OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 27, No. 6 • November 2005

Also available online

Highlights

Measure 37

■ *MARION COUNTY CIRCUIT COURT INVALIDATES MEASURE 37*

MacPherson v. Department of Administrative Services, No. 05C10444 (Marion Co. Circ. Ct. Oct. 14, 2005), involved cross motions for summary judgment in a declaratory judgment proceeding under ORS Chapter 28 and ORS 250.044 regarding the validity of voter-passed Measure 37, which requires either payment for, or waiver of, certain land use regulations reducing property values.

The court allowed amendment of the complaint to show that some claims had been resolved by waiver of regulations in order to satisfy itself that some of the plaintiffs had standing. The court also found the case to be justiciable and amenable to a declaratory judgment proceeding because the parties were adverse and the court's decision would have a practical effect on the controversy. The plaintiffs generally alleged that the measure was unconstitutional, while the defendants advocated its validity. Moreover, the court cited uncontested affidavits from individual plaintiffs regarding the practical effects on personal and property interests of finding the measure valid. This evidence led the court to believe that the plaintiffs had standing and that the controversy was justiciable and amenable to resolution in this declaratory judgment proceeding.

The plaintiffs' first claim involved the alleged interference by Measure 37 on the legislative or "police" power that resides in the legislature and people. The court said the underlying land use regulations were not unconstitutional, nor were they invalidated by the measure. The court found Measure 37's restrictions on the government's regulatory power to be invalid because they relied on payment for their enforcement. By requiring payment for regulation, Measure 37 was found to "eviscerate" the regulatory power. The court added that when the regulatory power is abused, constitutional remedies are available. Appropriation of funds associated with costs for implementation of regulations is very different from payment of funds to individuals as a consequence of those same regulations. The court found that Measure 37's "pay or waive" provisions were essential to the measure and were not severable if the measure were found unconstitutional. Thus, the entire measure was invalidated.

The court then turned to the plaintiffs' claims of invalidity based on Article I, section 20 of the Oregon constitution, which states, "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

The court pointed to case law stating that this provision is violated if a "true class" receives privileges or immunities not available to other classes. A "true class" is one that has characteristics other than those created by the challenged legislation, such as those involving past or present residency, legitimacy, or military service. If the class is "true" and a suspect category (such as sex, race, sexual orientation, alienage, or religious affiliation) is also involved, the law is subject to a "particularly exacting scrutiny"; otherwise, it is subject to rational basis scrutiny.

In this case, the class under review ("pre-owners") owned the land before certain land use regulations came into effect. The measure granted a benefit to this class but not to other landowners. Review of the privileges and immunities for the class in this case does not involve the more exacting scrutiny. Nevertheless, Measure 37 was found to fail rational basis review, both because its effect was to impede the legislative or "police" power, and because the means by which compensation was calculated under the measure were not reasonably related to the measure's purpose. The measure of payment was neither the diminution of value at the time the restrictive regulation was adopted (adjusted to current value), nor the diminution at the time the owner sought to use the property notwithstanding the restrictive regulation (adjusted to current value). Instead, it was what the property would be worth today, but for the land use regulation. The court noted that property values in the state generally have increased greatly since the adoption of the first statewide land use regulations in 1973, that much land had been

placed off limits to urban development, and that population and demand for property have grown. The court concluded,

> Thus, permitting pre-owners to recover based on what their properties are worth today, instead of at the time the land use regulations were enacted and the injury to the owners was thus incurred, has no rational relation to the aim of Measure 37 of compensating property owners for the reduced fair market value of their property interest. The distinction between pre- and post-owners is not reasonably related to a legitimate state interest and, therefore, is unconstitutional.

The court also noted that owners who acquired property more recently will have a greater basis in the property and thus will receive a lesser payment under the measure, if any payment is made at all. The court found little rational basis for the distinction.

The court specifically found the notion that owners more recently acquiring property would receive a discount on their purchase price to be tenuous at best, particularly because most landowners taking advantage of Measure 37 were rural property owners who would have little prospect for residential subdivisions or other non-resource uses on their property. Moreover, the measure did not take into account buyers who purchased land because they were subject to a stable regulatory regime. For these reasons, the court found Measure 37 invalid under Article I, section 20 of the Oregon constitution "because it does not serve a legitimate State interest and, in any event, the means chosen to secure the State's interests are not rationally related to that interest." The court further found that the unconstitutional provisions of the measure could not be severed from the remaining provisions.

The court then turned to the plaintiffs' third claim: whether Measure 37 violated Article I, section 22 of the Oregon constitution, which provides, "The operation of laws shall never be suspended, except by the Authority of the Legislative Assembly."

The state argued that no laws were suspended by Measure 37, which it likened to a variance process. The plaintiffs responded that variances are granted, or not, according to fixed standards, as opposed to the Measure 37 process, which depends upon ownership and the date of acquisition.

The court found that Measure 37 did not affect existing or new laws, but did authorize suspension of those laws for certain property owners. The court said that the Measure was not like a variance because a variance would issue, or not, in light of fixed standards, while Measure 37 allowed new exemptions from land use regulations unless the government pays the regulated parties. Variances do not have this payment aspect. Because Measure 37 was enacted by the voters, it effectively suspended laws enacted by the legislature. The court found no violation of this constitutional provision inherent in the enactment of Measure 37 itself, but stated that its *effect* was to undertake suspension of laws in a way that violates Article I, section 20, as described above. Thus, the measure violated the suspension clause as well. The court also found that this suspension violation could not be severed from the rest of the measure.

The court found that Measure 37 did not violate Article IV, section 24 of the Oregon constitution, which provides that the state may waive sovereign immunity for all potential liability. The court found that the people may, consistent with this provision, choose to incur liability through the adoption of a statute.

The court then turned to the exemption from the measure's "pay or waive" provisions for nude dancing and the sale of pornography. It found that, because the plaintiffs had not alleged that they wished to make use of their property for such purposes, no justiciable controversy was raised. In addition, even if the court were to reach that issue, the provision would likely be severable from the remainder of the measure and would have no effect on the plaintiffs.

The court also found no violation of Article I, section 15 of the Oregon constitution, which prohibits payments to religious institutions. The court stated that the measure applied to all property owners, rather than to the functions of religious institutions themselves.

The court then turned to whether Measure 37 violated Article III, section 1 of the Oregon constitution, which provides for three separate departments of government (the executive, legislative, and judicial) and which states, "[N]o person charged with official duties under one of these departments . . . shall exercise any of the functions of another, except as in this Constitution expressly provided."

The plaintiffs claimed the measure intruded on the powers of the executive branch to enforce the laws because it allowed the legislative branch to decide whether to enforce generally applicable land use regulations and also provided inadequate procedural safeguards for non-claimants against arbitrary decisions. The court addressed the latter issue under its procedural due process analysis discussed below. The plaintiffs also claimed that the legislative body did not possess the power of exemption from the laws and therefore could not delegate this power to administrative bodies.

The court found that delegation by a legislative body to an administrative agency is permissible under the Oregon constitution. The court also found no legislative encroachment on the power of the executive, at least technically, because the legislative branch enacts laws and determines the limits of executive discretion. However, the court also found that the legislative branch (including the people) has no power to enact an unconstitutional law, so the constitutional violations noted above were not changed by the fact that they were adopted by the people, who cannot authorize delegation of an unconstitutional process.

The court then turned to the plaintiffs' claims based on due process and first resolved the claims involving procedural due process. The state had adopted regulations for claims administration, and administrative decisions on claims were subject to review as an "order in other than a contested case" under ORS 183.484. However, the measure did not provide, in the view of the court, adequate safeguards (as opposed to standards) for all affected parties. The court said that adjacent property owners must have a meaningful opportunity to be heard *before* irreparable harm occurs. Under the state's

scheme, affected neighbors did not get a court hearing until after deprivation of their rights occurred. If governmental action is ultimately found to be invalid, the damage will have already been done and it will be difficult, if not impossible, to remedy. The court concluded,

> The serious and imminent risk of an erroneous deprivation of property interests that are impacted by a government entity's decision on a Measure 37 claim, and the fact that a pre-deprivation hearing, with notice and the opportunity of property owners near the Measure 37 claimants' land to be heard could prevent the improvident exemption or nonapplication of land use rules, obligates governments to provide property owners near a Measure 37 claimant's property with notice and the opportunity to be heard before the public entity decides the claim. The state has already provided for such notice and hearing when it is the entity to which the claim applies. *See* OAR 125-145-0080. That said, neither the Measure nor the regulation afford the property owner any modicum of relief. Assuming property ownership is established, and the offending regulation post-dates the date of acquisition, Measure 37 does not permit any discretion to deny a waiver request (excepting to pay the landowner to comply with the law, which governments are financially unable to do.) Thus, at the very least, the procedural due process right of [one of the plaintiffs involved in the case] has been violated because the procedural protections are inadequate if they exist at all. (Footnote omitted.)

As to substantive due process, the court found that substantive due process is not a free-standing right, but must be connected with another constitutionally protected right. The court found this right to be the plaintiffs' potential loss of their property interests or value as a result of Measure 37 claims on their neighbors' properties. The court determined that the government "*could not* have had a legitimate reason for enacting Measure 37, because . . . the compensation provision of Measure 37 impedes the exercise of the plenary power." Thus, the plaintiffs' substantive due process rights had been violated.

This is an extraordinary decision. Regardless of how one feels about the outcome, the circuit court has certainly discovered new limits on lawmaking. Perhaps a system to review potential initiatives in order to avoid facial flaws might be an appropriate way of avoiding the current cycle of adoption, challenge, and invalidation.

Edward J. Sullivan

MacPherson v. Dep't of Admin. Servs., No. 05C10444 (Marion Co. Circ. Ct. Oct. 14, 2005).

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 5200 SW Meadows Road, Lake Oswego, OR 97035-0889.
Subscription Price: free to Real Estate and Land Use Section Members, $24.50 per year for others. To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

Editor
Kathryn S. Beaumont

Associate Editors
Alan K. Brickley
Edward J. Sullivan

Assistant Editor
Nathan Baker

Contributors

H. Andrew Clark
Lisa Knight Davies
David Doughman
Larry Epstein
Mark J. Fucile
Glenn Fullilove
Christopher A. Gilmore
Susan C. Glen
Lisa M. Gramp
Raymond W. Greycloud
Peggy Hennessy
Keith Hirokawa
Jack D. Hoffman
Emily N. Jerome
Mary W. Johnson
Michael E. Judd
Gary K. Kahn
Joan Kelsey
Jeff Litwak
Peter Livingston
Ben Martin
Matthew J. Michel
Steve Morasch
Tod Northman
David J. Petersen
John Pinkstaff
David Richardson
Carrie Richter
Susan N. Safford
Steven R. Schell
Kathleen S. Sieler
Ruth Spetter
Andrew Svitek
Isa A. Taylor
Ty K. Wyman
A. Richard Vial

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

2005 Oregon Legislation

Editors' Note: *Below are summaries of real estate and land use legislation passed in 2005 by the Oregon Legislative Assembly. The Real Estate and Land Use Section thanks the Oregon State Bar and the authors for granting permission to reprint the summaries, which are also published in* ***2005 Legislation Highlights (OSB CLE 2005)****. If you are interested in purchasing this book, which contains a review of important 2005 legislation covering a wide range of topics, please call the Bar at (503) 684-7413 or visit <www.osbcle.org/pub/>.*

Unless otherwise noted, all laws will be effective on January 1, 2006. For copies of the bills, visit <www.leg.state.or.us/measures05.html>.

■ 2005 REAL ESTATE LEGISLATION

I. TECHNICAL ISSUES

A. HB 2083 (Oregon Laws 2005, ch. 14)

Eliminates requirement that seller of property with water right notify Water Resources Department of sale. Eliminates the requirement that well information be recorded in property deed records. Eliminates provisions relating to water use registration when use is for wetland, stream or riparian restoration, or storm water management.

B. HB 2173 (ch. 118)

Requires Department of Consumer and Business Services to adopt rules for use of digital signatures by state agencies to protect the security, integrity, and confidentiality of state business transactions conducted by electronic commerce. Provides that business conducted by e-commerce can be audited. Repeals Digital Signature Act. Repeals registry of international trade consultant. Since 1997 when the law was passed only three digital signature authentication authorities and one international trade consultant have registered. The cost of maintaining the system exceeds the income.

C. HB 2176 (ch. 81) (effective May 25, 2005)

Eliminates position of Brownfields Redevelopment Coordinator, assigns the duties to the Economic and Community Development Department. It also establishes the Oregon Coalition Brownfields Cleanup Fund for grants, loans, and expenditures to assist in cleanup. Appropriates funds by keeping and processing federal monies for brownfields cleanup.

D. HB 2256 (ch. 82)

Clarifies that recording of a chattel mortgage can be by recording or filing. Modifies ORS 205.010.

E. HB 2263 (ch. 5) (effective Mar. 11, 2005)

Corrects a date in landlord-tenant law related to the recording of security interest for manufactured structures. Date changed from July 1, 2004 to May 1, 2005. Declares emergency; effective on passage.

F. SB 222 (ch. 11)

Defines multiple-unit residential housing as housing that provides two or more living units. Defines single family housing in relationship to housing for people with chronic mental illness. Allows care providers of residents with chronic mental illness to occupy community housing. Allows Department of Human Services to sell or otherwise dispose of community housing when it is no longer deemed suitable for use as housing. (DHS is currently implementing the Community Mental Health Housing Fund, established with proceeds from the sale of the former Dammasch State Hospital, and developing some community housing at the former hospital site.)

G. SB 353 (ch. 311)

Modifies the disclosure statement required in instruments transferring title to real property to inform the seller and purchaser of the potential that land use regulations to which the property is subject may trigger claims for compensation. Further notifies the seller and purchaser of the possibility that governments may modify or not apply land use regulations that benefit the subject property or neighboring properties in order to avoid such compensation claims. Amends ORS 93.040 as a result of Measure 37.

This law will require new language in all deeds prepared in Oregon and all sale agreements beginning on January 1. It suggests that the seller should inquire about his/her rights before signing and that the buyer should inquire about rights of neighbors. It does not specify with whom the seller should inquire, but does suggest that the buyer inquire with the city or county planning department.

H. SB 398 (ch. 107) (effective Jan. 1, 2006)

Modifies definition of "foreign limited liability company" to include entity organized under laws of any federally recognized Indian tribe. The Confederated Tribes of the Warm Springs Indian Reservation enacted a limited liability code in 1998. This law allows their LLCs to be recognized when dealing with property outside the reservation.

II. CONDOMINIUMS AND PLANNED COMMUNITIES

A. HB 2595 (ch. 96)

Adds property of homeowners associations to categories of property to which government entity may apply pesticide without first obtaining a pesticide operator license or evidence of financial responsibility.

B. SB 955 (ch. 543)

Requires condominium and planned community boards of directors to include under their annual reserve study a 30-year plan for the maintenance, repair, and replacement of the common elements of association property. (The law formerly covered only replacement.) Requires that the 30-year plan be appropriate for the size and complexity of the common elements and the association property. Requires the board of directors and the declarants to provide unit owners with a written summary of the reserve study and any adopted revisions to the plan within 30 days after conducting the reserve study.

III. REAL ESTATE TAXATION AND ASSESSMENT

A. HB 2511 (ch. 389)

Modifies definition of fraternal organization for purposes

of property tax exemption. Adds Lions, Soroptimists, Rotaries, and Kiwanis to nonexclusive list.

B. HB 2776 (ch. 549)

Eliminates sunset date on historic property special assessment program. Expands types of property for which owner may apply for second 15-year period if approved by local governing body. Residential properties are now eligible to apply for a second period. Disqualifies property from special assessment when sold or transferred unless the new owner assents to the preservation plan in effect.

C. SB 283 (ch. 688) (effective Nov. 4, 2005)

Permits property of limited liability company to qualify for property tax exemption or special assessment if limited liability company is wholly owned by one or more nonprofit corporations and property would qualify for exemption or special assessment if directly owned by nonprofit corporation. Lowers the existing 70% residency requirement to 50% for certification as a long-term care facility, nursing facility, assisted living facility, or residential care facility.

IV. GOVERNMENT PROPERTY; CONDEMNATION; FORFEITURE

A. HB 2077 (ch. 557) (effective July 20, 2005)

Directs Department of Transportation to adjust amount paid to contractor under public improvement contract that includes steel material if contractor requests adjustment and demonstrates that delivered cost of steel material to contractor exceeds original bid quote by specified amount. Applies where cost of steel is more than ten percent of price on original bid.

B. HB 2087 (ch. 15)

Allows Department of Transportation to lease land for periods longer than five years without prior approval of Department of Administrative Services.

C. HB 2268 (ch. 433)

Requires that if an appraisal in a condemnation action relies on a written report, opinion, or estimate of a person who is not an appraiser, then a copy of the report, opinion, or estimate must be attached to the appraisal. Requires that if an appraisal relies on an unwritten report, opinion, or estimate of a person who is not an appraiser, then the name and address of the person who provided that information must also be included.

D. HB 2269 (ch. 124) (effective Nov. 4, 2005)

Establishes optional procedure allowing public condemner to give notice that condemner will take immediate possession of property subject to condemnation and acquire order confirming immediate possession of property.

E. HB 3457 (ch. 830) (effective Sep. 2, 2005)

Provides that forfeiting agency in civil forfeiture proceeding must prove by clear and convincing evidence that real property constitutes proceeds of prohibited conduct or instrumentality of prohibited conduct. Provides process that forfeiture counsel and property claimants must follow to resolve claims in property subject to forfeiture. Includes provisions for notice and brings matter to issue by means of claims and affidavit. Provides court with broad discretion in forfeiture matters and requires that forfeiting agency transfer property with warranty from "constitutional defect."

F. SB 101 (ch. 149)

Authorizes claim for relief against Department of Transportation if certain approach roads are closed by department. Extends relief for loss of approach roads to owners who acquired their access before the permit process began.

G. SB 281 (ch. 243)

Modifies terms and conditions under which county may sell or exchange real estate. Prior law allowed county to sell only by cash or installment contract. Now "cash" can be earnest money followed by a single payment and any real estate security instrument can be used for the sale, although an "installment agreement" used by the county will be subject to special forfeiture rules, not those of a standard statutory "real estate sales contract."

H. SB 1096 (ch. 773)

Transfers exclusive control of and jurisdiction over county roads within City of Gresham from Multnomah County to City of Gresham.

V. MANUFACTURED DWELLINGS; HOUSEBOATS; LANDLORD-TENANT

A. HB 2216 (ch. 41)

Specifies that existing laws covering disclosures to manufactured dwelling buyers and contracting requirements related to space improvements apply to rented lots in manufactured dwelling subdivisions. Makes dealers or park owners that contract to make improvements to the dwelling owner's site responsible for completion of work. Moves deadline forward for providing the buyer an estimate of costs (before construction begins). Requires contractors who provide cost estimates for improvements to comply with contractor bidding statutes.

B. HB 2247 (ch. 619)

Replaces two abandoned property landlord-tenant statutes with several revised shorter statutes. Requires manufactured dwelling park and floating home moorage owners to register with Housing and Community Service Department. Requires at least one owner/manager/person to complete continuing education consisting of six hours every two years. Contains provisions for utility billing and conversion to submeters.

C. HB 2255 (ch. 4) (effective Mar. 11, 2005)

Corrects statutory reference relating to manufactured structure deed records protecting security interest in dwelling. Declares emergency; effective on passage. Provides that dealer may fill out application for owner within the 25-day time period described in ORS 446.736(7).

D. HB 2389 (ch. 826)

Creates tax credit for qualifying individual who involuntarily moves manufactured dwelling due to manufactured dwelling park closure. Makes credit refundable to qualifying

individuals with low income. Applies to involuntary moves occurring in tax years beginning on or after January 1, 2006. Creates tax exemption for gain realized by manufactured dwelling park landlord from sale of park to certain associations or organizations or to housing authority. Applies to park sales occurring in tax years beginning on or after January 1, 2006. Requires Housing and Community Services Department to act as collector and source of information regarding manufactured dwelling park spaces available for rent. Provides that jurisdiction may not prohibit relocation of manufactured dwelling to manufactured dwelling park or mobile home park based solely on age of dwelling if relocation is due to park closure.

Law increases qualified manufactured dwelling from value of $50,000 to $100,000 on the date it was involuntarily moved. Allows credit for household with income of $60,000 or less with credit amount up to $10,000. Provides that if income is not more than 200% of federal poverty guideline, credit may be taken in one year.

E. HB 2524 (ch. 391)

Provides that security deposit or prepaid rent held by residential landlord is not garnishable property. Sets forth new regulations for landlord termination of tenancy. Requires landlord who charges an application fee to provide written statement of reasons for denial. Includes rules for disposition of tenant belongings where left in premises that are declared unfit for use by an official or agency. Where landlord has hired a contractor to assess or clean up a contaminated area, landlord must provide tenant with contractor information.

VI. REAL ESTATE SERVICE PROVIDERS—BROKERS; ESCROW; APPRAISERS; CONTRACTORS; INSPECTORS—LICENSING AND LIABILITY

A. HB 2071 (ch. 263)

Requires that complaint or arbitration demand filed with Construction Contractors Board and involving work on or an appurtenance to a commercial structure must be accompanied by statement of claim in a form prescribed by Board rule. Also requires the statement of claim to accompany the copy of the judgment or award sent to the surety company. Amends ORS 701.146.

B. HB 2072 (ch. 207)

Authorizes the Construction Contractors Board (CCB) to determine how a party may avoid a contested case hearing, including a time limit for filing the claim in court instead. Allows the CCB to waive its claim processing fee for all employee claims if the board decides that a majority of claimants are eligible for fee waivers based on inability to pay and to waive statutory pre-claim notice requirements when it is clear to the board that the contractor has, by other means, received notice of a pending claim against the board. The measure prevents the last-minute canceling of a contested case hearing due to filing of a suit.

C. HB 2075 (ch. 114)

Requires Construction Contractors Board to adopt minimum standards of practice and professional conduct for certified home inspectors. This is in addition to the existing provisions regarding education, training, and examination.

D. HB 2078 (ch. 647)

Creates a Task Force on Construction Claims. Specifies membership and duties of task force. Requires task force to report to the next legislature. Sunsets task force January 1, 2008. Relates primarily to claims against contractors' bonds.

E. HB 2096 (ch. 116)

Makes technical and grammatical changes throughout real estate and escrow licensing laws. Adds definition of "sole practitioner." Deletes requirements that licenses be returned to the agency when changes are made to allow more online transactions. Adds requirements for fingerprints and criminal background checks for initial licensing as well as allowing the same but not requiring it for license renewal. Allows non-licensed real estate manager who is an employee of a real estate broker to discuss financial matters relating to management of real estate with owner. Allows Real Estate Agency to adopt guidelines for closing the business of deceased or incapacitated persons. Clarifies fees for branch offices and address changes.

F. HB 2200 (ch. 432)

Changes construction business owner or responsible employee requirement. Revises training and testing requirements and defines "responsible managing individual" and "owner." Increases information required on application for license, including past history with other companies that were licensed or adjudicated construction debt that is still owing. Requires each licensed business to have at least one trained and tested individual. Requires training and testing prior to replacing a revoked license. Provides for a pocket-sized certificate of licensure to be issued by the board. Clients should be advised to carry these cards as evidence of licensure.

G. HB 2258 (ch. 799)

Corrects reference to statutory sanctions that apply to sale of lot, parcel, or interest in subdivision or series partition. Clarifies that violations of certain statutes requiring the issuance of a public report prior to sale or lease of a lot, parcel, or interest in a subdivision or series partition is an unlawful trade practice.

H. HB 2604 (ch. 393)

Makes a number of changes affecting the licensing of real estate and escrow agents. Modifies and rearranges grounds for discipline of a licensee. Allows a real estate broker associated with a principal broker to create a business entity for receiving commission payments from the principal broker. Requires Real Estate Agency to establish a procedure to disperse disputed funds from client's trust accounts to the person who delivered the funds to the broker. Directs the Real Estate Commissioner to adopt rules providing for progressive discipline and an objective investigation method. Specifies that an investigator's report to the Commissioner must not contain conclusions as to violations. Specifies that suspension or revocation may not be imposed without showing significant damage or injury, incompetence, dishonesty or fraud,

or repeated conduct. Clarifies that a real estate licensee does not have the duty to investigate the condition of property, the legal status of the property's title, or the owner's conformance with law. Provides that unlicensed activity caused by failure to renew within time allowed by law constitutes a single offense for each 30-day period.

I. HB 2634 (ch. 277)

Establishes pleading requirements for actions against real estate licensees for professional negligence. Clarifies what actions the pleading requirements apply to. Requires a claimant's attorney to consult a qualified real estate licensee who will testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the licensee whom the claimant is suing. Applies to cross-claim, counterclaim, and third party complaint for negligence. Calls for a certification to be filed, with first document asserting liability. The same standard already exists for architects.

J. SB 385 (ch. 254) (effective June 20, 2005)

Authorizes Appraiser Certification and Licensure Board to discipline state-registered appraiser assistants. Allows Board to retain civil penalties and license-related fees for operating costs.

K. SB 574 (ch. 169)

Authorizes contractor who builds new structure to present for recording a written warranty agreement between contractor and original owner to facilitate handling of construction defects and express warranties. Specifies the content of the filing, including any express warranties, legal description of the property, and the names and signatures of the contractor and original owner. Specifies that the warranties in recorded agreements apply to subsequent owners of the structure and cease to affect the title ten years after the warranty is recorded. The intent is to provide homeowners with information on the contractor if building defects are later discovered.

Although the warranty agreement is between the contractor and the original owner, if it is recorded under this statute it benefits and burdens the subsequent owners as well. A recorded warranty agreement will show as an exception for a 10-year period. The purpose is to give the current owner access to warranty and contractor information. Before attempting to resolve defect disputes, check to see whether a warranty is of record.

L. SB 1002 (ch. 249)

Reduces threshold contract value for requiring that residential construction contract be in written form. Changed from $2,500 to $2,000.

VII. LENDERS, LIENS, MORTGAGES AND TRUST DEEDS

A. HB 2052 (ch. 643)

Increases Housing and Community Services Department revenue bond limit from $2 billion to $2.5 billion. The department issues revenue bonds to help finance low- and moderate-income housing.

B. HB 2054 (ch. 75) (effective Mar. 25, 2005)

Directs Housing and Community Services Department to establish threshold property purchase price (currently $150,000) that triggers review by State Housing Counsel of loans for single-family home ownership. Deletes statutory loan amount limit. Extends council review requirements to additional forms of funding awards. Transfers responsibility for submitting funding award proposals from Director of the Housing and Community Services Department to Housing and Community Services Department. Applies to loans, grants, and other funding awards proposed by department on or after January 1, 2006. Extends maximum housing finance bond maturity period (from 42 years to 47). Declares emergency; effective on passage.

C. HB 2222 (ch. 383)

Provides that the Department of Justice (DOJ) has a lien on its recipients' judgments or amounts payable under settlement for all assistance provided by the DOJ from the date of the injury that forms the basis of the assistance to the date of the satisfaction of the judgment or final payment under the settlement. Sets out procedures to perfect the lien, including recording of a notice to be entered in the hospital and physician's lien docket. Provides remedies to the DOJ against persons or entities who pay recipients in disregard of a perfected lien and recipients who do not notify DOJ of amounts received from a judgment or settlement.

D. HB 2233 (ch. 618)

Provides that judgment in criminal action containing award of restitution does not expire until 50 years after entry of judgment. Changes interest on judgment from 9% to 12.5% for the first five years and then 4% for the remainder. Requires Director of Employment Department, at request of United States Attorney's Office, to make available individual's employment and wage information for purposes of collecting civil and criminal judgments.

E. HB 2359 (ch. 568)

Revises law governing judgments. Under section 9, if an administrator (Support Enforcement) eliminated a judgment lien document by recording a release of lien document in a county clerk lien record, the administrator may reinstate the lien by recording a notice of reinstatement in the county clerk lien record for the county where the judgment was entered. If the release was recorded in another county, the administrator may record the notice of reinstatement there as well. The reinstatement may only be used if (1) the release was for all real property of a judgment debtor in a county, and (2) the judgment that was eliminated arose out of the support award portion of the judgment. A certified copy of the judgment document or lien record abstract for the judgment must be attached to the notice of reinstatement. A notice of reinstatement may be recorded for a release of lien filed before the effective date. If a criminal judgment is entered and there is a money award, it must be stated separately in order to become a lien on real property. Section 21 contains language regarding protection from recent judgment liens for bona fide purchasers and purchase money lenders.

F. HB 2548 (ch. 274)

Mandates arbitration in circuit court proceedings in matters for $50,000 or less. (Currently court may opt to set the limit at $25,000 or $50,000.)

G. HB 2637 (ch. 97)

Specifies that a mortgage lender's surety bond or letter of credit is accessible only to consumers by limiting right of action against the surety to signers of the mortgage application. Deletes criminal penalties for violating loan originator continuing education requirements. Requires the Department of Consumer and Business Services to certify organizations that give the loan originator exams for initial or continuing education credit and that the exams be given in secure locations.

H. HB 2980 (ch. 129)

Specifies that notice of foreclosure sale involving trust deed is effective when mailed. Amends ORS 86.740.

I. HB 3266 (ch. 287)

Modifies definition of "financial institution" in relation to seller's property disclosure statement. Adds trust companies to the definition.

J. HB 3324 (ch. 134)

Allows an Oregon-chartered bank or trust company to organize as a limited liability company (LLC) as an alternative to being organized as a corporation. Specifies that organization as an LLC will be under the authority of the Department of Consumer and Business Services (DCBS). Requires the LLC to be managed in substantially the same manner as an Oregon bank or trust company organized as a corporation with the same rights and responsibilities. Specifies that membership (ownership) interests are freely transferable. Allows, through specified steps, conversion of a bank or trust company organized as a corporation to an LLC and conversion of an LLC to a corporation. Specifies how stockholders and owners may dissent from plans of conversion and receive value of shares. In 2003 the FDIC promulgated rules allowing them to insure LLCs.

K. SB 223 (ch. 20)

Increases maximum veteran's home loan from 97 percent to 100 percent of appraised value of real property.

L. SB 273 (ch. 456)

Increases homestead exemption for judgment debtor from $25,000 to $30,000 for single debtor and from $33,000 to $39,600 for joint debtors who are members of the same household. Increases motor vehicle exemption for judgment debtor from $1,700 to $2,150.

M. SB 940 (ch. 371)

Allows former owner, whose property has been foreclosed and sold in a foreclosure sale for failure to pay an irrigation district assessment, 180 days to redeem the property by paying the amount of purchase money paid for the property at the sheriff's sale, interest on the purchase money at the rate of 9% from the date of sale, and any amount the purchaser was required to pay in taxes on the property. Allows heirs, devisees, and grantees of the former owner and holders of equitable or legal title and liens upon the land to exercise the right of redemption. Applies to sales after the effective date.

VIII. PROBATE AND ESTATES

A. HB 2289 (ch. 122)

Allows claiming successor to small estate or personal representative to file amended affidavit within four months of filing of original affidavit for purpose of correcting any error or omission and to file one or more supplemental affidavits at any time after filing affidavit for purpose of including property not described in original affidavit. Filing of such an amended or supplemental affidavit extends the claims period to four months from the new filing date. Applies retroactively. Sponsored by Elder Law Committee.

B. HB 2415 (ch. 270)

Provides that an abuser (person convicted of felony abuse) may not obtain property from the abused through intestate succession, by will, by trust, or from a life insurance policy if the abused dies within five years of the abuse. Prohibits an abuser from obtaining property that is owned jointly with rights of survivorship with the decedent; however, the abuser retains a life estate in an undivided one-half interest. Provides that a decedent's life estate in property continues in heirs or devisees for a time equal to the normal life expectancy of the decedent where the abuser has some future interest in that property. Applies to convictions before or after the effective date but not to deaths before the effective date.

C. HB 2547 (ch. 273)

Increases from $140,000 to $200,000 the value of estates for which small estate affidavits may be filed. Increases from $90,000 to $150,000 the amount that may be attributed to real property in small estates.

D. HB 3352 (ch. 741)

Provides that surviving parent of decedent does not inherit by intestacy if parent willfully deserted decedent or neglected to provide proper care and maintenance for decedent for 10-year period immediately preceding date on which decedent became adult or death of minor decedent.

E. SB 277 (ch. 349)

Modifies terminology of Oregon Uniform Transfers to Minors Act, changing the term "minor" to "beneficiary." Allows transfers for the benefit of the beneficiary at any time before the beneficiary reaches age 25. Allows for delay of transfer to beneficiary until age 25.

F. SB 392 (ch. 535)

Provides that if person slays other person, property that would have passed from heir or devisee of decedent to slayer, whether by intestate succession, by will, or by trust, passes and vests as if slayer had predeceased decedent. Clarifies that the slayer cannot inherit from heir or devisee either, unless that heir or devisee specifically provides otherwise by will or other instrument executed after death of decedent. Prohibits a slayer from benefiting from an insurance policy on the life of the person slain through the slain person's heirs.

X. MISCELLANEOUS

A. HB 2287 (ch. 85)

Authorizes additional bankruptcy documents to be presented for recordation in deed records of counties. Provides

for a "Notice of Bankruptcy" that is signed and acknowledged and provides certain required information. Also provides for the recording of an order or judgment of the bankruptcy court. Provides that certain judgments and orders of the bankruptcy court must be certified by the bankruptcy court rather than the district court clerk. Sponsored by Debtor/Creditor Committee. Amends ORS 93.770.

B. SB 275 (ch. 348)

Enacts Oregon Uniform Trust Code. There are some minor modifications to conform with existing Oregon law. Requires notification and accounting by the trustee to the beneficiary upon request with some limited exceptions. Removes language permitting court to change the amount designated for a pet trust.

C. SB 563 (ch.168)

Requires water utilities to mail notice of a water bill delinquent for more than 120 days to the persons listed as the owners of the property in county property tax records. Applies to water utilities operated by public utilities, municipalities, cooperatives, and unincorporated associations.

D. SB 468 (ch. 230)

Authorizes county surveyor to waive setting of required monument during survey of subdivision or partition plat when setting monument is impracticable under specified circumstances. Allows county governing board to waive filing report of certain surveys. Changes references from points or positions to monuments.

E. SB 920 (ch. 542)

Substantially revises laws relating to execution sales. Requires writ of execution to be recorded if it calls for the sale of real property. Requires order authorizing sale of real property. Allows the State Court Administrator to establish a web site for legal notices. Allows judgment debtor to post bond in lieu of having property seized. Sets forth how real property that has been sold pursuant to a writ of execution may be redeemed. Specifically provides that a sheriff may not accept teller's checks as a manner of payment. Imposes obligation on judgment creditor to provide notice of parties with potential interest in property to sheriff and requires purchaser at sale to record the certificate of sale.

Greg Nelson, Regional Counsel, Chicago Title Insurance

Mr. Nelson served as chair of the RELU Section's Real Estate Legislative Committee during the 2005 legislative session.

■ *2005 LAND USE LEGISLATION*

I. INTRODUCTION

The 2005 Legislature struggled to address the myriad issues raised by Measure 37 (Oregon Laws 2005, chapter 1). Ultimately, the effort failed to produce legislation that was acceptable to both houses and the text of Measure 37 remains unchanged. The effort to address Measure 37 consumed much of the House and Senate land use committees' energy and, as a result, few bills of statewide significance were passed. As ever, a variety of smaller bills were passed in response to particular local circumstances.

II. LOCAL AUTHORITY AND PROCEDURE

A. HB 2356: Final Plat Review

House Bill 2356 addresses the Oregon Court of Appeals decision in *Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003). In *Hamme*r, the court ruled that final plat review and approval by a county surveyor was a limited land use decision under ORS 92.100 and 197.015(12). The bill amends these statutes to clarify that review of a final plat by a surveyor, assessor, or other county official is not a land use decision or limited land use decision.

The bill is significant for what it omits as much as what for it includes. In addition to the surveyor and assessor, in many jurisdictions a final plat is also reviewed by planning staff to determine whether it is consistent with the preliminary plat, conditions of approval, and other land use requirements. If staff exercises discretion when making this determination, a decision to approve the final plat is likely a land use decision, subject to appeal to LUBA. If notice of final plat review is not provided, the appeal period for the decision is potentially open-ended. The bill thus resolves questions regarding review of a final plat by the surveyor, but leaves unanswered similar questions regarding review by planning staff.

Finally, even if a decision by the surveyor to approve a final plat is not a land use decision subject to LUBA jurisdiction, it may be subject to appeal under the writ of review provisions of ORS 34.010 through 34.100.

B. HB 2458: Rural Industrial Development

House Bill 2458 repeals the "sunset" on a 2003 law that allows any size and type of industrial development on certain land outside urban growth boundaries. The land must be zoned for industrial use as of January 1, 2004, outside the Willamette Valley, and more than three miles from the UGB of a city larger than 20,000. A county may also approve on-site sewer facilities to serve an approved industrial use and related accessory uses.

In plain terms, the bill grants an automatic Goal 14 exception for these areas and a limited Goal 11 exception for the on-site sewer facilities.

C. HB 2668: Vacating Interior Lot Lines

House Bill 2668 amends ORS 368.351. As amended, the statute now allows interior lot lines to be vacated without public hearing if 100 percent of the property owners consent to the vacation and the planning director makes written findings that the vacation complies with applicable land use regulations and "facilitates development of the property."

The bill appears to create a new approval criterion for lot line vacations and inserts it into the road vacation statutes. The long-term effect of this amendment is uncertain.

D. HB 2755: Utility Easements and Rural Survey Requirements

House Bill 2755 amends a series of statutes in ORS chapter 92 relating to utility easements, conditions of approval, and survey requirements.

First, section 1 amends the list of definitions in ORS 92.010 to include a definition of "utility easement." For pur-

poses of ORS chapter 92, "utility easement means an easement on a subdivision plat or partition plat for the purpose of installing or maintaining public utility infrastructure for the provision of water, power, heat or telecommunications to the public." Significantly, the list of utilities does not include sewer utilities. Accordingly, sewer easements are not a "utility easement" for purposes of ORS chapter 92.

Second, the bill prohibits cities and counties from requiring utility easements outside of road rights-of-way unless "specifically requested by a public utility provider." It is unclear how this requirement should be implemented when a developer installs utilities that are subsequently turned over to the public utility provider. It may be interpreted to allow the utility provider to request specific easements (*e.g.*, for water or power) even though the utilities will not be accepted by the utility until after the development is approved and constructed. Until the provision is clarified, practitioners should continue to ensure coordination between developers, utility providers, and local governments to locate the utility easements in the most appropriate location, notwithstanding the requirements of this section.

Finally, section 6 of the bill expressly states that parcels larger than 10 acres outside an urban growth boundary do not have to be surveyed. Nonetheless, a seller's representative would be well advised to request a survey prior to purchasing a parcel covered by this section.

E. SB 688: Development Agreements

Senate Bill 688 repeals the current durational limits on development agreements in ORS 94.504. Currently, the statute prohibits a development agreement from exceeding four years for a development on fewer than seven lots or seven years for a development on seven or more lots. The bill deletes the restriction on the number of lots and allows agreements up to seven years for counties and 15 years for cities.

F. SB 1032: Metro Urban Growth Boundary

Senate Bill 1032 adds language to ORS 197.299 that directs Metro to establish a process for expanding the Metro UGB to accommodate land for public schools in a high-growth school district. "High growth school districts" are defined in ORS 195.110. The process must provide a decision on a proposed expansion within four months of the date the proposal is submitted to Metro by the school district.

The specifics of this bill are relevant only to Metro and practitioners who represent high-growth school districts. However, the bill is an example of legislation that addresses specific land needs within the Metro UGB, and we are likely to see more like it in the future.

III. LCDC PROCEDURE AND AUTHORITY

A. HB 3310: Periodic Review

House Bill 3310 modifies the process for periodic review of local comprehensive plans and land use regulations. As amended, the process is now focused on compliance with Goal 9 (economic development), Goal 10 (housing), Goal 11 (public facilities), Goal 12 (transportation) and Goal 14 (urbanization).

The bill also establishes a new schedule for periodic review and limits the process to specific jurisdictions. ORS 197.629 now requires Metro and cities within a "metropolitan planning organization" to conduct periodic review at least every seven years. Other cities with populations larger than 10,000 must conduct the review every 10 years. "Metropolitan planning organizations" are defined by federal transportation funding rules and include Metro, Eugene/Springfield (LCOG), Salem/Keizer, Medford, and Bend. The Land Conservation and Development Commission may require other small cities to conduct periodic review under certain circumstances, including significant population increase or a major new employment or transportation facility, if LCDC provides funding for the review. The schedule and requirements for counties remain unchanged.

The bill also makes final and not subject to review all decisions by the director of the Department of Land Conservation and Development (1) to approve a work program, (2) that a work program is not necessary, and (3) that no further work is necessary. A decision by the director to approve or remand a work task must be issued within 120 days and may be appealed to the commission.

Finally, the bill rewrites ORS 197.646 to expressly apply to Metro's regional framework plan. Under current law, ORS 196.646 requires comprehensive plans and land use regulations to be amended to comply with newly adopted statutes, goals, and rules. HB 3310 extends this requirement to Metro's framework plan. The bill also directs LCDC to develop a timeline for local governments to follow when bringing their plans and ordinances into compliance with new statutes, goals, and rules.

B. SB 82: Task Force on Land Use

Senate Bill 82 establishes a ten-member Oregon Task Force on Land Use Planning appointed by the Governor, Senate President, and Speaker of the House of Representatives, to study Oregon's land use planning system and recommend changes. The task force is specifically directed to study (1) the effectiveness of the program in meeting the needs of Oregonians, (2) the roles of state and local governments, and (3) issues specific to urban and rural areas and the urban/rural interface. The task force is further directed to conduct public meetings, survey citizens, collect specific data, and recommend legislation to the 2007 and 2009 legislatures. The Department of Land Conservation and Development is directed to provide staff support. Within three months of creation, the task force is required to submit a preliminary report to the Governor, Senate President, and Speaker of the House regarding its work plan. The Task Force must submit a progress report to the 2007 Legislative Assembly, the Governor, and the Land Conservation and Development Commission by February 1, 2007. The bill requires the Task Force to submit a final report to the 2009 Legislative Assembly, the Governor, and the Commission by February 1, 2009.

IV. ANNEXATION

A. HB 2484: Annexation

House Bill 2484 amends ORS 195.215 to require approval by a majority of voters in an annexing city *and* a majority of voters in the territory to be annexed for the annexation to be effective.

B. SB 887: Annexation

Senate Bill 887 does a number of things. First, it specifically prohibits Beaverton from using the "island annexation" provisions of ORS 222.750, and generally prohibits the city from annexing territory without the consent of affected property owners and residents until 2008.

Second, while the language is not entirely clear, section 3 of the bill appears to override ORS 195.215, as amended by HB 2484, to require a proposed annexation to be submitted *only* to the electors in the territory proposed for annexation. This section applies to all annexation plans, not just the City of Beaverton, and is repealed January 2, 2008.

Third, the bill prohibits Beaverton from annexing property held by specific companies until 2035, including Nike, Columbia Sportswear, Tektronics, and EFI, unless the company consents. Further, if the sunset clause is not amended before 2035, it is automatically extended to 2040.

V. FARM AND FOREST ZONES

A. HB 2069: Landscaping Businesses

House Bill 2069 adds landscaping businesses operated in conjunction with a nursery to the list of conditional nonfarm uses authorized in EFU zones under ORS 215.213 and 215.283.

B. HB 2932: Community Centers

House Bill 2932 adds community centers that are in existence on the effective date of the bill (January 1, 2006) and that provide certain services to veterans to the list of conditional nonfarm uses in ORS 215.283 (non-marginal land counties).

C. HB 3117: Law Enforcement Facilities

House Bill 3117 adds county law enforcement facilities that are in existence on August 20, 2002 to the list of permitted nonfarm uses in ORS 215.283 (non-marginal land counties).

VI. MISCELLANEOUS

A. HB 3494: Water Rights–Deschutes Basin

House Bill 3494 was enacted in response to the Court of Appeals decision in *Waterwatch of Oregon v. Water Resources Commission*, 199 Or App 598, 112 P3d 443 (2005). The bill expressly states that the administrative rules adopted by the Water Resources Commission to establish a mitigation program for groundwater withdrawals in the Deschutes Basin satisfy the applicable statutory requirements. The Water Resources Department is directed to study the effectiveness of the rules in mitigating the effect of the groundwater withdrawals on stream flows in the Deschutes River and to report back to the legislature not later than January 2009. Finally, the bill directs the commission to repeal the administrative rules on January 2, 2014.

B. SB 101: ODOT Access Closure

Under ORS 374.313, when ODOT closes certain access roads, a person holding an interest in the affected property may initiate a contested case proceeding under ORS 183.415 through 183.500 to challenge the closure. Senate Bill 101 expands the types of access roads subject to the statute to include access roads that were "allowed by law prior to enactment of statutory permit requirements for approach roads."

C. SB 859: Utilities in State Highway Rights-Of-Way

In 2001, the legislature enacted a law that allows ODOT to charge a fee to place certain utilities (gas, water, electric, communications) in a state highway right-of-way. Oregon Laws 2001, chapter 664, section 2; *see also* note preceding ORS 374.305. The law was originally scheduled to sunset in January 2006. Senate Bill 859 extends the sunset to January 2008.

D. SB 1044: Destination Resort Map

Under ORS 197.455, a destination resort must be sited on lands mapped as eligible for destination resort siting. The map is part of the county's comprehensive plan. In eastern Oregon, this map can modified either at periodic review or as a post-acknowledgement plan amendment. In western Oregon, the map can be modified only as part of periodic review. Senate Bill 1044 extends to jurisdictions in western Oregon the ability, currently only enjoyed in eastern Oregon, to amend their destination resort maps as a post-acknowledgment plan amendment. This will be important to practitioners representing Bandon Dunes.

Christopher Crean, Assistant Counsel, Multnomah County; and Matthew Shields, Salem, J.D. 2004, Northwestern School of Law of Lewis & Clark College

Mr. Crean served as chair of the RELU Section's Land Use Legislative Committee during the 2005 legislative session.

Appellate Cases—Real Estate

■ STATUTORY IMMUNITY COVERS LANDOWNERS WHO ALLOW THE PUBLIC TO CROSS THEIR LAND FOR RECREATIONAL ACTIVITIES ON OTHER PROPERTIES

Liberty v. State, 200 Or App 607, 116 P3d 902 (2005), *adh'd to on recons*, ___ Or App ___, ___ P3d ___ (Oct. 26, 2005) examined the scope of ORS 105.682's grant of immunity to landowners who allow public use of their land for "recreational purposes." This immunity applies to any personal injuries, deaths, or property damage that arise out of such use.

In this case, the state permitted the plaintiffs to use its land along the banks of the Wilson River to park their vehicles and to access an adjacent privately owned beach, on which the plaintiffs went swimming. When the plaintiffs finished swimming they left the private property and attempted

to return to their vehicles via a concrete path on the state-owned property. Unfortunately, the path on which the plaintiffs were walking broke, and the plaintiffs were injured after they tumbled down a steep slope.

The plaintiffs sued the state for negligently maintaining the concrete path. The state moved for summary judgment, asserting immunity pursuant to ORS 105.682, in that the plaintiffs had used the state-owned path for the recreational purpose of accessing the privately owned beach. The plaintiffs countered that immunity did not attach because they were not using the state's land for a recreational purpose at the time of their injuries. Instead, the plaintiffs argued, they merely used the state's land to access the private beach and that this use did not constitute a recreational purpose under the statute. The trial court agreed with the state's analysis and dismissed the suit.

On appeal, the plaintiffs alleged two errors. First, they asserted that ORS 105.682 immunity applies only to the land where both the recreational use and the injury occurrs. The plaintiffs argued that they had merely used the state's land to access the private beach and that no recreational activity had actually taken place on the state's land. Thus, the state should not be immune from suit under the statute. Secondly, the plaintiffs argued that if ORS 105.682 did provide immunity to the state in these circumstances, then the statute necessarily violates the remedies clause in Article 1, section 10 of the Oregon constitution.

In response the state argued that the court of appeals did not need to consider what constitutes a recreational purpose under ORS 105.682 because another statutory provision, ORS 105.688, provides that recreational purpose immunity applies to any land that is adjacent or contiguous to a body of water. In any event, the state also asserted that ORS 105.682 applies because the plaintiffs' use of the state's land was a recreational purpose within that statute's meaning.

In its ruling upholding the trial court's dismissal, the court of appeals followed the interpretive framework outlined in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993), by examining the statutory language, any prior judicial construction of the statute, and the statute's legislative history. At the outset of its analysis, the court found that ORS 105.682 immunity attaches if two conditions are met: (1) a public or private land owner must directly or indirectly permit the public to use its land for recreational purposes, and (2) personal injury, death, or property damage must arise out of the use. Thus, the court rejected the state's contention that the court need not determine whether the plaintiffs' use of its land was for "recreational purposes" to determine the propriety of the trial court's dismissal.

The court noted that the statute does not explicitly define "recreational purposes." However, ORS 105.672(3) states that the term "includes, but is not limited to" such activities as waterskiing, boating, and swimming. From these explicitly enumerated activities and a dictionary definition of "recreational," the court of appeals reasoned that the legislature must have intended ORS 105.682's immunity to include landowners who make their land available for access to the water in which people actually engage in recreational activities such as swimming.

In this case, the court ruled that this immunity included the state's land. As the court stated, in light of the ordinary meaning of the statutory language, "it seems reasonably plausible that, when a person enters land for the purpose of gaining access to another parcel for recreational purposes, the access itself has a recreational purpose in that the end, object, result, or goal of the entry is recreation." 200 Or App at 616.

The court buttressed its conclusion by referring to its prior decision in *Brewer v. Department of Fish and Wildlife*, 167 Or App 173, 2 P3d 418, rev den, 334 Or 693 (2002). In that case, ORS 105.682's immunity was held to apply to the owners of a fish migration dam when swimmers were killed in the river below it in an area not owned by the dam owners. The court also examined the statute's legislative history, which it found to support its reading of the statute. Finally, the court rejected without discussion the plaintiff's contention that ORS 105.682 violates the Oregon constitution's remedies clause by referring to its discussion of that issue in *Brewer*, 167 Or App at 190–91.

Ben Martin

Liberty v. State, 200 Or App 607, 116 P3d 902 (2005), *adh'd to on recons*, ___ Or App ___, ___ P3d ___ (Oct. 26, 2005)

Editors' Note: *On October 26, 2005, the court of appeals allowed reconsideration and adhered to its opinion, rejecting an argument by the plaintiffs that the concrete path on which they were injured constituted a state highway.*

■ ON THE WATERFRONT: COURT OF APPEALS RESOLVES OWNERSHIP DISPUTE

Coussens v. Stevens, 200 Or App 165, 113 P3d 952 (2005), is a continuation of cases challenging title to various properties in Cannon Beach adjacent to the Pacific Ocean. This case resulted from a disagreement over a sand and vegetation management plan. The plaintiffs owned the westernmost lots in the Elk Creek Park subdivision, which is laid out adjacent to Ocean Avenue as it runs parallel to the coastline, while the defendants owned the oceanfront property immediately south of the subdivision.

The defendants' claim of ownership was based on 1983 quitclaim deeds that they purchased from the heirs of one of the original owners of the disputed area. In addition, in 1988 the defendants filed an action to quiet title to various properties including "[t]hat portion within the plat of Elk Creek Park." In that action, the defendants named "all persons or parties unknown claiming any right, title, lien or interest in the property described in the complaint herein"—not any specific persons, including the plaintiffs.

When the present dispute arose, the plaintiffs filed an action to quiet title, alleging that their lots extended "to the mean high water line of the Pacific Ocean, subject to the rights of the public in and to Ocean Avenue as dedicated on the plat dated August 6, 1903." The defendants argued that they held superior title to the area west of Ocean Avenue based on either the 1988 default quiet title judgment or by adverse possession. The essence of the dispute was how to interpret the map and plat of Elk Creek Park. The plaintiffs argued that the subdivision extended to the Pacific Ocean,

while the defendants argued that the plaintiffs' lots extended no further than Ocean Avenue and that the original owner had intended to reserve for himself the land west of Ocean Avenue.

The trial court granted summary judgment in favor of the plaintiffs, quieting title in them "to [the] mean . . . high water line of the Pacific Ocean subject to the rights of the public in and to Ocean Avenue as dedicated on the Elk Creek Park Plat." The defendants appealed.

The court of appeals agreed with the defendants that the original owner had retained for himself the land west of the centerline of Ocean Avenue when he conveyed the Elk Creek Park land in 1903. The court found the facts of the case "materially and functionally indistinguishable" (200 Or App at 174) from *Oliver v. Klamath Lake Navigation Co.*, 54 Or 95, 102 P2d 786 (1909). In Oliver, the Oregon Supreme Court held that when separately described platted lots are conveyed together and a platted street separates the lots from waterfront property, a presumption arises that the landowner intended to retain the shoreline for himself.

The court also reviewed ORS 93.310, the statutory presumptions governing conveyances, holding that "[t]he plat map . . . , rather than the metes and bounds description in the plat dedication, governs the extent of plaintiffs' lots. Plaintiffs' titles, therefore, extend to the centerline of Ocean Avenue, but no further." 200 Or App at 178–79.

The court also distinguished two cases cited by the plaintiffs: *McAdam v. Smith*, 221 Or 48, 350 P2d 689 (1960), and *Stott v. Stevens*, 127 Or App 440, 873 P2d 380 (1994). According to the court, neither of these cases involved situations where an intervening roadway separated the disputed area and the plat boundary.

In holding that the plaintiffs did not hold title under the 1903 deed, the court reversed and remanded the lower court's judgment.

It is likely that there will be continuing litigation along the Oregon coast over these types of disputes. There are three reasons. First, in this particular case, the defendant was the same as in the *Stott* case, and there was additional property involved in the 1988 quiet title action. Second, a "land rush" in the early part of the last century resulted in a significant number of subdivision plats recorded up and down the coast that are open to interpretation. Third, the values of property along the coast are escalating based on significant increased demand.

Alan K. Brickley

Coussens v. Stevens, 200 Or App 165, 113 P3d 952 (2005).

■ *SECURITY AGREEMENT DISGUISED AS SALE/LEASEBACK MAY BE TERMINATED ONLY BY FORECLOSURE*

In *Swenson v. Mills*, 198 Or App 236, 108 P3d 77, *rev den*, 339 Or 156, 119 P3d 224 (2005), the Oregon Court of Appeals held that a quitclaim deed can convey an equitable mortgage that can be terminated only by foreclosure subject to a right of redemption.

Pyromid, Inc. struggled to manufacture camp stoves on industrial land in Deschutes County. Out of financial desperation, one of Pyromid's primary shareholders, Hait, sought a commercial loan and listed the property for sale to raise funds to pay off Pyromid's creditors.

Hait also sought a loan from his friend, Swenson, a real estate investor, but Swenson did not want to be a lender. So Hait and Swenson agreed that Hait would transfer the property to Pyromid, and Swenson would purchase the property for half of its fair market value and lease it back to Pyromid for ten years, subject to a repurchase option at the sale price plus an annual escalation. The rental was triple net and fixed by a rate of return on the sale price, not on fair rental value. After closing, the property continued to be listed for sale with the same broker, who had not taken a commission. The parties agreed that if the property did not sell, Pyromid would exercise the lease option to repurchase it, but if the property sold, the parties would split the profit. Pyromid never made a lease payment, and Swenson took no action to terminate the lease.

Mills soon became interested in purchasing the property. Pyromid, with Swenson's consent, assigned its lease option to Mills and gave him a quitclaim deed. The broker received a commission on the transaction.

Two years later, Swensen discovered a construction lien against the property, and terminated the lease by eviction. Mills exercised the option to repurchase the property and tendered the price into escrow, claiming that the eviction did not terminate his equitable mortgage interest and right of redemption, which could be terminated only through foreclosure.

The court found that Hait/Pyromid and Swenson intended to convey and receive the property as security for the fulfillment of an obligation to repay a loan through lease payments or repurchase of the property through exercise of the option. The court ruled that the structure of the transaction was not determinative, and that the form of the instrument of conveyance was not material. The court outlined a number of factors it considered in determining the parties' interest. Applying these factors, the court held that the transaction was a security agreement rather than a sale/leaseback, and remanded the case for entry of a judgment declaring Mills's equitable interest in the property. The court agreed with Mills that his interest can be terminated only by foreclosure.

Thus, a loan by any other name is still a loan. And a quitclaim deed may not be absolute, but may reserve a right of redemption. The moral of the story is never to rely on transfers by quitclaim deed, and always use a bargain and sale deed or a warranty deed.

Mary W. Johnson

Swenson v. Mills, 198 Or App 236, 108 P3d 77, rev den, 339 Or 156, 119 P3d 224 (2005).

■ NINTH CIRCUIT ADDRESSES SEATTLE'S WTO PROTEST EXCLUSION ZONE

Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005), involved police procedures and actions during the World Trade Organization (WTO) meeting in Seattle from November 30 to December 3, 1999. The plaintiffs sought declaratory relief and damages over the city's imposition of an emergency order and requested class certification for those arrested during the disturbances but not convicted of any crime. The trial court granted summary judgment to the city on the plaintiffs' facial challenges, denied the plaintiffs' motion for summary judgment on some of the as-applied facets of the order, and denied class certification.

The Ninth Circuit reviewed the matter de novo and explained that there had been disturbances in downtown Seattle several weeks before the WTO meeting, and that these disturbances also involved property damage. Protests and violence increased on the first day of the WTO meeting, causing a "lock down" of the meeting venue and escalating into assaults on police, as well as property damage. On the afternoon of the first day of the meeting, Seattle's mayor declared a civil emergency under the city code and imposed a general curfew, while the governor called out the National Guard. The mayor's Civil Emergency Order No. 3 prohibited entry, with some exceptions, of persons into the meeting vicinity and authorized fines and/or imprisonment for violations under the city code. Some protestors defied the order and there were 300 arrests.

The plaintiffs claimed that the order was facially not a constitutional time, place, and manner restriction and that it was unconstitutionally applied because only WTO protestors were arrested under it. Turning first to the facial challenge, the court said it must be shown that the order was content neutral, was narrowly tailored to serve a significant governmental interest, and left open alternative channels of communication.

The court found the order content-neutral because it did not turn on the content of the protestors' message, nor favor a certain position over another, nor act pretextually, though it did determine places in which all speech could not occur. Exemptions given to businesses and shoppers to enter the restricted zone did not turn on their position on the WTO and there was no evidence that these persons were a problem to law enforcement. The court held that the order was narrowly tailored to serve a significant governmental interest—*i.e.*, the interest in public order—that could not have been more efficiently achieved without the order. The court said that the violence against persons and property was facilitated by the large number of innocent protestors, whose presence impeded police response to criminal acts, and that the police were unable to discern violent from non-violent protesters. The boundaries of the restricted area were set by the conference center and by delegate hotels. The order may or may not have been the least restrictive means of serving public order, but it was more efficient than the situation absent the order. Finally, there were adequate alternative channels of communication, because protestors could communicate their message outside the zone and indeed adjacent to the meeting center. This constituted a reasonable opportunity for the protestors to have their message heard. Because the court found the order to be a reasonable time, place, and manner restriction, it did not reach the plaintiffs' prior restraint contentions.

As to the plaintiffs' claims that the police were given unfettered discretion to allow persons to enter the restrictive zone or not, the court conceded that a reasonable amount of discretion had been given in order to allow permitted activities such as working or shopping. Because *all* protest activity was banned within the exclusion zone, the police did not have discretion to favor some protestors over others.

The court then turned to the "as applied" challenges and noted that the city may be liable for actions of its police only if those actions were unlawful and a product of city custom or policy (*e.g.*, longstanding practice, the decision of a policy maker, or ratification of the conduct by the city). There were several affidavits by those who were told they could enter the zone only if they removed protest signs or stickers. Because there had been no discipline for police ordering removal of these signs and stickers, the court reversed the denial of certification of the proposed class and determined that there were genuine issues of material fact regarding city liability. However, the court dismissed the actions brought against the mayor and police chief because there was no evidence of inadequate training or supervision, or of personal culpability or inadequate or reckless conduct in their part.

As to the individual incidents, the court reversed summary judgment for the city on an arrest for blocking an intersection and interfering with a police officer where there was deposition testimony and a videotape that contradicted the city's position. Similarly, a Fourth Amendment claim arising out of the same facts was remanded for trial, as was a civil rights claim. Another grant of summary judgment was affirmed because the only challenge in that case was based on the constitutionality of the order. A further summary judgment against an individual protestor was affirmed in favor of the city because searching of backpacks was not shown to be a customer practice of the city or to otherwise fall into a category by which the city may become liable.

A final challenge to the grant of summary judgment to the city against a protestor included the seizure of a protest sign. The trial court found the officer's conduct arose out of a belief that the protestor had violated the order and that exigent circumstances existed. While the officer could have arrested the protestor and seized a sign without a warrant as an incident of arrest, the officer did not do so. The court declined to allow incidental seizures of property where no arrests were made. Thus, there was a constitutional violation. For a civil rights violation, the constitutional violation must involve a "clearly established" right. The court reversed the trial court determination and remanded the matter for trial but sustained summary judgment on the First Amendment issue because the protestor was unable to show that the seizure had been motivated by opposition to the protestor's political beliefs or to chill the protestor's speech.

Judge Paez concurred and dissented, finding the order to be content-neutral but that it was neither narrowly tailored nor left open adequate channels of communication. Judge

Paez agreed with the majority on its disposition of the as-applied claims, but stated that the order did not give sufficient guidance to law enforcement personnel and was in fact hostile to the WTO protest. The dissent also disagreed with the majority over the justification for the 25-square-block exclusion zone, the extent of the violence, and the justification for the order. Relying principally on a report given to the city council on the police activity in connection with the protest, Judge Paez cited inadequate planning and response to the violence. He noted that the restrictions were more likely to fall on those having protest stickers or signs, who were more likely to be searched, stopped, or excluded from the zone. Judge Paez cited a number of examples to illustrate the point. The dissent pointed out the 25 square blocks were a public forum and found the order overly broad as to the area covered and as to its scope because it banned all forms of protest within that area and it allowed entry to people who did not bear protest signs or stickers in the zone. While the "least restrictive means" standard does not apply, the Constitution does require that speech be restricted no more than is necessary and must target the evil it seeks to remedy. Bearing protest stickers alone should not have resulted in arrest or exclusion.

Finally, Judge Paez found other alternative means to achieve public order and noted that many of those who were arrested were not charged with any crime. Moreover, he found the order vague and subject to great discretion in its implementation. Judge Paez would have remanded a greater portion of the trial court decision for trial on the merits.

The majority's decision on the as-applied claims was thoughtful and the dissent appeared to join that portion of the opinion. While the facial aspects of the challenged order were upheld, the dissent raises some troubling points over whether the "narrowly tailored" requirement was actually met. These points should be reviewed by those representing police departments. The temptation to second-guess the police, who must act instantly in a complex world, is inviting, but the job of the courts is to examine these cases to assure that First Amendment rights are not trampled in an emergency.

Edward J. Sullivan

Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005).

Appellate Cases—Landlord/Tenant

■ *LEASE DRAFTING 101: BE SURE THE CONTRACT CONTAINS ALL THE TERMS TO WHICH THE PARTIES HAVE AGREED*

Aero Sales, Inc. v. City of Salem, 200 Or App 194, 114 P3d 510 (2005), addresses the burden of proof necessary to reform an existing lease to include an alleged antecedent agreement between the parties that is not captured in the written contract.

Aero Sales leased property at McNary Field in Salem for an aircraft hangar, which it later subleased to the Oregon State Police. The leased property abutted the existing south taxi-way at the airport. At the time the lease was being negotiated, the airport commission was planning the construction of a new north taxi-way. The final location of the north taxi-way had not yet been determined at the time the city and Aero Sales entered into their lease.

Eventually, the new north taxi-way was built 20 feet north of Aero Sales' leased property, and the intervening land was leased to a third party, which refused to grant Aero Sales access to the north taxi-way. Aero Sales sued, alleging (among other claims) that its lease should be reformed to capture its antecedent agreement with the city that if the north taxi-way ultimately did not abut its leased property, the city would either reserve access for Aero Sales in any subsequent lease, or would lease additional property to Aero Sales sufficient to give it access.

The trial court rejected Aero Sales' reformation claim, and the court of appeals affirmed. The Oregon Supreme Court has established a three-part test for reformation of a contract. *Jensen v. Miller*, 280 Or 225, 228–29, 570 P2d 375 (1977). Resolution of Aero Sales' reformation claim, however, turned solely on resolution of the first element, which requires proof by clear and convincing evidence that there was an antecedent agreement to which the contract can be reformed.

The court first rejected Aero Sales' claim that the lease should be reformed to include a promise that the city would reserve access to the north taxi-way for Aero Sales in any third-party lease. The court found that Aero Sales had submitted no evidence that it and the city had reached such an agreement prior to execution of the lease.

Aero Sales' second argument, that the city had promised to later lease any additional property to Aero Sales needed to access the north taxi-way, had some evidentiary support in testimony that the city's representative had made an oral promise to that effect prior to lease execution. The court, however, rejected Aero Sales' second argument as well. First, it (like the trial court) chastised Aero Sales, a sophisticated business entity, for relying on an alleged oral promise rather than ensuring that its lease include specific provisions protecting its right of access to the north taxi-way. Further, the court found that the statement was insufficiently specific for the court to determine the terms of any antecedent agreement between the parties. For example, there was no evidence from which the court could determine whether the additional property would be leased to Aero Sales at no cost, at a rent proportional to the existing lease, or under terms to be negotiated at a later date. Consequently, Aero Sales had not met its burden of proof to provide clear and convincing evidence of an antecedent agreement and was not entitled to reformation of its lease.

This case demonstrates that in a transaction between sophisticated business parties, the courts will be disinclined to accept a party's claim that its lease or contract did not capture all the terms that were agreed to in the course of negotiations. Aero Sales' problem could easily have been avoided by

including a specific provision for access to the north taxi-way in its lease. Although the court did not say so, the absence of such a provision probably contributed to skepticism about Aero Sales' claim, and at any rate (in the words of the trial court), Aero Sales' representatives had "no one but themselves to blame for the situation they [found] themselves in."

David J. Petersen

Aero Sales, Inc. v. City of Salem, 200 Or App 194, 114 P3d 510 (2005).

Appellate Cases—Takings

■ ONLY SO MANY BITES AT THE APPLE: NINTH CIRCUIT LOOKS AT CLAIM PRECLUSION IN TAKINGS CONTEXT

In June, the Ninth Circuit examined claim preclusion in the context of takings litigation. *Spoklie v. State of Montana*, 411 F.3d 1051 (9th Cir. 2005), involved challenges to the application of a Montana ballot measure on a number of fronts. The appellants owned and operated "alternative livestock" ranches in Montana. They raised a variety of game animals and then allowed hunters to shoot preselected animals under the supervision of guides for pay.

In November 2000, Montana voters approved a ballot measure that effectively banned hunting for pay on "alternative livestock" ranches. The appellants began a series of lawsuits challenging the ballot measure, which was known as I-143. One set of appellants, the Kafkas, filed the lawsuits that resulted in the claim preclusion ruling in this case.

The Kafkas began their challenges in February 2001 with a lawsuit in federal district court against the Montana Department of Fish, Wildlife & Parks seeking an injunction against the enforcement of I-143 on federal and state constitutional grounds. When the court denied their request for a preliminary injunction, they dismissed that lawsuit voluntarily.

In April 2002, they filed a similar case in Montana state court that included takings claims under both the U.S. and Montana constitutions. The state trial court dismissed that lawsuit—including the takings claims—in February 2005.

In November 2002, the Kafkas filed a second federal case that also included the takings claims. They sought a stay of that case while their state court case was pending. The federal district court denied their motion for a stay and eventually dismissed their case in its entirety in September 2003.

The Kafkas appealed the second federal case. The Ninth Circuit affirmed. In doing so, the Ninth Circuit first noted that when the federal district court dismissed the Kafkas' claims the state court had not yet entered a judgment in the parallel litigation. But, the state court had done so by the time the federal case was on appeal. Therefore, the Ninth Circuit applied claim preclusion to the case. Under Montana law, which is roughly similar to that in most other jurisdictions, prior resolution of a claim acts as a bar to the relitigation of the same claim if (1) the parties in the second case are the same as in the first, (2) the subject matter of the second case is the same, (3) the underlying issues are the same as they relate to the basic subject of the lawsuit, and (4) the capacities of the persons involved are the same.

As the Ninth Circuit put it, "[a]ll four requirements are easily met here." 411 F.3d at 1056. The parties (and the capacity in which they were acting), the subject matter, and the issues were all the same—including both the state and federal takings claims involved.

The significance of *Spoklie* lies in the interplay between preclusion and ripeness. Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), "as applied" federal takings claims are not "ripe" until a state fails to provide compensation. A few days after *Spoklie*, the *U.S. Supreme Court in San Remo Hotel, L.P. v. City and County of San Francisco*, 544 U.S. ___, 125 S. Ct. 2491 (2005), dealt with the related concept of issue preclusion and found that *Williamson County* does not prohibit federal takings claims from being pled in the alternative in the predicate state case. Putting the two cases side-by-side suggests that, at least in jurisdictions where state takings law is coextensive with federal takings law, it is very difficult to relitigate issues in a separate federal proceeding that have been resolved in a state forum.

Mark J. Fucile

Spoklie v. State of Montana, 411 F.3d 1051 (9th Cir. 2005).

Appellate Cases—Land Use

■ OREGON COURT OF APPEALS ADDRESSES POLK AND YAMHILL COUNTIES' ATTEMPTS AT "COLLABORATIVE REGIONAL PROBLEM SOLVING"

Polk County v. Department of Land and Conservation & Development, 199 Or App 501, 112 P3d 409 (2005), involved two appeals of an LCDC order sending a periodic review work task back to Polk County. LCDC ordered the county to take an exception to Statewide Land Use Planning Goal 3 in order to designate an area as an "urban unincorporated community." Both the county and 1000 Friends of Oregon appealed the LCDC order.

Polk County argued that in ordering it to take an exception to Goal 3 to justify the unincorporated community designation, LCDC had improperly interpreted and applied the statutory provisions on "collaborative regional problem solving," ORS 197.652–.658. Those provisions provide that a county may join with other local governments in a collaborative process to seek "resolution of land use problems in a region." ORS 197.654. They allow LCDC to acknowledge plan amendments that "do not fully comply with the rules of the commission that implement the statewide planning goals" if, among other things, agreement is reached by all local participants and the commission. ORS 197.656(2).

Years ago, Polk County joined with Yamhill County and

other jurisdictions in a regional problem-solving process to address growth in two of the unincorporated communities being considered in this work task. Unfortunately for Polk County, Yamhill County withdrew from the process prior to an agreement being reached. Still wanting to avoid taking an exception to Goal 3, Polk County argued that agreement among the remaining jurisdictions was sufficient to give it the benefit of the statute. The court, noting that ORS 197.656(2) only authorizes an exception if agreement is "reached by *all* local participants," affirmed LCDC's conclusion that Polk County could not avail itself of that statutory scheme.

In its petition, 1000 Friends argued that LCDC had erroneously applied its unincorporated community's administrative rule by allowing inclusion of too much land in that category. As a threshold issue, however, it faced the county's assertion that it lacked constitutional standing to appeal LCDC's order under *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001). In attempting to make the necessary showing that LCDC's decision would have a "practical effect on its rights," 1000 Friends argued that part of its mission was "protection of Oregon's quality of life through the conservation of farm and forest lands, the protection of natural and historic resources, and the promotion of more compact and livable cities." The commission's order would adversely affect these interests because it would allow encroachment of development on rural land.

Comparing this case to the situations in Utsey (where standing was denied) and *WaterWatch v. Water Resources Commission*, 193 Or App 87, 88 P3d 327, *rev allowed*, 337 Or 476 (2004) (where the applicant was found to have standing) the court held that 1000 Friends had not established the requisite "practical effect" in this case. In the court's view, 1000 Friends' argument "expresses only philosophical and political disagreement with LCDC's decision," rather than "'plausible, actual, concrete ramifications.'" 199 Or App at 507 (quoting *WaterWatch*, 193 Or App at 97). The *Polk County* opinion does not draw a bright line for the "practical effect" threshold, but does indicate that direct involvement in the local proceedings will be a relevant consideration.

Michael E. Judd

Polk County v. Dep't of Land Conservation & Dev., 199 Or App 501, 112 P3d 409 (2005).

■ WHAT EXACTLY IS THE PROPERTY'S PLAN DESIGNATION?

Knutson Family LLC v. City of Eugene, 200 Or App 292, 114 P3d 1150 (2005), concerned an application to rezone five parcels of property in the City of Eugene and the effect on that application of the relationship between the Eugene-Springfield Metro Plan and an area refinement plan. The requested rezone would allow more intensive commercial uses of the property than currently allowed. The city denied the application, and LUBA reversed the city's decision. A neighboring property owner who had intervened at the LUBA level appealed.

The city's denial was based upon a perceived conflict between the Metro Plan's apparent residential designation of the property and the property's commercial designation under the Willakenzie Area Plan (WAP). The WAP is a refinement plan that supplements the general Metro Plan, and the Metro Plan specifically authorizes local jurisdictions to "make more specific interpretations of [the Metro Plan's diagram] through refinement plans and zoning."

The property's designation under the Metro Plan was not clear. LUBA noted that because the Metro Plan did not provide specific referents for specific properties, the subject property could arguably lie within or outside a commercial designation under the Metro Plan. Where such ambiguities exist, LUBA determined that the WAP is used to establish the plan designation. This determination was based upon the Metro Plan's language and a similar conclusion reached by LUBA in *Carlson v. City of Eugene*, 3 Or LUBA 175 (1981). The WAP identified the plan designation of the property as commercial, and LUBA therefore concluded as a matter of law that the property is designated commercial.

At the court of appeals, the petitioners argued that the property's plan designation was a question of fact, and that substantial evidence existed in the record to support the city's determination that the property's plan designation was residential. The court of appeals disagreed with that assertion, noting that the relationship between the Metro Plan and the WAP and the methodology for determining the property's plan designations are legal issues governed by the plans themselves.

Because the WAP served to resolve the property's ambiguous designation under the Metro Plan, and because the Metro Plan authorized local jurisdictions subject to the plan to remedy such inconsistencies through the use of refinement plans, the court of appeals affirmed LUBA's reversal of the city's decision to deny the zone change request.

David Doughman

Knutson Family LLC v. City of Eugene, 200 Or App 292, 114 P3d 1150 (2005).

■ COURT HOLDS THAT LATE APPEAL LACKING BASIS FOR TIMELINESS IS UNTIMELY

Cutsforth v. City of Albany, 199 Or App 442, 112 P3d 395 (2005), involved the City of Albany's resolution to authorize annexation of a 310-acre area inside the city's urban growth boundary pursuant to city ordinances and ORS 222.750. That statute allows annexation of land that is surrounded either by a city or by a city and a "stream" without the consent of the owners of the annexed land. The annexation area is bounded by the Calapooia River on three sides and by the city limits on the fourth.

Before adopting the resolution, the city council mailed individual notice to the owners of land within the area to be annexed and held a public hearing, at which many of those owners spoke. The mailed notice was not required by city law but the hearing was. At the end of the hearing, the city council adopted a resolution referring the proposed annexation to the city's voters, and the mayor signed it, all in accord with city law.

Thirty-five days later, thirty-six named petitioners, including persons who had spoken at the city hearing, appealed the city's resolution to LUBA, which dismissed the appeal as untimely based on ORS 197.830(9). The court of appeals affirmed for a slightly different reason.

Petitioners argued before LUBA that they were obligated to file the appeal within 21 days after receiving actual notice, based on ORS 197.830(3), because the city had not mailed notice of the decision adopting the resolution to owners of land within the annexed area. LUBA held that the city's decision was a legislative one to which that section of the statute does not apply, so the appeal was due within 21 days after the mayor signed the resolution. Before the court of appeals, petitioners argued that LUBA had erred in concluding that ORS 197.830(3) does not apply. The court concluded it did not have to resolve that issue, given the facts and the briefs.

The court agreed with LUBA that "nothing in the record or in the parties' briefing explains why those petitioners who actually attended the . . . hearing at which the city made the challenged decision lacked notice of it or why they waited more than 21 days to appeal it," presumably because, absent extraordinary circumstances, they had actual notice of the decision the city council made at the hearing. 199 Or App at 446. Given the absence of any explanation of why those petitioners had waited beyond the 21-day deadline in ORS 197.830(9), there was "no basis on which it reasonably could be concluded that their appeal was timely." 199 Or App at 446.

Similarly, with respect to the petitioners who had not attended the city hearing, the court said "there is no evidence in the record that specifies when they learned of the city's decision and, therefore, no means to determine whether the filing was timely, even under ORS 197.830(3)(b)."

Larry Epstein

Cutsforth v. City of Albany, 199 Or App 442, 112 P3d 395 (2005).

Cases from Other Jurisdictions

■ NEW JERSEY COURT UPHOLDS TOWNSHIP'S USE OF EMINENT DOMAIN FOR "SLOWING DOWN" RESIDENTIAL DEVELOPMENT

Mt. Laurel Township v. Mipro Homes, LLC, 379 N.J. Super. 358, 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005), involved a developer's contention that a township improperly used its eminent domain power to slow growth. The township had been involved in nationally significant growth management litigation and had to open its private lands for more intense residential development. After doing so for many years, the township decided to slow growth and provide for more public open space. In 1998 the township referred to the voters a proposal for raising property taxes in order to acquire open space land. The voters approved the measure.

Following that approval, the township adopted an open space plan that targeted land previously zoned for residential use for open space acquisition, because it was less expensive, would not detract from the township's commercial or industrial tax base, and would remove from its residential inventory land that would be more expensive to service.

Mipro Homes received preliminary residential subdivision approval but, after receiving further voter approval for additional tax funds for open space, the township began proceedings to acquire Mipro Homes' property. Before eminent domain proceedings were begun and after final subdivision approval was granted, the developer had made site improvements. Mipro Homes claimed in its answer to the eminent domain complaint that the township was using eminent domain for an improper purpose, *i.e.*, to slow growth. The town amended its open space plan to include all undeveloped residential parcels as potential acquisition objects.

On cross motions for summary judgment, the trial court found eminent domain to be facially valid but found that the true purpose of that exercise in this case was to prevent residential development and that there was no public need for the open space at that time.

The appellate court held that the township had statutory authority for open space acquisition, that it may exercise that authority even without a specific plan for the ultimate use of the land to be acquired, that selection of property for open space acquisition does not constitute an improper exercise of the eminent domain power, and that there was insufficient evidence of abuse of that power in this case.

The court turned first to whether the eminent domain power could be used even if the property was not designated for open space in the town's comprehensive plan, noting that the conservation element of that plan was optional. New Jersey law provides for other means by which open space needs are weighed, including state grant programs, which in this case were used to secure funds to acquire the subject site. The township planning board's decision to not refer the acquisition proposal to the voters was also not fatal. New Jersey law made such referral for approval optional for local governments, and Mt. Laurel had chosen not to use that procedure.

New Jersey's townships may condemn lands for public use under multiple statutory, constitutional, and local ordinance grounds. The developer contended that the township must show a "need" for the land and an end-use plan. The court concluded that acquisition of lands for open space was a public use and that it was not necessary for the township to have a plan to put the land to immediate and active use.

Finally, the court said it would not examine the township's motive in the absence of evidence of bad faith, fraud, or manifest abuse. The exercise of eminent domain is a legislative act. Even if the motive was to slow down growth, that motive is not sufficient to invalidate the process, just as a site development does not prevent the use of eminent domain. The fact that the land had been targeted for "high end" housing showed that it would not interfere with New Jersey's affordable housing constitutional interests. The trial court judgment was reversed and the eminent domain action reinstated.

This case involves the intersection of the police and eminent domain powers and avoids the temptation for the courts to second-guess the wisdom or motive of local government

policy in eminent domain actions.

Edward J. Sullivan

Mt. Laurel Twp. v. Mipro Homes, LLC, 379 N.J. Super. 358, 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005).

■ PLANTING TREES IN FRONT OF BILLBOARDS NOT A TAKING OR BREACH OF CONTRACT, SAYS CALIFORNIA APPELLATE COURT

Regency Outdoor Advertising, Inc. v. City of Los Angeles, 25 Cal. Rptr. 3d 73 (Cal. Ct. App.), *petition for review granted*, 28 Cal. Rptr. 3d 645 (Cal. 2005), involved a claim for breach of contract and inverse condemnation by the plaintiff billboard company because the defendant city planted palm trees in front of its six billboards and in the median strip in the middle of the street leading to Los Angeles International Airport, thereby obstructing views of the billboards. The city obtained summary judgment in the breach of contract claim and won the inverse condemnation claim at trial on both the merits and on the lack of damages. The trial court awarded expert witness fees and costs in the amount of $104,145.00 to the city. The defendant appealed.

The plaintiff pointed to the takings clause of the California constitution, which entitles property owners to just compensation when property is taken "or damaged," even without physical intrusion. The court said that whether property is taken or damaged is a mixed question of fact and law, and one that an appellate court would look at in reviewing the legal questions de novo. The trial court found, as a matter of law, that there was no valid claim for loss of visibility.

Under revisions to California statutory law regarding eminent domain, it was possible that damages might be awarded for the impacts of public improvements on properties not taken from a landowner, so the appellate court found that the trial court misapplied the law.

However, the appellate court found that the trial judge reached the correct result in any event. After surveying the case law advanced by the plaintiff, the court concluded that damages may be paid for a loss of access or reasonable view as part of severance damages when eminent domain is used or a public improvement is constructed, if either is an unreasonable impairment. However, the loss of visibility of the plaintiff's property alone was not actionable. The court concluded,

> This conclusion follows logically from the established law that there is no obligation to compensate a landowner for diminution of property value resulting from highway changes which do not interfere with access, but cause diversion of traffic or circuitry of travel beyond an intersecting street. If reduction of a business's value caused by the rerouting of traffic is not compensable, then there is no reason to reach a different conclusion where the routing remains the same, but the visibility of the business is changed by the planting of trees.

25 Cal. Rptr. 3d at 80–81 (citation omitted).

The court also rejected the plaintiff's contention that the California Outdoor Advertising Act was applicable. The Act would have required government payment if a billboard were removed or if there had been interference with the maintenance of a billboard. These thresholds were not reached in this case. Having found no cause of action for a taking, the court did not reach the issue of damages.

Finally, the court reviewed the award of costs to the city, which had made a settlement offer to the plaintiff thirty days or more before trial to pay it $1,000 and to remove one of the trees. The offer was declined and the defendant prevailed at trial. Pursuant to statute, the court found the city entitled to the costs awarded by the trial court, including expert witness fees of $89,295 under California statutory law.

This case demonstrates that a city's use of its public improvement powers does not necessarily raise a cause of action for adjacent landowners whose expectations are not met.

Edward J. Sullivan

Regency Outdoor Adver., Inc. v. City of Los Angeles, 25 Cal. Rptr. 3d 73 (Cal. Ct. App.), *petition for review granted*, 28 Cal. Rptr. 3d 645 (Cal. 2005).

■ FEDERALLY APPROVED RAILROAD PLANS AVOID LOCAL CONDEMNATION, SAYS SIXTH CIRCUIT

City of Riverview v. Surface Transportation Board, 398 F.3d 434 (6th Cir. 2005), involved land along the Detroit River originally owned by the Riverview-Trenton Railroad Company that it once used as a railroad facility. The plaintiff cities wished to condemn the land for redevelopment and discussed acquisition with the corporate successor owner of the railroad. However, that company sold the land to a third corporation, which quitclaimed the property to a fourth company incorporated under the state's railroad laws. The fourth company proposed to use the land for an intermodal transportation facility. The company requested and received approval of these plans from the defendant, the Surface Transportation Board (STB), the successor to the Interstate Commerce Commission. The STB has exclusive jurisdiction over interstate rail lines. The company also sought a state court injunction, contending that local governments are preempted from condemnation if the land is approved for a rail line under an STB exemption.

The cities sought to revoke the exemption granted by the STB, contending that the company's application was a sham made to avoid condemnation. The STB reconsidered the plans and an environmental assessment and reaffirmed its former action, subsequently determining that the project could proceed. The cities appealed that decision to the Sixth Circuit.

The Sixth Circuit found adequate and substantial evidence in the record that the proposed transportation facility was legitimate and that the STB decision was not arbitrary or irrational. The STB was aware of the pending condemnation action and, the court said, considered these issues in granting the exemption. The STB had in fact said it would reopen the

case if no action were taken to construct the facility within three years. In addition, there were no specific condemnation plans by the cities in place at the time of the proceedings.

The court also upheld the order against other challenges based on NEPA, the Coastal Zone Management Act, and an executive order from President Clinton that included the Detroit River in the American Heritage Rivers Initiative. The STB decision was thus affirmed.

Time will tell whether the proposed intermodal transportation facility will be constructed or whether this effort was indeed a sham to avoid condemnation. But it is apparent from this case that condemnation can be defeated by the invocation of railroad plans.

Edward J. Sullivan

City of Riverview v. Surface Transp. Bd., *398* F.3d 434 (6th Cir. 2005).

Announcements

■ 2005 GOODBYES AND HELLOS

Publishing the *Real Estate and Land Use Digest* would not be possible without the invaluable assistance of the Assistant Editor. Nathan Baker, Staff Attorney with Friends of the Columbia Gorge, has served as Assistant Editor for the past three years. During his tenure, Nathan has expanded the *Digest's* coverage to include cases from Washington and the Columbia River Gorge, reinstated more consistent coverage of landlord/tenant cases, increased the roster of contributing authors, and overseen the *Digest's* transition from a paper to electronic publication. Although Nathan's tenure as Assistant Editor has come to an end, he will continue to contribute to the *Digest* as an author. He also plans to focus on his law practice and spend more time with his wife, Mandy, whom he married on September 3, 2005.

Joining the *Digest* as Assistant Editor is Natasha Ernst. She is a 2004 graduate of Lewis & Clark Law School, served as Chief of Staff for Representative Brad Avakian during the 2005 legislative session, and is currently a Contracts Manager at Portland General Electric.

On behalf of the RELU Section, we thank Nathan for his excellent work for the *Digest* and welcome Natasha. If you have questions about the *Digest's* publication schedule or wish to submit an article for publication, please contact Natasha at natasha.c.ernst@gmail.com.

■ WANTED: REAL ESTATE AUTHORS

The *RELU Digest* would not exist without a number of volunteer attorneys, and new faces are always welcome. If you would like to become more involved in the Section by summarizing recent case law in the real estate field or by submitting an article of interest to real estate practitioners, please contact the Editors.

Presorted Standard
US Postage
PAID
Portland, OR
Permit #341

Oregon State Bar
Section on Real Estate and Land Use
5200 SW Meadows Road
Lake Oswego, OR 97035-0889

Recycled/Recyclable