the waters adjacent to the Commonwealth of the Northern Mariana Islands (CNMI) in favor of the United States. The court relied on the federal paramountcy doctrine as the basis for its opinion.

The CNMI is a commonwealth government composed of sixteen islands in the West Pacific. Through a covenant agreement with the United States, the CNMI is under the sovereignty of the United States but retains the right of local self-government. The CNMI filed suit under the Quiet Title Act, 28 U.S.C. § 2409(a), requesting a declaration that the CNMI holds title to the submerged lands underlying the internal, archipelagic, and territorial waters adjacent to the Northern Mariana Islands. The United States counterclaimed, seeking to quiet title to the same lands in its favor and also seeking a declaration that two laws passed by the CNMI legislature asserting ownership over the submerged lands were unenforceable. After both sides filed motions for summary judgment, the trial court entered summary judgment in favor of the United States.

Following World War II, the United Nations established the Trust Territory of the Pacific Islands over Micronesian Islands in the Pacific. The United States "was not a sovereign over but a trustee for the [Trust Territory]" *Wabol v. Villacrusis*, 958 F.2d 1450, 1458 (9th Cir. 1992). The purpose was to "steward Micronesia to self-government." *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 649 (9th Cir. 1989). In 1976, a covenant between the United States and the CNMI was enacted into law. The covenant details the political relationship between the United States and the CNMI. Section 801 of the covenant provides, in part, that "[a]ll right, title, and interest of the Government of the Trust Territory of the Pacific Islands in . . . real property in the Northern Mariana Islands . . . will . . . be transferred to the Government of the Northern Mariana Islands." The CNMI relied on this provision in bringing the claim.

The paramountcy doctrine holds that the United States, as a "function of national external sovereignty" acquires "paramount rights" over seaward submerged lands. *United States v. California*, 332 U.S. 19, 34 (1947). The underlying basis for the theory is that the federal government has an overriding interest in maintaining authority over submerged lands because "[n]ational interests, national responsibilities, [and] national concerns are involved." *United States v. Louisiana*, 339 U.S. 699, 704 (1950). The doctrine is not limited to disputes between national and state governments. It affects any claim of sovereign right or title over the ocean by any party other than the United States.

The court began its analysis by noting that the United States acquired paramount rights to the disputed submerged lands off of the CNMI shores as a function of sovereignty. In the covenant, the CNMI agreed to the United States' sovereignty and received protection and security in return.

The CNMI argued that the paramountcy doctrine is inapplicable to the CNMI, because the covenant limits the application of federal law to the CNMI. The court disagreed, holding that the doctrine draws its authority from the obligations placed on the sovereign governing entity to conduct international affairs and control matters of national concern. The court held that the covenant "unquestionably places these powers and obligations in the United States." 399 F.3d at 1063. Because the covenant places sovereignty and foreign affairs obligations in the United States, the paramountcy doctrine applies.

The CNMI next argued that section 801 of the covenant transferred the submerged lands to the CNMI and that the transfer fits within a recognized exception to the paramountcy doctrine. Although Congress may transfer ownership of submerged lands to the states or other entities, the court found that the covenant did not result in such a transfer.

In rejecting the CNMI's transfer argument, the court found that there is a strong presumption of national authority over seaward submerged lands. "Absent express indication to the contrary, the ownership of seaward submerged lands accompanies United States sovereignty. The Covenant lacks such an expression." *Id.* at 1064. The court held that the CNMI could not show a clear intention on the part of the United States to cede its authority over submerged lands.

The CNMI also argued that two orders issued by the Secretary of Interior supported its position. The first order,

Secretarial Order #2969, empowered local district legislatures within the Trust Territory to create legal entities to hold title to public lands within the district. However, the order limited the transferability of "submerged lands." Thus, it did not support the CNMI's position. The second order, Secretarial Order #2989, in part transferred title to public lands from the Trust Territory to another administrator, the United States Resident Commissioner. The court found, however, that there was no indication in that order "that the United States contemplated a permanent divestment of the paramount rights that the United States would obtain upon assuming sovereignty." 399 F.3d at 1065.

In reaching its decision, the court placed great emphasis on the presumption of national authority over seaward submerged lands. In any future case involving the paramountcy doctrine, a successful litigant will have to establish that Congress intended to cede its paramount authority over such lands. In the absence of an express intention, submerged seaward lands will remain under the jurisdiction of the United States.

Gary K. Kahn

Northern Mariana Islands v. United States, 399 F.3d 1057 (9th Cir. 2005).

Appellate Cases—Land Use

■ *NINTH CIRCUIT UPHOLDS ORDINANCE REGULATING SECONDARY EFFECTS OF ADULT BUSINESSES*

In *Gammoh v. City of La Habra*, 395 F.3d 1114, *amended by* 402 F.3d 875 (9th Cir. 2005), the Ninth Circuit Court of Appeals considered whether the City of La Habra's municipal ordinance regulating adult businesses violated, among other things, the freedom of speech and expression guarantees of the First Amendment.

Prior to the enactment of the ordinance, the city conducted an extensive review of materials related to adult businesses, including studies on secondary effects, declarations from police officers, reports on sexually transmitted diseases, and judicial opinions concerning the regulation of adult businesses. As a result of its review, the city determined that the ordinance was necessary to combat the secondary effects of adult businesses. The first section of the ordinance reported the city's findings that adult businesses generate crime, economic harm and the spread of sexually transmitted diseases. Other sections of the ordinance regulate such secondary effects, including a prohibition on contact between patrons and performers.

The appellants, the owner of an adult establishment in the city and several dancers, challenged section 7 of the ordinance, which requires "adult cabaret dancers" to remain at least two feet from patrons during off-stage performances (the "two-foot rule"). The appellants' establishment features on-stage nude dancing and off-stage minimally clothed dancing with patrons. The appellants argued that close proximity to patrons is a key element of the dancers' expressive activity and that the two-foot rule is a complete ban on proximate dancing as a form of expression.

In considering the appellants' First Amendment claim, the court first determined whether the ordinance was a complete ban on protected expression. Because the ordinance merely prescribed the allowed proximity of the off-stage dancers to the patrons, the dancers were not completely banned from such expression. The court noted that, "'[w]hile the dancer's erotic message may be slightly less effective from [two] feet, the ability to engage in the protected expression is not significantly impaired.'" 395 F.3d at 1123 (quoting *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1057 (9th Cir. 1986) (second alteration in original)).

The court then sought to determine the appropriate level of scrutiny for reviewing the ordinance. Citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the court recognized that contrary to the traditional distinction between content-based and content-neutral regulations to determine the level of scrutiny, virtually all regulation of adult businesses is now considered content-based. Content-based regulations are usually subject to strict scrutiny. Content-based regulations, however, may be subject to intermediate scrutiny if two conditions are met: (1) the ordinance regulates speech that is sexual or pornographic in nature, and (2) the primary motivation behind the regulation is to prevent secondary effects. *Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1164–65 (9th Cir. 2003) (citing *Alameda Books*, 535 U.S. at 434, 448)).

Rejecting the appellants' argument that the off-stage dancing was not sexual because the dancers were "clothed," the court found that the minimal clothing and context in which such off-stage dancing occurred fell within the limits of sexual speech, satisfying the first condition. Given the ordinance's substantial pre-enactment record and its statement of purpose and findings, the court found that the city had adequately demonstrated a desire to combat secondary effects. Having met both conditions, the ordinance was subject to intermediate scrutiny.

A regulation will survive intermediate scrutiny if it (1) is designed to serve a substantial government interest, (2) is narrowly tailored to serve that interest, and (3) does not unreasonably limit alternative avenues of communication. *Ctr. for Fair Pub. Policy*, 336 F.3d at 1166; *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986). The appellants conceded that combating the secondary effects of adult businesses is a substantial government interest, but argued that the city's evidence was flawed and irrelevant. The court rejected the appellants' argument, stating that as long as the city's evidence "'is reasonably believed to be relevant to the problem that the city addresses[,]' it is sufficient to support the Ordinance." 395 F.3d at 1126 (quoting *Renton,* 475 U.S. at 51–52) (alteration in original). The court then found that the two-foot rule was narrowly tailored to prevent such sec-

ondary effects such as the exchange of drugs or money. Finally, the court found that the ordinance allows the dancers to perform so long as they are two feet away from the patrons, leaving open ample alternative avenues of communication. Based on the foregoing, the ordinance survived intermediate scrutiny. The judgment of the district court was affirmed.

Lisa M. Gramp

Gammoh v. City of La Habra, 395 F.3d 1114, *amended by* 402 F.3d 875 (9th Cir. 2005).

■ *UNITED STATES SUPREME COURT UPHOLDS RLUIPA ON FACIAL CHALLENGE IN PRISON SETTING*

Cutter v. Wilkinson, 544 U.S. ___, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005), involved the constitutionality and validity of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, in an Ohio correctional facility setting. The plaintiffs were practitioners of "non-mainstream religions" (Satanist, Wicca, Asatru, and a Christian Identity sect) who claimed the state had denied them access to religious literature, group worship, and a chaplain. The parties stipulated that the plaintiffs are sincere in their religious beliefs. The defendant prison officials mounted a facial challenge to RLUIPA, contending that it violates the Establishment Clause. The Sixth Circuit found that RLUIPA was facially unconstitutional.

Speaking through Justice Ginsburg, the U.S. Supreme Court noted that there was room for governments to maneuver without violating either the Free Exercise Clause or the Establishment Clause and found that, on its face, RLUIPA violated neither clause. The court recounted the history of the Religious Freedom Restoration Act (RFRA) and its demise in a land use setting in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and also recounted the subsequent passage of RLUIPA.

According to a joint statement by the major proponents of RLUIPA, Senators Kennedy and Hatch, the Act was drawn to take down "frivolous or arbitrary" barriers to religious exercise. 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000). The United State Magistrate in this case found no conflict with security functions at prisons on the record before the court and upheld the Act. However, the Sixth Circuit reversed, finding that the creation of a favored class of prisoners of religious faith over other prisoners violated the Establishment Clause.

The Supreme Count found accommodation of religion not to be endorsement of religion and stated,

> Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. . . . Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens of a requested accommodation may impose on nonbeneficiaries. And they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths.

125 S. Ct. at 2121 (citations omitted).

The court went on to say that free exercise includes not only belief but also the performance of physical acts including religious assembly and worship, even in a tightly run government institution, but that there must be accommodation between security and discipline on the one hand and religion on the other. The court added that it had no cause to believe that RLUIPA would not be applied in an appropriately balanced way and noted that the Act, as written, does not favor any particular religion. Specifically, the court said that religion was not favored or benefited as opposed to other belief systems. In this case, the Sixth Circuit could not have found the statute facially unconstitutional because it was possible to accommodate security along with religious exercise, observing that the federal prison system had done so for some years.

For those seeking a declaration as to the constitutionality and validity of RLUIPA at the state and local land use level, there was disappointment, but not surprise. The court steered away from an overly broad pronouncement and left the question of the validity and constitutionality of RLUIPA in the land use area for another day.

Edward J. Sullivan

Cutter v. Wilkinson, 544 U.S. ___, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

■ *DID THE NINTH HIT A CIRCUIT CLOUT FOR WIRELESS PROVIDERS?*

With *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005), the Ninth Circuit seems to have weighed in on the side of wireless providers in the ongoing battle to balance federal regulatory power and local zoning authority under the federal Telecommunications Act of 1996 (TCA). The basic arguments are familiar. MetroPCS asserted that, in denying its application to install a wireless antenna, San Francisco "effect[ively] prohibit[ed] the provision of personal wireless services," contrary to section 332 of the TCA. The city countered that the proposed antenna was not necessary to MetroPCS's ability to provide service to the area and that it already enjoyed excellent wireless coverage.

The federal courts recognize that a two-prong test guides this issue. Does the regulation or permit denial create a "significant gap" and is the proposed facility the "least intrusive means" to fill that gap? However, the circuits have split on what constitutes a significant gap and the least intrusive means.

On the former issue, the Fourth Circuit has concluded that "only 'blanket prohibitions' and 'general bans or policies' affecting *all* wireless providers count as effective prohi-

bition of wireless services under the TCA." 400 F.3d at 730 (quoting *AT & T Wireless PCS, Inc. v. City Council of City of Virginia*, 155 F.3d 428 (4th Cir. 1998)). In *Omnipoint Communications, Inc. v. Zoning Hearing Board*, 331 F.3d 386 (2003), the Third Circuit held "that a 'significant gap' exists only if *no provider* is able to serve the 'gap' area in question." 400 F.3d at 731 (quoting *Omnipoint*, 331 F.3d at 398).

The Ninth Circuit chose instead to follow *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 628 (2002), in which the First Circuit articulated a "multiple provider rule." Under this rule, an agency effectively prohibits wireless service "whenever a provider is prevented from filling a significant gap in *its own* service coverage." 400 F.3d at 733.

The circuits have also split on what constitutes the "least intrusive means" to fill an identified gap. The First and Seventh Circuits require that a provider demonstrate that the proposed site is the only viable option. The Ninth Circuit, however, deemed this standard too exacting and a waste of time and municipal resources.

The court instead relied on the standard set forth by the Second and Third Circuits: that "the manner in which [the provider] proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *APT Pittsburgh Ltd. P'ship v. Penn Township, Butler County*, 196 F.3d 469, 480 (3d Cir. 1999). This standard allows for a meaningful comparison of alternative sites by the agency before the application is rejected and the process is needlessly repeated.

Ty K. Wyman

MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715 (9th Cir. 2005).

Editor's Note: This case is noteworthy because it involves questions of law under the TCA that the Ninth Circuit had not authoritatively addressed. Among the issues analyzed in the court's decision are (1) the TCA's requirement that a local government decision to deny a wireless facility "shall be in writing," (2) the requirement that such decisions must be supported by "substantial evidence," and (3) the TCA's anti-discrimination provisions. Practitioners who represent wireless providers, local governments, and opponents of wireless facilities should pay special attention to this decision.

■ CONDITIONS OF APPROVAL MUST NOT INCORPORATE BY REFERENCE VAGUE EXPERT RECOMMENDATIONS

The primary issue in *Sisters Forest Planning Committee v. Deschutes County*, 198 Or App 311, 108 P3d 1175 (2005) is the level of specificity and clarity required for conditions of approval in land use decisions. The applicant applied for a conditional use permit to build a dwelling on a 320-acre tract of forest land three miles northwest of Bend. An administrative decision granted approval with conditions. On appeal, the hearings officer also approved the application subject to the same conditions. The hearings officer also added a new condition that the "applicant/owner shall implement all of the recommendations contained in" a letter concerning fire prevention and suppression from the applicant's expert. The new condition further provided that in the event of a conflict between the administrative approval conditions and the expert's recommendations, the recommendations would control.

Before LUBA, petitioner Sisters Forest Planning Committee, a conservation group, argued that the recommendations were too vague, imprecise, and hortatory to function as legally sufficient conditions of approval. LUBA opined that it would have been better had the hearings officer adopted specific recommendations from the expert's letter, rather than simply reference the entire letter, but nonetheless found the recommendations in the letter sufficient conditions of approval. On judicial review, the petitioner further argued that the same level of "specificity and clarity" required by *Sunnyside Neighborhood v. Board of Commissioners of Clackamas County*, 280 Or 3, 21, 569 P2d 1063 (1977), for findings should also be required for conditions of approval.

The court of appeals reversed LUBA's decision on this issue, but declined to adopt the petitioner's argument as a matter of law. It noted that while "clear and objective" conditions of approval are rarely required by statute, specificity and clarity are always desirable. The court agreed with the petitioner that the expert's recommendations were indeed too imprecise and hypothetical to serve as conditions of approval. For example, the letter did not "state the exact areas or features to which certain recommended measures are applicable," nor did it "explain which recommendations are intended to address county-imposed requirements." 198 Or App at 317. The court also found troublesome the hearings officer's "in case of conflict" directive. In certain aspects, the expert's recommendations appeared to be more lenient than and violate the county code requirements. The court was additionally concerned that several of the expert's recommendations appeared to give the applicant discretion in implementing them.

The second substantive issue in *Sisters Forest Planning Committee* was whether a county ordinance required the county to analyze alternative dwelling sites when granting a conditional use permit for a forest dwelling. Deschutes County Code § 18.36.060 provides that certain factors must be used to "identify" a dwelling site that has "the least impact" on nearby forest lands and "minimizes" the amount of forest land used for the building site. LUBA found that these requirements "necessarily entail[] a demonstration and some discussion of why the preferred location is, on balance, equal to or superior to other potential locations on the property in those respects." The court of appeals agreed, affirming LUBA's remand to the county for further consideration of the county code requirements.

Because the court of appeals remanded for clarification of the conditions, it did not address the petitioner's argument that LUBA had erred in concluding it did not need to make

feasibility findings regarding the conditions. The court also rejected without discussion the petitioner's challenge to LUBA's assessment of the adequacy of the county's analysis of increased fire suppression costs.

Isa A. Taylor

Sisters Forest Planning Committee v. Deschutes County, 198 Or App 311, 108 P3d 1175 (2005).

■ COURT AGAIN DEFERS TO LOCAL GOVERNMENT'S INTERPRETATION OF ITS OWN ORDINANCE

In *Staus v. City of Corvallis*, 199 Or App 217, 111 P3d 759 (2005), the Oregon Court of Appeals upheld a LUBA decision that found the City of Corvallis's interpretation of its land use ordinances reasonable. The appeal involved an existing business park known as the Corvallis Station Site. Home Depot had requested, among other things, a zone change to allow it to build a new store on the site. The City of Corvallis, in reversing its planning commission, approved the zone change.

The petitioners appealed, arguing that the comprehensive plan map conflicted with and "trumped" or took precedence over the comprehensive plan text. The city, in interpreting its own ordinance, disagreed.

LUBA agreed that there was an inconsistency between the map and the text. LUBA therefore deferred to the city's interpretation of its comprehensive plan under the standards set forth in ORS 197.829(1). LUBA, citing *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), followed the well-accepted rule that a local government's interpretation of its own ordinance will be affirmed, unless it is inconsistent with the express language, purpose, or underlying policy of the legislation or is contrary to a statute, land use goal, or rule that the local legislation implements.

The court of appeals agreed with LUBA that the city's interpretation of its rules was reasonable and therefore affirmed.

Jack D. Hoffman

Staus v. City of Corvallis, 199 Or App 217, 111 P3d 759 (2005).

■ THE THIRD TIME WAS NOT A CHARM: FAILURE TO PROVIDE A HEARING DURING PERIODIC REVIEW REMAND PROCEEDINGS REQUIRES REVERSAL

Manning v. Land Conservation & Dev. Comm'n, 198 Or App 488, 109 P3d 376 (2005), is the third case involving Marion County's proceedings designating petitioner's property exclusive farm use (EFU) after the City of St. Paul removed the petitioner's property from its urban growth boundary (UGB).

In the first case, *Manning v. Marion County*, 42 Or LUBA 56 (2002), LUBA remanded the county's adoption of Ordinance 1152, which applied a "Primary Agriculture" (EFU) designation because the county had failed to consider any other possible designation in spite of evidence that the property was bordered by land within the city limits and an argument that it should be zoned for rural residential use.

In the second case, *Manning v. Marion County*, 45 Or LUBA 1 (2003), DLCD remanded the county's adoption of the same ordinance submitted as part of periodic review, instructing the county to make findings required by LUBA.

LUBA and DLCD remands effectively reopened the matter of the appropriate zoning of petitioners' property based on the record already developed. The county responded to the remands by adopting Ordinance 1160, based on findings justifying the Primary Agriculture designation and EFU zoning for the property. The county declined to hold a new hearing and did not provide the petitioners with notice of an opportunity to comment on the revisions before it. Instead, the county relied on the record developed in support of Ordinance 1152.

During LCDC's review of Ordinance 1160, the petitioners again asserted that the property should not be Primary Agriculture, arguing that the county had committed substantive and procedural errors in making the designations. The petitioners argued that whether the land is currently farmed is relevant. LCDC rejected that argument and concluded that the EFU zoning was consistent with the goals because under Goal 3, the Class II and III soils on the property automatically made the land agricultural land and the property also included "other lands" suitable for farm use. The petitioners argued that the county had failed to follow appropriate procedure and had violated their due process rights by refusing requests for additional evidentiary hearings to rebut evidence presented during adoption of Ordinance 1152 that there was farming activity on the property. LCDC concluded that the objection was procedural and outside LCDC's review authority. The petitioners appealed LCDC's decision.

The court of appeals found no legal authority for LCDC's claim that the county's prior hearing leading to adoption of Ordinance 1152 should be considered part of periodic review leading to adoption of Ordinance 1160. The court said that by refusing the petitioners' requests for additional evidentiary hearings leading to adoption of Ordinance 1160, the county had violated OAR 660-025-0080(2)(b), which requires local government to provide an opportunity for comment at one or more hearings conducted on work tasks under periodic review. The county was not permitted to treat the hearing conducted for a separate purpose as fulfilling that requirement. The court held that given the county's failure to give the issues that the petitioners raised consideration, as required by OAR 660-025-0080(2)(b), LCDC's approval of the county's decision was based on an incomplete record and as such constituted legal error that required reversal.

Next, the court held that the county's Primary Agriculture designation required LCDC to remand to the county because (1) it was based solely on soil types, whereas

soil type is only one of four criteria for determining property is Primary Agriculture under the county's ordinance; and (2) the petitioners had been prejudiced by the county's failure to consider evidence that existed at the time of the decision and its failure to provide a hearing at which the petitioners could argue that the existing record did not support the Primary Agriculture designation.

Finally, the court held that before rejecting the petitioners' request for an exception to Goal 3, the county must provide an opportunity for the requesting party to make a complete record and to argue in support of the exception, and the county must consider that record and argument in making its decision. Because the county had failed to conduct a hearing before adopting Ordinance 1160, the record and argument were not complete and the lack of a hearing was error and was not harmless.

This case illustrates that adherence to statutory due process protections is still a vital part of the Oregon land use system.

John Pinkstaff

Manning v. Land Conservation & Dev. Comm'n, 198 Or App 488, 109 P3d 376 (2005).

Article—Land Use

COMPREHENSIVE PLANS, INFRASTRUCTURE FINANCING, AND ECONOMIC FAIRNESS

In *The Role of the Comprehensive Plan in Infrastructure Financing*, published in the Winter 2005 issue of *The Urban Lawyer*, Edward J. Sullivan and Isa Lester explore the role of comprehensive plans in infrastructure financing, with an emphasis on the ability for local governments to avoid costly takings litigation by self-imposing an "economic fairness" mandate into their comprehensive plans. The article begins with a historical review of the evolution of infrastructure financing before turning to an examination of the courts' treatment of developer challenges to the imposition of such financing, with particular attention paid to exactions. The authors propose that local governments may simultaneously avoid constitutional challenges to their exactions and encourage rational development by integrating an economic fairness mandate into their comprehensive plans.

After a brief review of traditional infrastructure financing methods, including general property taxes, special assessments, and land exactions, the authors describe how the 1970s brought a marked reduction in federal infrastructure spending, increased costs for capital improvements, and a widespread "fiscal revolt" against increased general taxes. These elements combined with a more critical attitude toward community growth, so that local governments began requiring a substantial increase in private sources of infrastructure financing. Such financing often took the form of an increase in development exactions and user impact fees. As a result, developers and permit holders turned to the Fifth Amendment's Takings Clause to seek judicial relief from this rising tide of increased exactions.

The authors begin their discussion of legal challenges to infrastructure financing techniques by distinguishing judicial standards imposed on taxes from those imposed on fees. Taxes are broadly imposed pursuant to the government's taxation power and used to pay for public facility construction and maintenance. As such, they are generally accorded a great deal of judicial latitude. Conversely, fees and other exactions are levied to specifically benefit the property on which they are imposed. They may face more intense judicial scrutiny than general taxes and will be found to require compensation under the Fifth Amendment's Takings Clause when they go "too far."

So, when do exactions go "too far?" *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), say that an administratively imposed real estate exaction requires compensation unless an "essential nexus" exists between the exacted condition and a legitimate state interest requiring the condition's imposition. Further, such a proposed exaction must be "roughly proportional" to the development's projected impact and the local government has the initial burden of making an "individualized determination" that the proposed dedication is related both in nature and extent to the proposed development's impact.

However, the authors note that much remains unclear. Do these legal standards apply to legislatively enacted exactions, as well as administrative exactions? What about their applicability to fees and other monetary exactions, as opposed to real property exactions?

By thoroughly analyzing a variety of federal and state cases, the authors illustrate the convoluted legal issues involved in answering these questions given the paucity of clearly controlling precedent. Although much of the law remains unsettled, their analysis concludes that, at least in Oregon and California, *Nollan* and *Dolan* are applicable to legislatively enacted exactions where their application involves discretion. Nevertheless, the totality of the authors' discussion provides a warning to potential takings litigants that the unsettled nature of exactions law may ultimately result in lengthy litigation and correspondingly large legal bills.

Following the lead of *Golden v. Planning Board of the Town of Ramapo*, 285 N.E.2d 291 (1972), *appeal dismissed*, 409 U.S. 1003 (1972), and subsequent scholarship regarding this decision, the authors propose that local governments may avoid these court battles while simultaneously stimulating rational development by incorporating an "economic fairness" component into their comprehensive plans. This will provide developers and permit holders with predictable infrastructure improvement costs that can be factored into their future business plans. Further, an economic fairness mandate creates a firm record documenting the local government's rationale and methodology in choosing between competing infrastructure financing methods, which should aid in the event of judicial challenge.

Although the article refrains from providing specific provisions for an economically fair comprehensive plan, it does provide a number of suggestions for future consideration. For instance, an exhaustive study of the existing infrastructure capacity and a projection of the need, type, and cost of future capacity would prove useful for government and private sectors alike. Further, these new comprehensive plans could include studies of alternative financing methods and establish ceilings for future exactions, beyond which the local government could only venture after amending their plan following a public hearing. Indeed, in the interest of achieving consensus among the government, the general public, and the development community, the authors believe that in all stages of the creation and implementation of the new comprehensive plans public participation should be maximized. Taken together, these suggestions would provide for fairer comprehensive plans that should diminish both the need and the desire for costly takings litigation.

Ben Martin

Edward J. Sullivan & Isa Lester, *The Role of the Comprehensive Plan in Infrastructure Financing*, 37 Urb. Law. 53 (2005).

Appellate Cases—Landlord/Tenant

■ LANDLORD CAN'T HAVE IT BOTH WAYS: MUST REJECT RENT AND SEEK EVICTION OR ACCEPT RENT AND WAIVE RIGHT TO EVICT

In *Lilly Court LLC v. Lee*, 198 Or App 132, 108 P3d 642 (2005), the Oregon Court of Appeals held that a mobile home park landlord waived its right to evict its tenants when it accepted rent even though the landlord retained, but did not cash, the tenants' checks.

The trial court's findings were undisputed. Throughout June and July 2002, the landlord served numerous noise rule violation notices on the tenants. When the noise problems did not abate, the landlord served an eviction notice on the tenants in July 2002. The landlord never acted on the July notice, and in January 2003 filed a second eviction notice based on the noise rule violations during the previous month and for noise stemming from a four-day-long party held by the tenants.

Despite the notice, which required the tenants to vacate the premises by March 3, 2003, the tenants continued to send rent checks to the landlord for February, March, and April rent. The landlord cashed the February rent check, but not the March and April checks. Instead, the landlord retained them.

The trial court held that the landlord had not waived its right to evict the tenants because payment by check does not constitute legal tender. Based on the trial court's reasoning, only legal tender can immediately cure rental agreement violations. Because the tenant could stop payment on the checks at anytime, the trial court found that the landlord had neither accepted payment nor waived its right to evict the tenants.

Judge Landau issued the court's decision and held that the under the rules of statutory interpretation established in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 2d 1143 (1993), the Oregon Residential Landlord Tenant Act at ORS 90.100(32) allows payment of rent by check.

The court then turned to the issue of whether retaining the tenants' rent checks constituted acceptance of rent, and held that based on the ordinary plain meaning of the term "accepted," the landlord had accepted tenants' payment of rent. Not satisfied that the ordinary meaning of the term "accepted" was conclusive proof of the legislature's statutory intent, the court then looked to ORS 90.415(2), which requires a landlord to reject a tenant's offer of rent by returning it within six days. Because the tenants' checks constituted rent and the landlord had not rejected the rent within six days, the court concluded that the landlord had accepted the tenants' rent for March and April 2003.

Although ORS 90.415 provides that a landlord waives the right to seek eviction by accepting a tenant's payment of rent for "two or more separate rental periods . . . with knowledge of the default by the tenant," the landlord argued that an exception pursuant to ORS 90.415(5) applies to this rule in the case of manufactured dwellings. According to this provision, the landlord argued that it had not waived its right to seek eviction if the tenant was in continuous breach of the rental agreement while on notice of the breach.

The court dismissed the landlord's argument for an exception to the waiver rule, because the evidence did not show that the tenants were in continuous breach of the agreement and the landlord's notice was insufficient to place the tenants on notice that further breaches of the agreement would result in eviction. The court declined to address the landlord's additional arguments and reversed the trial court's ruling.

Glenn Fullilove

Lilly Court LLC v. Lee, 198 Or App 132, 108 P3d 642 (2005).

Cases from Other Jurisdictions

■ DENIAL OF CAMPUS MINISTRY FACILITY IS NOT A RLUIPA VIOLATION, SAYS MICHIGAN FEDERAL COURT

Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004), involved cross motions for summary judgment over the proposed demolition and replacement of a worship facility in a university town's historic district. The plaintiff foundation asserted that its growth required it to have a larger facility to fulfill its religious mission, and that its present location was best for it to

serve its student population. The city's historic regulations require city permission prior to demolition, which was denied in this case (although the city's historic review commission suggested it would be open to additions to the existing structure). The plaintiff filed suit on First Amendment and RLUIPA grounds, contending it could not engage in its religious mission to worship as an entire congregation, seek growth, and engage in community outreach. The plaintiff asserted that the demolition denial constituted a substantial burden on its religious exercise. The city responded that its action had not caused the plaintiff's members to abandon their religious precepts, so there was no substantial burden, and even if its actions created a substantial burden, its zoning ordinance served a compelling governmental interest (zoning) and was narrowly tailored to achieve its intended purpose. Finally, the defendant asserted that RLUIPA was unconstitutional.

The court deferred the constitutional claims until after review of statutory issues. After first determining it had jurisdiction to hear the plaintiff's RLUIPA claim, the court turned to the substantial burden issue. The court said that many of the elements in the proposed use were secular, but the court determined that RLUIPA's definition of "religious exercise" is broad enough to encompass these activities. The court did not find a substantial burden on religion, because there was no choice required between adherence to governmental requirements and religious precepts, as would be the case in, for example, Sunday closing laws applied to Jewish merchants, acceptance of Sabbath-breaking to receive unemployment benefits, and the like. The court cited *Lakewood Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), which upheld a ban on churches in a residential district and rejected arguments that requiring a church to be sited in a more expensive commercial community was a substantial burden. The Sixth Circuit in the *Lakewood* case noted that the congregation members were not required to abandon their religious beliefs under civil or criminal penalties. Nor was the exercise of religion taxed.

The court held that the burdens in the instant case were not severe enough to constitute a substantial burden. One-half of the plaintiff's current space on its second floor was leased to commercial tenants and could be converted for use by the plaintiff. Additionally, the plaintiff could also lease or sublease other facilities so that the congregation could worship as a whole. The court noted that university facilities would likely also be available. In any case, the court held that increased rental costs do not constitute a substantial burden on religious exercise. Unlike other cases where a pressing need and a discriminatory animus against the church were shown, this was a case where the need was only to increase space to accommodate 120 members for worship where 100 were currently worshipping and there was no showing of anti-religious animus. Given that no substantial burden on religious exercise had been found, the court denied the plaintiff's motion for summary judgment and granted the city's motion.

There now is a growing consensus among many courts that RLUIPA's substantial burden requirements do not mean mere inconvenience, but rather that alternatives are unavailable or there is animus against religion.

Edward J. Sullivan

Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004).

■ *WISCONSIN APPELLATE COURT UPHOLDS SPENDING OF IMPACT FEES, BUT REQUIRES ANY EXCESS FUNDS TO BE RETURNED TO LANDOWNERS*

In *Metropolitan Builders Association of Greater Milwaukie v. Village of Germantown*, 2005 WI App 103, ___ Wis. 2d ___, 698 N.W.2d 301 (Wis. Ct. App. 2005), the defendant village collected impact fees to fund an aquatic/youth center. The village originally intended to build, *inter alia*, a swimming pool at the center, but later changed its institutional mind and decided to provide a "spray ground" (a playground with water) instead. The plaintiff association, representing homebuilders in the area, objected and sought a refund of the monies collected from the owners of the lots on whom the charge was imposed. The issue was whether the spray ground was within the scope of the fees authorized to be collected and whether the imposition of the fee was proportional to the improvement to be made.

In 1995, the village undertook a needs assessment for recreational uses and determined to expand capital improvements over a twenty-five-year period in light of its population projections. The village attributed a need of approximately $744,300 to be imposed on projected new construction and came up with a $613.32-per-home fee that it imposed by ordinance. These funds were placed in a segregated interest-bearing account dedicated to the provision of capital improvements. However, the voters turned down a village referendum asking to use the money to fund the aquatic/youth center, so the governing body substituted the spray ground instead and did not seek voter approval this time.

When the plaintiff challenged the fees, the village rejected its challenge, stating that the spray ground was within the scope of its impact fees ordinance and suggesting that the plaintiff did not have standing to challenge the imposition of the fees. The trial court agreed.

On appeal, the court said it would review the village's decision, rather than that of the trial court, and held that the plaintiff had standing to represent the interests of its members so long as any members suffered an injury in fact that was within the zone of interest protected by the relevant statute or constitutional provision. The court noted its own precedent in the standing area, its view of public policy militating for broad standing, and the efficiency of a "one for all" standing determination. Finally, the court noted that the enabling legislation specifically recognized that developers had the right to challenge impact fees, and decided the standing issue in favor of the plaintiff.

Turning to the merits, the court looked first at whether the impact fee could be used for the spray ground. The plaintiff contended that the impact fee had to be used for a swimming pool, while the defendant contended that the desired improvement was stated more broadly as an aquatic/youth center. The relevant ordinance imposed a fee for "parks, playgrounds and other recreational facilities," and therefore was not specific enough to resolve the dispute. The court turned to a pre-ordinance needs assessment, in which an "aquatic center/youth center" and a "swimming pool *or youth center*" was mentioned. The court concluded that the village was not "locked in" to provide a swimming pool, noting that it had not settled on an indoor/outdoor facility during the needs assessment process and had chosen to leave open the particular use to which the funds could be put. In addition, the costs spelled out in the needs assessment were only required under Wisconsin law to be "estimates" and the village had noted the absence of recreational facilities before the needs assessment was made so that the impact fees could be used to satisfy any portion of the recreational needs of the community. The court also found that municipalities need, and are given, flexibility under state law in recreational planning. Given that the voters had rejected taxes for the remainder of the facility, the defendant could change the proposal so as to stay within budget and use available funds or provide no recreational facilities. The revised plans were well within the description of the aquatic or youth facility objectives, either of which would have been sufficient.

Nevertheless, the court said that the fact that it was permissible to spend these funds on the facility did not mean that more funds than were necessary to construct the facility may stay with the municipality. The court noted that under the needs assessment, 41.35% of the cost of the facility was to be imposed on new developers (because the needs assessment assumed that the remaining portions would be attributable to use by existing development). The court concluded that if the spray ground costs less than the original proposal, the proportional share must be returned to the lot owners under state law and local ordinance. Given that the needs assessment had contemplated only one aquatic/youth center, the village could not keep the excess money to possibly spend on other aquatic or youth recreational opportunities during the time period specified in the impact fees ordinance.

This case is a rare excursion into the authorization and use of impact fee funds (otherwise known as system development charges). While the court was liberal in finding both standing and the revised scheme to be within the authorized scope of the statute, the court did hold the local government to the proportional use of those funds for the authorized improvement.

Edward J. Sullivan

Metro. Builders Ass'n of Greater Milwaukie v. Vill. of Germantown, 2005 WI App 103, ___ Wis. 2d ___, 698 N.W.2d 301 (Wis. Ct. App. 2005).

■ *WASHINGTON COURT OF APPEALS UPHOLDS GORGE COMISSION DECISION TO EXPAND STEVENSON URBAN AREA*

In *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 126 Wn. App. 363, 108 P.3d 134, *reconsideration granted and opinion amended by* ___ Wn. App. ___, ___ P.3d ___ (2005), Division III of the Washington Court of Appeals affirmed the trial court's decision that the Gorge Commission's findings relied upon in granting a petition to revise and expand the City of Stevenson's federally defined urban area boundary were supported by the record and substantial evidence.

The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (Scenic Act), enacted by Congress in 1986, regulates land use and development in certain designated areas in the Columbia River Gorge National Scenic Area, a 300,000-acre region encompassing lands in Hood River, Multnomah, and Wasco counties in the State of Oregon, and Klickitat, Clark, and Skamania counties in the State of Washington. The Scenic Act also established the boundaries of certain autonomous urban areas, including the Stevenson Urban Area in Skamania County. In establishing the urban area boundaries, Congress allowed counties within the Scenic Area to request revisions to the boundaries of their urban areas.

This case involved a 36-acre triangle of land in southwest Stevenson that was within the city limits, but which had been excluded from the urban area drawn by congressional staff and placed instead within the restricted general management area. The 36 acres, comprising parts of three parcels that were split by the boundary between the urban and general management areas, included a17.6-acre tract of land that had been developed after the Gorge Commission granted a variance in 1991 to expand the Skamania Lodge golf course. The remaining 16.2- and 2.2-acre tracts of land contained some residential development, and Skamania County argued that these parcels were unsuitable for agriculture or timber production. All 36 acres had been annexed by Stevenson in 1974, and were included in the city's long-range population growth planning.

The owners of the 16.2-acre tract lobbied the city, county, and Gorge Commission to revise the Stevenson Urban Area boundary to coincide with the city limits and include the 36 acres. In 1997, the Gorge Commissioners decided in a 9 to 2 vote that the discrepancy between the urban area boundary and the city limits "appear[ed] to be an unintended mistake." Thereafter, Skamania County filed a request with the Gorge Commission to revise the urban area boundary to coincide with the city limits.

The Scenic Act provides that the Gorge Commission may expand an urban area only if four criteria are met. 16 U.S.C. § 544b(f)(2)(A)–(D). Specifically, the Gorge Commission must find that (A) there is a demonstrable need to accommodate future population growth or to meet economic needs, (B) revision of the boundary would be consistent with the Management Plan and the Scenic Act's purposes to protect the scenic, cultural, recreational, and natural resources

of the Columbia River Gorge, (C) revision of the boundary would result in maximum efficiency of land uses within and on the fringe of the existing urban area, and (D) revision of the boundary would not result in the significant reduction of agricultural lands, forest lands, or open spaces.

Friends of the Columbia Gorge challenged the county's revision application, arguing it was in fact a request for an expansion of the urban area, and that it did not meet the expansion criteria under the Act. The county argued it was not asking for an expansion, but simply trying to avoid the negative consequences of a manifest mapping error, and that the application met the expansion criteria in any event. The Gorge Commission approved the revision after a public hearing. Friends appealed to superior court. The court concluded that the Gorge Commission's findings were supported by substantial evidence, the conclusions were supported by the findings, and the order was neither arbitrary nor capricious.

Friends appealed to the court of appeals, arguing that the Scenic Act does not provide a mechanism to administratively correct mapping errors, that the Gorge Commission's sole authority to revise urban boundaries is pursuant to 16 U.S.C. § 544b(f)(2) of the Scenic Act, and that Skamania County's application did not satisfy the applicable criteria. The Gorge Commission responded that irrespective of whether or not the revision resolved a mapping error, the application met all four of the criteria.

Because the Scenic Act and the bistate Columbia River Gorge Compact incorporating federal law govern the Gorge Commission, the Washington Court of Appeals applied federal law. The court of appeals also applied the procedural rules and standards of review of the Washington Administrative Procedure Act, RCW Chapter 34.05, and reviewed the Gorge Commission's decision for substantial evidence supporting the findings of fact. The court found that the Gorge Commission had correctly interpreted the plain language of the Act as permitting it to make minor revisions upon finding the facts set forth in criteria A through D of 16 U.S.C. § 544b(f)(2). The court also held that the Commission had properly determined that all four of the criteria had been met.

Criterion A. The Gorge Commission had concluded that criterion A was satisfied because the revision was necessary to accommodate the city's long-range urban growth population requirements and its economic needs, based on the following findings:

(1) "Because of the disputed triangle's proximity to the Skamania Lodge, its value is enhanced. Adding it to the urban area would permit residential use. This would boost the city's tax base";

(2) "Compatible uses will help protect the atmosphere of the lodge, one of the city's most vital economic assets. Protection of the atmosphere of the lodge is important. The area is not well suited to commercial logging. Logging is one of the few uses allowed in the general management area. A clear-cut adjacent to the lodge could impair its ambiance"; and

(3) "Much of Stevenson's future urban growth will be low density development on the fringe. The subject area lends itself to this sort of growth. If the revision is denied, this housing development will proceed outside the urban area, depriving the city of the tax revenue."

Examining the record, the court found that two of these findings were supported by substantial evidence. The benefit to the municipal tax base was asserted in the petition and was not disputed in the record. As evidence of the economic necessity of conforming the urban area to the city limits, the city administrator had testified that the lodge was the county's biggest private sector employer. Further, though the court agreed with Friends' assertion that there was no evidence that logging was not equally permissible under the municipal ordinances as under the Scenic Area rules, it found that the Gorge Commission could easily have inferred from the city administrator's testimony that the owners were likely to log the property if the revision were denied. On the other hand, the court disputed the Gorge Commission's third finding because it implied that housing development would proceed unabated under the Scenic Area rules, when in fact unregulated residential development is not permitted under these rules.

Criterion B. The Gorge Commission had concluded that criterion B was satisfied because revision of the urban area was consistent with the standards and purposes of the Scenic Act, based on the following findings:

(1) "Four of the standards relevant to this application are protection and enhancement of agricultural lands, forest lands, open spaces, and recreational resources. The subject land is not suitable for agriculture or logging. Therefore, including it in the urban area will not adversely affect scenic area forest lands";

(2) "The land has no 'significant and/or sensitive resources necessary to be considered open spaces.'"; and

(3) "The only recreational resources are the 17 acres of Skamania Lodge golf course and hiking trails, and these are not affected. The land cannot be seen from any key viewing areas, and the anticipated low to moderate density residential development would not adversely affect scenic resources. The land contains no cultural resources."

Examining the record, the court found that these findings were supported by substantial evidence as well. The city administrator testified that only nine to ten acres of the disputed property was timberland, and that logging was not commercially feasible because of fragmented ownership, existing uses, segregation from nearby forest, inadequate road access, a high water table, and wetlands. Further, the court found that the record included a letter from the federal Scenic Area Manager supporting the revision, and saying that no sensitive resources would be affected and that the revision was consistent with the purposes of the Scenic Act.

Criterion C. The Gorge Commission had concluded that criterion C was satisfied because revision of the urban area

boundary would result in maximum efficiency of land uses within and on the fringe of the existing urban area, based on the following findings:

(1) "The subject area has been within the city limits since 1974. Efficient urban growth dictates that growth and provision of urban services should first occur on lands within city limits before spreading outward into unincorporated areas"; and

(2) "The subject area is within the city's long-term infrastructure plans and is more likely to be served by urban services before unincorporated lands in the urban area. It is appropriate for the city to target incorporated lands for provision of urban services before unincorporated areas. The revision also will allow urban service expansion and more urban growth to occur inside city limits before reaching unincorporated areas."

Examining the record, the court found that these findings generally reflected the evidence, particularly the testimony of the city administrator, and supported efficient land use by incorporating what had been a fringe area.

Criterion D. The court did not address criterion D because the Friends did not challenge the Gorge Commission's finding that it was satisfied.

The court also discussed several additional considerations that supported the Gorge Commission's decision, including the fact that the city limits follow a natural boundary formed by the Bonneville Power Administration's power line, the administrative difficulties caused by parcels located within the city limits but outside the urban area boundaries, and evidence in the form of the city administrator's testimony that the county and Gorge Commission staff had consulted with wildlife and cultural resource experts and geologists who reported that the revision would not adversely affect any resources.

Thus, the court concluded that the Gorge Commission's findings and order were supported by substantial evidence and affirmed the trial court. However, the court acknowledged that Friends expressed an important concern that less than strict construction of the restrictions on expansion of urban areas would compromise the integrity of the Scenic Act, and therefore expressly limited its holding to the specific facts of the case.

On a joint motion for reconsideration, the parties requested that the court correct its statement that the applicable law was the Washington Administrative Procedure Act, because the provisions of the Columbia River Gorge Compact and the Scenic Act make the Washington and Oregon APAs jointly applicable to Gorge Commission decisions. In an opinion filed May 5, 2005, the court granted the motion for reconsideration, but amended the original opinion to state "Absent published procedural rules, therefore, we apply the Washington Administrative Procedure Act, chapter 34.05 RCW." In a footnote, the court stated the Gorge Commission had not complied with the statutory requirement to publish its rules. Thus, according to the court, the applicable standards of law for review of Gorge Commission decisions by Washington courts are found in the Washington APA.

Lisa Knight Davies

Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission, 126 Wn. App. 363, 108 P.3d 134, *reconsideration granted and opinion amended by* ___ Wn. App. ___, ___ P3d ___ (2005).

■ *NEW YORK APPELLATE COURT REQUIRES ZONING SPECIFICITY FOR MULTIPLE DWELLINGS ALLOWED BY PLAN*

Bergstol v. Town of Monroe, 790 N.Y.S.2d 460 (N.Y. App. Div. 2005), involved the Town's master (comprehensive) plan, which provided that land meeting certain criteria would be compatible with multifamily use. Subsequently, the town adopted a zoning regulation that precluded multifamily housing from the zone in which the plaintiff's property was located. The plaintiff claimed that the zone was consistent with the plan criteria and that the town could not adopt the regulation. On cross motions for summary judgment in a declaratory judgment proceeding, the town prevailed.

The appellate court noted that state law provided that, on adoption of a master plan, zoning decisions thereafter must be consistent with that plan. However, a challenge to the legislative adoption of a zoning regulation requires a challenger to bear a heavy burden, *i.e.*, if the validity of the regulation is "fairly debatable," the enacting body prevails. In this case, the plan did not provide that multifamily dwellings must be allowed in all locations within the various zones to which the plan applies. Thus, the adoption of the regulation was not inconsistent with the plan.

New York is a state that sometimes gives credence to plans. However, this case appears to analyze a statutory consistency requirement along the lines of what was actually prohibited by the plan. That is an acceptable outcome under most of the precedent analyzing regulations for consistency with plans.

Edward J. Sullivan

Bergstol v. Town of Monroe, 790 N.Y.S.2d 460 (N.Y. App. Div. 2005).

■ *HAWAI'I COURT ALLOWS "STEALTH" CELLULAR FACILITY*

T-Mobile USA, Inc. v. County of Hawai'i Planning Comm'n, 106 Haw. 343, 104 P.3d 930 (2005), involved the defendant's decision that the plaintiff's cellular facility required a special use (conditional use) permit, despite being a "stealth" facility, *i.e.*, a cellular facility housed in a false chimney and attached to a single-family residential farm dwelling with an accessory equipment facility located within a garage. The issue involved whether such use was allowed outright in a farm zone or was required to go through the special use permit process.

In *Curtis v. Board of Appeals, County of Hawai'i*, 90 Haw. 384, 978 P.2d 822 (1999), the Hawai'i Supreme Count determined that a 140-foot-high cell tower sitting on a concrete block was not a"utility line" or "communication equipment building" nor accessory to any farm use. The *Curtis* court noted that the cell tower in that case was much higher than a utility line so as to strain the limits of land use convention.

In this case, however, the plaintiff contended the stealth facility was indeed accessory to the farm use so that a special permit was not required. The tower was 23.5 feet high, which was within the height limitations for a farm dwelling including a chimney, and the garage-type building housing the equipment was allowed outright and was accessory to a farm use. The court said that the cell tower and the equipment facility were not permitted farm uses, but accepted the plaintiff's argument that these structures were contained within buildings permitted within a farm zone. The court determined that, unlike the 140-foot cell tower in *Curtis*, this tower was enclosed within a structure designed for human habitation and therefore constituted a permitted use. The court emphasized that the garage building was well within the dimensional requirements for farm structures, distinguishing it from the *Curtis* case.

The dissent asserted that the majority opinion was inconsistent with legislative history; however, the majority responded that the legislative history is not used unless there is an ambiguity in the statutes, which was not present in this case. The court reversed both the planning commission and the trial court, both of which had required a special use permit.

While this case turns on statutory construction of Hawai'i law, it supports the idea that construction of a "stealth" tower facility attached to a residential structure on a farm gives the appearance of a farm use, while also providing a necessary community service—not a bad outcome for resolution of this controversy.

Edward J. Sullivan

T-Mobile USA, Inc. v. County of Hawai'i Planning Comm'n, 106 Haw. 343, 104 P.3d 930 (2005).

■ *ELEVENTH CIRCUIT DECIDES THREE BILLBOARD CASES*

The Florida billboard market must be competitive, because the Eleventh Circuit has recently decided three interesting billboard cases. The cases deal with with mootness and free speech matters.

The first case was *Seay Outdoor Advertising, Inc. v. City of Mary Esther, Florida*, 397 F.3d 943 (11th Cir. 2005). The plaintiff filed a complaint over a then-repealed sign ordinance so as to enjoin the city from enforcing it on a permanent basis, and to compel the issuance of seven sign permits. The plaintiff also sought damages, attorneys fees, and costs. However, the plaintiff did not challenge a newly adopted ordinance. The trial court found, on cross motions for summary judgment, the previous ordinance unconstitutional, but the unconstitutional provisions were severable. The trial court upheld the city's ban on billboards under the previous ordinance. The plaintiff did not appeal the denial of its seven permits, but rather discussed the matter with the city attorney and, upon adoption of the amended sign ordinance, filed the suit challenging the original ordinance. The city contended that the case was moot, but the trial court disagreed and decided the case on the merits in favor of the city.

The appellate court saw mootness as a jurisdictional issue and rejected the trial court's use of the doctrine of "voluntary cessation," under which a defendant must show there is little chance of unconstitutional conduct being repeated for a case to be moot. Because the defendant was a municipality, the appellate court said that there is more leeway in the application of the doctrine, because a public agency was less prone to repeat unconstitutional conduct, and such cases are often dismissed as moot with the repeal of the offending regulation. The court noted that the city attorney had represented to it that the conduct would not recur. Moreover, the court determined that the plaintiff had no vested right to its permits under Florida law. The court rejected the plaintiff's claim of equitable estoppel because it had shown no reliance under the previous ordinance, which had also prohibited billboards. Nor could the court discern any bad faith on the defendant's part in the emergency adoption of the revised ordinance, because there was no delay in processing the permits to accommodate that revision. Finally, the court found the unconstitutional provision of the previous ordinance to be severable, and because there was no provision of the new ordinance challenged in this case, there was nothing for the court to decide. The court thus affirmed the trial court judgment, but for different reasons. One judge concurred in the result.

The other two cases, both entitled *National Advertising Company v. City of Miami*, also dealt with mootness. The first case, reported at 402 F.3d 1335, dealt with a summary judgment granted by the trial court in favor of the defendant city when the plaintiff filed constitutional challenges to its sign code. The code had allowed a five-year amortization period for non-complying signs. After the end of that period, the city indicated that it would enforce its regulations, and the plaintiff filed suit on constitutional grounds and moved for a preliminary injunction, which the trial court denied. The city then amended its regulations (presumably motivated by the allegations in plaintiff's complaint) to include an allowance to place a non-commercial message wherever a commercial message was allowed. On cross motions for summary judgment, the district court granted the city's motion and found, *inter alia*, that the plaintiff had no standing to raise the rights of non-commercial speakers. The plaintiff appealed.

The court reviewed the legal issues *de novo* and found mootness to be jurisdictional under the "case or controversy" provisions of the federal Constitution, observing that normally the repeal of a regulation renders a case involving that regulation moot. However, the court noted the "voluntary cessation doctrine" described above and the more deferential view given to municipalities in the application of that doctrine. Finding no evidence that the city would undertake

future unconstitutional action, the court found the case moot, noting that the city had corrected the alleged deficiency described in the original complaint over not allowing non-commercial messages where commercial messages were allowed.

The final *National Advertising* case, reported at 402 F.3d 1329, involved a billboard company that filed six permit applications for new billboards and a planning clerk who indicated that billboards were not allowed in the relevant zone. The plaintiff then went to federal court, but the city defended on ripeness grounds, noting also that neither the height nor size regulations for billboards had been met by the applications. The district court granted summary judgment to the city, finding that the plaintiff's claims were unripe because there had been no written denial of its sign permit application.

On appeal, the Eleventh Circuit noted that the ripeness doctrine prevents judicial interference with government agencies before they finalize their decision, and determined that the plaintiff had never pursued its claims through the administrative process allowed by the city's zoning ordinance to a final decision. The oral opinion of a planning clerk was not sufficient in this case. The court thus upheld the grant of summary judgment in favor of the city.

These cases deal with matters of mootness and ripeness and generally indicate that regulations relating to land use and speech cannot be challenged if they are not in existence at the time of the case or controversy and that failure to secure a final decision may be fatal to a constitutional claim.

Edward J. Sullivan

Seay Outdoor Advertising, Inc. v. City of Mary Esther, Fla., 397 F.3d 943 (11th Cir. 2005); *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1335 (11th Cir. 2005); *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329 (11th Cir. 2005).

■ *VIRGINIA COURT DENIES PRIVATE ACCESS OVER RESIDENTIAL LAND FOR MINING USE*

Capelle v. Orange County, 269 Va. 60, 607 S.E.2d 103 (2005), involved a 139-acre parcel, containing both agriculturally and residentially zoned portions. The applicant requested a special use permit for a mining operation on the agriculturally zoned portion and proposed an access way to a public highway across the residential zoning district, where mineral extraction was not permitted. The defendant board of supervisors allowed the use with conditions and the plaintiffs filed a declaratory judgment proceeding challenging the decision as arbitrary, capricious, and unreasonable.

The appellate court noted that the zoning ordinance provided that any use not specifically permitted in a zoning district was prohibited. Accessory uses were allowed in both of the zoning districts and were defined generally as "secondary uses of structures customarily incidental to, and located on the same lot occupied by, the main use or structure." A "lot" was defined as a parcel of land having fixed boundaries and recorded as an individual unit of real estate for purposes of ownership, conveyance, or taxation.

In interpreting the zoning ordinance, the court looked first to the plain and natural meaning of the terms used and noted that the zoning ordinance stated that the definitions were as stated therein "except where the context clearly indicates a different meaning." The court construed the meaning of "accessory use" to relate to those uses customarily incidental to the listed permitted uses in the zoning district. In the case of the residential zoning district, the listed uses included single-family dwellings, agriculture, places of worship, and public uses such as schools and parks. To accept the defendant's interpretation would be to allow uses in a residential district that are accessory to uses on a differently zoned part of the same lot. The court observed that the code drafters did not intend to undermine the purpose of the residential zoning district by allowing adverse impacts for more intense uses as accessory uses. Reading the definitions in context, the court decided that a private access way in a residential district could not be accessory to a use prohibited in that underlying district. Thus, the court reversed the trial court decision and gave judgment for the plaintiffs.

The use of "split zoned" parcels has often plagued the courts, but the Virginia court decision in this case, by basing its determination on the allowable uses, seems to have it right.

Edward J. Sullivan

Capelle v. Orange County, 269 Va. 60, 607 S.E.2d 103 (2005).