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Highlights

Appellate Cases—Takings

■ *THE WHOLE PARCEL RULE APPLIES UNDER OREGON CONSTITUTION, SAYS OREGON SUPREME COURT*

In *Coast Range Conifers, LLC v. State ex rel. Board of Forestry*, 339 Or 136, 117 P3d 990 (2005), the Oregon Supreme Court held that state wildlife regulations that prevented the plaintiff from logging nine acres of a 40-acre parcel did not constitute a taking under Article I, section 18 of the Oregon constitution, nor under the Fifth and Fourteenth Amendments to the U.S. Constitution.

In 1996, the plaintiff, which is in the business of logging timber, acquired a 40-acre parcel of timber in the Coast range as part of a land exchange with the U.S. Forest Service. In 1998, two bald eagles, which are listed as a threatened species under the federal Endangered Species Act, 16 U.S.C. §§ 1531-1544, were seen at a nest within the 40-acre tract. The plaintiff filed a written plan with the State Forester before engaging in logging activities that might damage the nest site as required under state law. *See* OAR 629-665-017(1)(d), 629-665-0020, and 629-665-0220(1). After the plaintiff's initial plan to log within 330 feet of the nest site was rejected as failing to provide sufficient protection, the plaintiff modified its plan so that a 400-foot buffer would be provided and the State Forester approved the plan. The plaintiff logged 31 of the 40 acres consistent with the plan, then submitted a new plan to log the remaining nine acres, which the State Forester denied. The Board of Forestry upheld the State Forester's ruling and the plaintiff filed an action alleging that the state's refusal to let it log the remaining nine acres took property in violation of Article 1, section 18, of the Oregon Constitution and the Fifth Amendment to the U.S. Constitution.

The plaintiff argued that the nine-acre tract had no economic value unless it can be logged. The state did not dispute that, but argued that the proper focus was the 40-acre parcel. The fact that the regulation prevented use of part of the property did not mean that the property, as a whole, had no economically viable use. The trial court agreed, and the plaintiff appealed.

The Oregon Court of Appeals reversed. 189 Or App 531, 76 P3d 1148 (2003). The court of appeals recognized that under the federal Constitution, the U.S. Supreme Court has applied the "whole parcel rule" in determining whether a regulation denies an owner any economically beneficial use of his or her property. However, it found that the Oregon Supreme Court had "effectively rejected" the whole parcel rule under the state constitution, and therefore, the court of appeals concluded that in determining whether the regulation deprived the plaintiff of all economically beneficial use of the property, it should focus on the nine-acre parcel that the regulation affected rather than the 40-acre parcel that the plaintiff owns. 189 Or App at 550. Because the regulation deprived plaintiff of all economically viable use of the nine acres, the court of appeals held that the state had taken that part of the plaintiff's property in violation of Article I, section 18, of the Oregon constitution.

The Oregon Supreme Court reversed, holding that the whole parcel rule applies under both Article I, section 18 of the Oregon constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.

First, the court rejected the portion of the state's argument that Article I, section 18, applies only to physical or title takings, and has no application to regulations that limit the uses of property. The court pointed to cases recognizing takings by other than physical means, such as flooding, denial of access to a street, and overflights, which are the equivalent to a physical taking.

Second, the court rejected the plaintiff's argument that rather than applying cases that distinguish between physical takings and regulatory takings, the

courts should apply a "unified theory" of takings law, which recognizes that there is a taking whenever government actions "substantially interfere with the use" of a person's property. Such a theory would be contrary to *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 189, 935 P2d 411 (1997), which held that mere regulation is not enough for a taking as long as the property retains some economically viable use, as well as *Suess Builders v. City of Beaverton*, 294 Or 254, 259, 656 P2d 306 (1982), and *Dodd v. Hood River County,* 317 Or 172, 182, 855 P2d 608 (1993), which recognized that different legal tests applied to physical takings and regulatory takings.

Third, the court rejected the plaintiff's interpretation of *Suess Builders* and *Boise Cascade*, saying that neither case addressed the applicability of the whole parcel rule. To the contrary, the court said it had applied, albeit without discussing, the whole parcel rule in deciding regulatory takings claims, *see, e.g., Dodd*, 317 Or at 185-86, and therefore whether the whole parcel rule applies under Article I, section 18 was an open question.

Fourth, the court declined to adopt a rule contrary to the whole parcel rule because such a rule would mean that a ten-foot setback ordinance would be a taking of the ten-foot strip even though the property owner remained free to place a home elsewhere on the lot. Instead, a court should consider a property owner's ability to use the whole parcel in determining whether the property retains any economically viable use. The court also rejected the plaintiff's argument that its interest in the timber is separate from its interest in the real property. Timber is part of the underlying real property unless it is subject to a contract to be cut, and in this case, no contract to cut existed, so there was no basis for treating the timber interest as separate from the plaintiff's interest in the real property.

The court then turned to the federal Constitutional claims. The court relied upon the recent Supreme Court decision in *Lingle v. Chevron*, 544 US __, 125 S. Ct. 2074 (2005), to reject the plaintiff's argument that a regulation becomes a taking whenever it fails to "substantially advance" a legitimate state interest. *Lingle* held that the so-called *Agins* test was not a separate basis for finding a taking but rather one of the "factors" to be considered under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31, 98 S. Ct. 2646 (1978).

Next, the court rejected the plaintiff's theory that because the nine acres had no economic value the state had taken the property under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L Ed 2d 798 (1992), stating that although the U.S. Supreme Court had questioned the whole parcel rule in Lucas, it had reaffirmed the rule twice in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331, 122 S. Ct. 1465 (2002), and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 644-45, 113 S. Ct. 2264 (1993).

Next, the court rejected the plaintiff's third federal takings argument: that the regulation resulted in a physical occupation of its land and is a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982) (ordinance authorizing company to place permanent cable on apartment building constituted a partial taking). The court said a regulation that prevents a property owner from altering naturally occurring conditions differs from rules that authorize a third person to enter and occupy another's property, and that the reasoning in *Loretto* only addresses the latter class of rules.

Finally, the court rejected the plaintiff's fourth federal takings argument: that a jury should decide whether the regulation is a taking under the balancing test set out in *Penn Central*. The court said *Penn Central* makes clear the question whether the undisputed historical facts establish that a regulation is a taking presents a question of law for the court. The court conceded that a takings case may be remanded to allow a trial court to determine factual issues (*e.g.*, historical facts regarding impairment of an owner's investment-backed expectations). However, in this case, the court said, rather than arguing that the historical facts were disputed, the plaintiff argued that a jury should weigh the plaintiff's investment-backed expectations against the state's interest in enforcing wildlife regulations to determine whether the regulations took property. Under *Penn Central*, the weighing of such factors based on historical facts is a question of law and, therefore, the trial court properly reached the merits of the plaintiff's claim.

The court concluded that the state wildlife regulations that had been applied to prevent the plaintiff from logging nine acres of the 40-acre parcel did not effect a taking under Article I, section 18 of the Oregon constitution, nor under the Fifth and Fourteenth Amendments to the U.S. Constitution.

John Pinkstaff

Coast Range Conifers, LLC v. State ex rel. Bd. of Forestry, 339 Or 136, 117 P3d 990 (2005).

■ *UNITED STATES COURT OF FEDERAL CLAIMS DENIES SUMMARY JUDGMENT IN TAKINGS CLAIM FOR MISIDENTIFIED WETLAND*

Sartori v. United States, 67 Fed. Cl.263 (2005), involved cross motions for summary judgment after the plaintiffs obtained an appellate ruling that its land was, in fact, not subject to rules regulating jurisdictional wetlands by the federal government and therefore was not properly subject to a cease and desist order that had affected the property for more than five years. The plaintiffs purchased the land in 1989 as a part of a number of parcels within a Florida county. Subsequently, the U.S. Army Corps of Engineers

and EPA determined that the plaintiffs had graded some of the property in violation of federal environmental law because it was a wetland. These agencies then imposed a cease and desist order. The plaintiffs claimed a temporary taking based on a cash loss of $6.5 million during the period of the order, plus interest and attorney fees.

The plaintiffs claimed a temporary regulatory taking on two grounds: a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992), because the property could not be used in an economically viable manner for the period of the cease and desist order, and a taking under the three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

Before deciding either ground, the court evaluated whether the claims were ripe. Usually that determination requires agency action on a permit application. If no permit has been requested, there is normally no taking, even if the regulatory agency mistakenly thought a permit could not be issued. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1350 (Fed. Cir. 2002). In this case, however, the plaintiffs agreed to a study that they had paid for, including a wetlands determination that concluded the site was not a wetland. The federal government refused to follow this determination. The court said that under *Palozzolo v. Rhode Island*, 533 U.S. 606 (2001), there was a fact question as to whether the study and its results are the functional equivalent of a permit and constitute the Corps's final determination regarding the existence of a wetland for the purposes of ripeness. The court also determined that the cease and desist order did not prevent an application for a permit and that the Corps of Engineers had not required "corrective action." Therefore, summary judgment could not be granted on the ripeness issue.

The court then turned to the "parcel as a whole" rule. Citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 508 U.S. 602 (2002), the court found that this rule was both spatial and temporal in nature and that in Tahoe-Sierra, the United States Supreme Court had overruled two landowner-oriented cases to the contrary. *See Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986); *Loveladies Harbor, Inc. v. United States*, 15 Ct. Cl. 381, 391-93 (1998), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). Because the plaintiffs claimed that the land had been purchased in segments and was defined by natural and man-made barriers, the court concluded the factual record concerning these parcels should be developed and that summary judgment was inappropriate.

The court then turned to the two takings theories advanced by the plaintiffs. As to the temporary deprivation of all viable economic use under *Lucas*, the court called *Lucas* an "extraordinary case." Here, the plaintiffs had not shown that the inability to develop their property for many years amounted to a categorical taking under *Lucas*. As to the *Penn Central* factors, the court said that

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the first factor (economic impact on the plaintiff) must be weighed by applicable parcel as a whole principles; the second (reasonable investment-backed expectations) will depend on what a prudent investor might reasonably have thought; and the third (the character of the governmental action) will depend on the circumstances of the case.

In this case, the plaintiffs had purchased the land for agricultural use, the only reasonably economic use to which the land could be put, so the first factor appeared to support the plaintiffs (assuming that only a smaller site was appropriate for consideration under the parcel as a whole rule). The court also said there was a reasonable investment-backed expectation that the land could be used for agricultural purposes. Given recent case law, however, it was not clear that the denial of use for many years automatically amounted to a taking under the third *Penn Central* factor. Thus, the court denied summary judgment and ordered the case be set for trial.

The use of the *Penn Central* regulatory takings factors will often result, as it did in this case, with a case being set for trial instead of summary disposition.

Edward J. Sullivan

Sartori v. United States, 67 Fed. Cl. 263 (2005).

Appellate Cases—Land Use

■ *COURT REJECTS METRO'S SUBREGIONAL UGB EXPANSION RULES*

City of West Linn v. Land Conservation and Development Commission, 200 Or App 269, 113 P3d 935 (2005), involved a challenge by the cities of West Linn and Portland and 1000 Friends of Oregon to certain Land Conservation and Development Commission (LCDC) rules regarding the Metro urban growth boundary. The rules (OAR 660-026-0000 through 660-026-0040) "allow Metro to define 'subregions' within its regional urban growth boundary (UGB), allocate a regional need for land to those subregions, and amend its regional UGB if lands within or near a subregion are inadequate to accommodate the subregion's need." 200 Or App 272. Petitioners challenged the rules on the grounds that they were invalid under Statewide Land Use Planning Goals 2 and 14, and under ORS 197.298 (which establishes priorities for incorporation of land into UGBs). Because the court agreed with the petitioners' goal-based challenges, it did not address their statutory argument.

Before addressing the merits, the court dealt with two preliminary matters: the petitioners' standing and the nature of the court's review. Standing to seek judicial review of a rule is initially determined by ORS 183.400(1), which provides that "any person" may seek review of a rule in the Court of Appeals. Because the court easily determined that all of the petitioners met the definition of a "person" under the statute, it held that all three had statutory standing. However, it is also necessary for a petitioner to establish standing under the Oregon Constitution in order to challenge a rule. Constitutional standing requires that a petitioner "demonstrate that a decision in the case will have a practical effect on his or her rights." 200 Or App at 273 (*citing Kellas v. Dep't of Corrections*, 190 Or App 331, 334, 78 P3d 1250 (2003), *rev allowed*, 337 Or 282 (2004)). The court determined that the rules would have a practical effect on the interests of Portland and West Linn, but not on 1000 Friends of Oregon. 1000 Friends had only expressed a philosophical or political disagreement with the rules, but had not established that the rules would have a practical effect on it sufficient to confer constitutional standing. The court did, however, consider the arguments raised by 1000 Friends of Oregon, because they had been incorporated by the City of Portland into its brief.

Next, the court considered the nature of its review. Defendant LCDC had argued that because the petitioners' challenge to the rules was in the form of a "facial" challenge rather than an "as applied" challenge, Petitioners were required to show that the rules were not capable of any valid application under the Goals and statute. In essence, LCDC argued that that standard was no different from a challenge to the Constitutionality of a statute, and therefore, the petitioners could not prevail in their challenge unless they could show that the rules could not be validly applied under any set of circumstances. The court disagreed, holding that the question to be considered in a challenge under ORS 183.900 is whether the rule being challenged authorizes an action that "departs from the standard expressed in the [state-wide land use] goal" or relevant statutes. 200 Or App at 275.

The court then turned to the merits of the petitioners' goal-based challenges. The challenged rules were intended to implement Goals 2 and 14 and ORS 197.732. The court's decision turned on its analysis of the relevant portions of the Goals.

> Goal 14 provides that the establishment and change of a UGB must be based on the following factors:
>
> "(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
>
> (2) Need for housing, employment opportunities, and livability;
>
> (3) Orderly and economic provision for public facilities and services;
>
> (4) Maximum efficiency of land uses within and on the fringe of the existing urban area;
>
> (5) Environmental, energy, economic and social consequences;

(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and

. . .

(7) Compatibility of the proposed urban uses with nearby agricultural activities."

200 Or App at 278-79 (quoting Goal 14). The first two factors are referred to as the "need" factors and the remaining five factors are termed the "location" factors.

Further, Goal 14 requires that any proposed UGB change also meet the requirements of a goal exception under Goal 2, the relevant portion of which allows an exception if "[a]reas which do not require a new exception cannot reasonably accommodate the use." Goal 2.

As noted earlier, the rules under review would "allow Metro to define 'subregions' within its regional urban growth boundary (UGB), allocate a regional need for land to those subregions, and amend its regional UGB if lands within or near a subregion are inadequate to accommodate the subregion's need." 200 Or App at 272. Put another way, the rules permit Metro to conclude that the Goal 14 need factors have been met for the region based upon a finding of need within one or more of the identified subregions. Further, once a need is identified, the rules would allow Metro to expand its UGB if the need could not be accommodated by land in or near the subregion, without regard to whether there were other lands within Metro's wider planning area for which an exception was not needed.

According to the court, the issue presented was whether the challenged rules violate the legal standard "in determining whether to amend its UGB, Metro must consider the locational factors of Goal 14 in the context of its regional UGB and cannot limit its consideration and evaluation of those factors to the lands in or near a particular subregion." 200 Or App at 281.

In its analysis of the rules, the court found that the district (the metropolitan service district that administers the regional UGB) was required to determine the need on a regional basis before allocating the need to individual subregions. The court found this aspect of the application of the rules consistent with Goal 14 and its previous decisions (specifically, *Residents of Rosemont v. Metro*, 173 Or App 321, 327, 21 P3d 1108 (2001)). However, the court found fault with the method by which the rules sought to accommodate the identified need. The rules did not require the application of the locational factors of Goal 14 on a region-wide basis. Rather, the geographic scope of the analysis was limited by the rules to only those lands within or near the identified subregion. This the court found inconsistent with Goal 14. "Although the rules require that the district must justify its allocation of regional need to subregions, the findings that the district must make do not require the region-wide application of the *locational* factors to accommodate the regional need. Thus, we conclude that the rules depart from the legal standard expressed in Goal 14." 200 Or App at 284 (emphasis added).

Significantly, however, the Court did not opine that a regional evaluation of the locational factors of Goal 14 would necessarily prevent incorporation of land near the areas of identified subregional need, but rather only that the process must be consistent with Goal 14. Whether Metro will decide to revise its rules in accordance with this dictate remains to be seen.

H. Andrew Clark

City of West Linn v. Land Conservation & Dev. Comm'n, 200 Or App 269, 113 P3d 935 (2005).

■ *HOW METRO GOT ITS MOJO*

City of Sandy v. Metro, 200 Or App 481, 115 P3d 960 (2005), is a handy primer on the constitutional, statutory, and charter sources of Metro's authority. The case involved the City of Hillsboro's challenge to a Metro ordinance that modified Hillsboro's urban growth boundary (UGB) and ordered the city to examine and possibly amend its industrial zoning.

The court first reviewed Metro's history. In 1969 the Oregon Legislature adopted the "The Metropolitan Service Districts Act" now found in ORS 268. Metro was formed under that Act in 1970. In 1977 the legislature amended Metro's statutory authority and gave Metro authority over "a variety of land use planning responsibilities." 200 Or App at 485. The legislation ordered Metro to develop "functional plans" to address area-wide issues such as water and air quality and transportation issues.

In 1990, the Oregon constitution was amended to allow "any metropolitan service district" to adopt a charter enabling it to enact district legislation on matters of metropolitan concern. Or Const, Art XI, § 14(3), (6). In 1992, Metro adopted a charter, which required it to adopt a "Regional Framework Plan" (RFP) to address "growth management and land use issues" that Metro determined required a regional approach. The RFP could be broken down into specific issues and specific plans, called "functional plans," adopted to address those issues. Metro adopted a functional plan that affected land use issues in the Hillsboro area. In 1997 legislation was adopted to conform existing enabling legislation to the charter adopted by Metro.

The court closed its historical review by outlining the hierarchy of authority that would have to be considered in determining whether the challenged Metro ordinance could be sustained. The court said that it would have to determine (1) whether the subject ordinance was within Metro's charter authority; (2) whether the charter authority itself was within the related statutory and constitutional authorizations; and 3) that the constitutional and statutory authorizations were, themselves, legal. The court

also noted that Article XI, section 2 of the Oregon constitution "deprives the legislative assembly of authority to interfere with a city's ability to structure its own government." 200 Or App at 486 (citing *La Grande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204, *adh'd to on reh'g*, 284 Or 173, 586 P2d 765 (1978)).

ORS 197.633 requires the Land Conservation and Development Commission (LCDC) to periodically review Metro's Functional Plans. After one such review, Metro adopted ordinances amending Metro's code. Some of those amendments enlarged Hillsboro's UGB in a manner contrary to the city's plans, and others addressed restrictions applicable to uses in Hillsboro's industrially zoned lands.

The city argued that Metro was obligated to make its UGB decisions in a "coordinative" manner with all three counties. The court disagreed, finding that LCDC had exclusive jurisdiction over the issue because it involved the consideration of Statewide Land Use Planning Goal 2.

In terms of Metro's orders affecting Hillsboro's industrially zoned lands, the court noted that Metro's code ordered cities and counties to review their land use regulations *and revise them* in a manner that limits the size of the uses allowed and has the least assumed impact on industrially zoned lands. In reviewing Metro's authority to adopt such a regulation, the court first noted that Metro's charter grants Metro authority "coextensive with that granted [to it] by statute and the constitution." Finding that the Oregon constitution generally authorizes Metro to adopt ordinances to exercise its powers, the court turned to statute to see what specific authority there might be for the Metro ordinances at issue. The court reviewed ORS 268.380 and 268.390 for all the areas that districts like Metro are authorized to address. ORS 268.380 is a general authorization to such a district to carry out its charter objectives and "exercise jurisdiction over . . . matters of metropolitan concern."

ORS 268.390 more specifically addresses this authority and permits the district to, among other things, (1) identify "areas and activities having significant impact upon the orderly and responsible development of the metropolitan area;" (2) adopt functional plans; (3) adopt urban growth boundaries in compliance with the Goals; and (4) review comprehensive plans for "areas and activities having significant impact upon the orderly and responsible development of the metropolitan area" and upon the UGB and "*recommend or require*" cities and counties to make changes to their comprehensive plans and land use regulations in order to ensure their compliance with a district's own functional plan (emphasis added).

Determining that these statutes are not ambiguous, the court held that they gave Metro the authority to make the determinations at issue in this case and to "require" Hillsboro to amend its planning code. In coming to this conclusion, the court rejected Hillsboro's arguments that (1) the authority to address city plans does not include the authority to address portions of those plans; (2) Metro's ordinances are so detailed that they transform Metro's RFP into a comprehensive plan in violation of ORS Chapter 197; (3) Metro's charter is a "special powers" charter as opposed to a "general powers" charter; and (4) Metro's ordinances are preempted by state laws empowering cities to enact comprehensive plans and exercise zoning authority.

Hillsboro also argued that the legislature's grant of authority to Metro impermissibly interfered with Hillsboro's home rule powers in violation of Article IV, section 1(5) and Article XI, section 2 of the Oregon constitution. The court dismissed these arguments, stating that Hillsboro's home rule authority is "subject to the other provisions of the Oregon Constitution, including the plenary authority granted by the constitution to the state legislature." 200 Or App at 495. Under this plenary authority, "a general law addressed primarily to substantive social, economic or other regulatory objectives of the state prevails over contrary policies preferred by some local governments . . . unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form." *LaGrande/Astoria*, 281 Or at 156.

As part of this plenary power the state legislature provided Metro, an entity whose existence was authorized by the state constitution, the power to require coordination of local comprehensive plans and "assign responsibilities regarding issues of district-wide impact." *Id.* It was pursuant to this authority that Metro ordered Hillsboro to take the actions at issue here. The court concluded,

> Because the constitution contemplates the exercise of regulatory power by Metro district-wide and because the grant of authority to home rule cities in the constitution is a limited grant of authority subject to other provisions of the constitution, Hillsboro's authority to determine the location of industrial zones and to enact enabling legislation must yield to the legislature's plenary authority derived from the constitution itself. Said otherwise, the exercise of such authority by the legislature is not irreconcilable with Hillsboro's freedom to chose [sic] its own political form because of Metro's district-wide regulatory objectives.

200 Or App at 495-96.

Judge Schuman's concurring opinion is worth reading in terms of clarifying the concept of home rule. He said, in part, "An enactment that falls within the sphere of a governmental unit's subject matter authority must not only trace that authority to a constitutional grant; it must avoid violating a constitutional limitation." 200 Or App at 496. Hillsboro argued that to the extent state statute authorized Metro to order Hillsboro to take certain land use actions, rather than have those actions come from Hillsboro's elected government, the legislation ran afoul of the constitutional prohibition of interference with the right of a city's citizens to choose their own form of government. Judge

Schuman rejected Hillsboro's position because he finds land use an issue of statewide concern and believes that the legislature has "superseding authority" to delegate the work in this area to state agencies and Metro, even to the point of authorizing Metro to order Hillsboro to adopt complying legislation. *Id.* His opinion also contains an interesting discussion of the differences between the states and the federal government and between local entities and the state legislature.

Ruth Spetter

City of Sandy v. Metro, 200 Or App 481, 115 P3d 960 (2005).

■ *FAILURE TO PARTICIPATE IN LUBA APPEAL PRECLUDES PARTY FROM LATER CHALLENGING LEGAL ISSUES RESOLVED IN THE APPEAL*

Friends of the Metolius v. Jefferson County, 200 Or App 416, 116 P3d 220 (2005), involved a site plan for expansion and redevelopment of a lodge and cabin facility in Camp Sherman. The initial approval was appealed to LUBA, and LUBA remanded, holding that the county erred in interpreting its code to allow more than *de minimis* residential use of the cabins by the owner/occupants. That decision was not appealed.

On remand, the county once again approved the application, but this time imposed a limit of 120 days per year of owner occupancy. Friends of the Metolius appealed that decision to LUBA, arguing that 120 days per year of owner occupancy was not *de minimis*. LUBA agreed, and LUBA's decision was appealed to the court of appeals by the Joneses. (See RELU Digest Vol. 27, No. 3 (May 2005) for a summary of LUBA's decision.)

On appeal to the court of appeals, no party argued that 120 days per year was *de minimis*. Rather, the Joneses argued that LUBA's legal conclusion imposing the *de minimis* owner occupancy standard was incorrect. However, because LUBA's legal conclusion concerning *de minimis* owner occupancy had not been challenged in any appeal of LUBA's prior decision, the court of appeals held that the issue was not within the court's scope of review of LUBA's order in the second appeal.

Relying on the Oregon Supreme Court's decision in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the court of appeals held that a party must seek judicial review of legal issues resolved in a LUBA order even if LUBA remands the case to the local decision maker. This rule is based upon principles of judicial economy. Had the petitioners sought judicial review in the prior LUBA case and prevailed, the case would have ended there, saving time and expense.

The Joneses were not parties to the prior LUBA appeal, but the court of appeals found that fact to be "insignificant" because the Joneses could have participated in the prior LUBA appeal and could have then challenged LUBA's legal conclusion concerning *de minimis* owner occupancy. Relying again on *Beck*, the court of appeals determined that even where the individuals who brought the first appeal to LUBA were not the same individuals who brought the second appeal, that difference is insignificant if the additional parties received notice of and had the opportunity to participate in the first appeal.

Steve Morasch

Friends of the Metolius v. Jefferson County, 200 Or App 416, 116 P3d 220 (2005).

■ *COUNTY'S ARGUMENT DOESN'T MAKE THE GRADE*

In *Klamath County v. Department of Transportation*, 201 Or App 10, 116 P3d 924 (2005), the county sought review of an ODOT order closing a railroad grade crossing near the city of Klamath Falls. The closure was vigorously opposed by a multitude of area residents and business owners, to the extent that the county had offered to pay half the cost of an overpass as an alternative to closure. ODOT acted under authority of ORS 824.206, which empowers it to eliminate or alter grade crossings "upon finding that such action is required by the public safety, necessity, convenience and general welfare."

The county, relying on ORS 366.290(3), claimed that ODOT had no authority to close the grade crossing without its approval. ORS 366.290(3) requires written consent of the county for ODOT to "eliminate from the state highway system any road or highway or part thereof," whereupon the roadway would become a county road. The county's theory was that this closure would eliminate the section of the highway lying within the crossing, therefore requiring its consent. The court disagreed, finding the "evident" meaning of the statute to be that the county's agreement is not required for road closures, but rather when a road is to be transferred from the state to the county system, thereby imposing a responsibility on the county.

The county also argued there was not substantial evidence in the record to support ODOT's conclusion that the closure "is required by the public safety, necessity, convenience and general welfare." The debate here was over the meaning of "required." ODOT argued for the dictionary definition as "suitable or appropriate in a particular case"; the county preferred the alternate definition "necessary or essential." The court held that considering the whole statutory scheme, including the stated public policy of eliminating grade crossings wherever possible, "suitable or appropriate" is the correct interpretation. Given this low hurdle, the court had no difficulty determining that the department's order was supported by substantial evidence.

Michael E. Judd

Klamath County v. Dep't of Transp., 201 Or App 10, 116 P3d 924 (2005).

■ OREGON COURT OF APPEALS AFFIRMS LUBA IN LATEST FLYING J APPEAL

In what appears to be the fourth case involving Flying J, Inc.'s Marion County property, Flying J has come off with flying colors. *Flying J, Inc. v. Marion County*, 201 Or App 99, 117 P3d 1027 (2005). The case involved 29 acres located near the I-5 Fargo Interchange. Prior to 2001, a series of land use actions resulted in 27 acres of those acres being zoned ID-LU (Interchange District with Limited Use Overlay Zone) and the remaining two acres being zoned ID with no overlay zone.

In 2001, the county adopted the Fargo Interchange Community Plan as part of its periodic review program. The adopting ordinance included the following finding: "the Limited Use Overlay Zone and restrictions applied to the Flying J property within the Fargo Interchange Community Plan area through prior land use actions shall remain in effect for the property." However, a zoning map attached as an exhibit to the ordinance depicted all 29 acres within the ID-LU zoning designation, rather than just the 27 acres previously zoned ID-LU.

Flying J then submitted development applications for the two-acre portion of its property. The county began to review the applications without following procedures applicable in the LU Overlay Zone, prompting neighbors to file a mandamus action against the county. During the mandamus proceedings, Flying J withdrew its applications. The mandamus action was dismissed after the county issued an interpretation declaring that the 2001 ordinance *did* apply the LU Overlay Zone to the two acres of Flying J's property. Flying J appealed that interpretation to LUBA. The central issue presented was the zoning of these two acres.

Before addressing the zoning issue, however, the court addressed its justiciability requirement. The court acknowledged that there was no development application pending at the time the county made the challenged interpretation, at the time the LUBA appeal was filed, or at the time of the court's consideration. When the issue is the *current zoning* of a property, however, the court held that the matter is justiciable even without any pending development proposal.

The court also affirmed LUBA's determination that the county's interpretation—in the form of a stipulation issued in the mandamus proceeding—was a land use decision subject to LUBA's jurisdiction.

Finally, the court agreed with LUBA's determination that the conflict between the text of the ordinance's findings and the exhibit to the ordinance must be resolved in favor of the text. "We know of no authority for the proposition that an exhibit to an ordinance contradicting the express text prevails and has the force and effect of law." 201 Or App at 107. Therefore, the 2001 ordinance adopting the Fargo Interchange Community Plan did not effectively apply the LU Overlay Zone to the two acres at issue. The county's interpretation to the contrary was held "wrong as a matter of law" and was reversed.

LUBA's decision also includes an interesting issue preclusion analysis, about which the court said very little. LUBA determined, and the court affirmed, that LCDC's overall review of the 2001 ordinance as part of periodic review did not preclude LUBA from considering the ordinance's effect on the zoning of the two acres at issue.

Emily N. Jerome

Flying J, Inc. v. Marion County, 201 Or App 99, 117 P3d 1027 (2005).

■ COURT OF APPEALS REAFFIRMS THE SUBSTANTIAL REASON RULE IN WRIT OF REVIEW CASES

In *Salosha, Inc. v. Lane County*, 201 Or App 138, 117 P3d 1047 (2005), the petitioners appealed a writ of review decision that upheld a Lane County order determining that the petitioners had violated two sections of the Lane County Code for storing inoperable vehicles and solid waste on their property and imposing civil penalties. To determine the appropriate civil penalty, the county used a formula that included a "gravity" variable based on the immediacy and magnitude of the violation at the time of enforcement. The petitioners claimed that the hearings official had impermissibly treated the inoperable vehicle violation as a "significant violation" and had assigned it a value of 2, even though the county had withdrawn that allegation prior to its final decision. The petitioners claimed that the hearing official had failed to explain why the alleged violation was classified as "significant."

The court began by summarizing the county code criteria for finding a violation "significant," noting the requirement that a violation must be considered "significant" if it occurs on property with particular zoning designations including land zoned for Exclusive Farm Use. Because this property was zoned EFU, the court concluded that the violation could be considered significant as a matter of law. However, the court found that it was not clear whether the hearings official had followed that line of reasoning, because the order made no reference to the zoning of the subject property. The court cited previous cases summarizing the rule of "substantial reason," under which an administrative decision maker must "demonstrate in its order a rational relationship between the facts and the legal conclusions upon which it acts in each case." *McCann v. OLCC*, 27 Or App 487, 493, 556 P2d 973 (1976).

The county urged the court to reject the substantial reason requirement because any error in the appealed order was harmless. The court declined, finding that the county's failure to adequately articulate the reasons supporting its conclusions substantially affected the petitioners' statutory

right to meaningful judicial review. "What is needed for adequate judicial review is a clear statement of what, specifically, the decision-making body believes, after hearing and consideration of all the evidence, to be the relevant and important facts upon which its decision is based." *Sunnyside Neighborhood v. Clackamas Co. Comm'rs*, 280 Or 3, 21, 569 P2d 1063 (1977). Because the hearings official's findings were inadequate, the case was reversed and remanded.

Carrie Richter

Salosha, Inc. v. Lane County, 201 Or App 287, 108 P3d 589 (2005).

■ *COURT OF APPEALS ADDRESSES CHALLENGE TO PORTLAND'S NORTHWEST DISTRICT PLAN*

In *NWDA, the Community Association of Northwest Portland v. City of Portland*, 198 Or App 287, 108 P3d 589 (2005), the Oregon Court of Appeals remanded in part, and otherwise affirmed, LUBA's order upholding the City of Portland's adoption of the "Northwest District Plan" and code amendments permitting the construction of several commercial parking structures in Portland's Alphabet Historic District.

The first issue on appeal was whether the commercial parking structures would be inconsistent with the base residential zone and planning designations in violation of the requirements in Goal 2 and ORS 197.175(2) that the city's land use decisions be consistent with its comprehensive plan. LUBA held that the city code expressly allows the city to modify the base zone regulations by creating a "plan district" for a unique area of the city and adopting implementing regulations that refine the base zone regulations to suit the plan district. In this case, the city created the Northwest Plan District and authorized commercial parking uses that are not otherwise allowed in the residential base zone. The court of appeals rejected NWDA's arguments that the city could not allow the structures without amending the comprehensive plan map and zone and that the code did not permit the city's plan district use regulations to be inconsistent with the base zoning classifications. It found that the city had designed the zoning code to give itself the flexibility to tailor the base zone use regulations to fit the specific areas of the city and that nothing prevented the city from doing so.

The second issue on appeal was whether the city failed to comply with Goal 5 by not conducting a review of the economic, social, environmental, and energy (ESEE) consequences of the commercial parking structures. If the city's decision permits a "new use" or a use that "could be conflicting" with a Goal 5 protected resource (OAR-023-0010(1)), then the city was required to comply with Goal 5 and perform the analysis required by the Goal 5 rule. LUBA did not find it necessary to determine whether the city's decision involved a "new use" or a use that "could be conflicting" with a Goal 5 resource. In the event Goal 5 was generally applicable, then the city's decision would be specifically exempt from the ESEE required under OAR 660-023-0200(7), which eliminates the ESEE process for a "program to protect historic resources."

The court decided at the outset that Goal 5 applied because it found the city's decision to involve both a use that "could be conflicting" and a "new use." The ordinance would "allow[] commercial parking structures in the Alphabet Historic District where that specific code-defined use type was not previously allowed." The court, however, stopped short of deciding whether the exemption for a program to protect historic resources applied. The court noted that LUBA erroneously assumed, but did not decide, that the city's parking ordinance was a "program" to protect historic resources. The court declined to make this determination because it involved both legal and factual issues about the ordinance that were most appropriate for LUBA to resolve in the first instance.

In remanding the case to LUBA, the court indicated that as long as there is a possibility that the decision might involve factual as well as legal issues, it had "'no authority . . . to review local land use decisions directly-or, in effect, to perform LUBA's role.'" 198 Or App at 302 (quoting *Recovery House VI v. City of Eugene*, 150 Or App 382 at 389, 946 P2d 342 (1997)). LUBA was instructed to examine the ordinances that the city adopted in this case, the requirements in Goal 5 and the pertinent rules, and the responsiveness of the city's findings to those requirements.

Andrew Svitek

NWDA, the Cmty. Ass'n of Northwest Portland v. City of Portland, 198 Or App 287, 108 P3d 589 (2005).

Editors Note: On July 6, 2005, the Oregon Supreme Court denied petitions for review of the court of appeals' decision. *NWDA v. City of Portland*, 338 OR 681, 115 P.3d 246 (2005). On remand LUBA concluded the exception in OAR 660-023-0200(7) for programs to protect historic resources applies, and no ESEE analysis was required. LUBA remanded the decision to the city to consider the transportation issues flagged in the original LUBA decision. *NWDA v. City of Portland*, ___ OR LUBA ___, October 5, 2005.

Appellate Cases—Real Estate

■ ON THE ROAD AGAIN: ACCESS EASEMENTS AND SUBSTANTIAL INTERFERENCE

In *D'Abbracci v. Shaw-Bastian*, 201 Or App 108, 117 P3d 1032 (2005), the Oregon Court of Appeals addressed the relative control of the parties to an access easement over the roadway within the easement. The court held that the plaintiffs, holders of an access easement defined by metes and bounds, had limited rights of use that did not necessarily preclude the defendant servient estate owner from placing permanent encroachments on part of the easement.

The important legal issue in this case revolved around a roadway easement. All of the parties own and reside on parcels of land that are only accessible by a gravel road built on a roadway easement that crosses several of the parcels, including the defendant's. The 60-foot-wide easement is described by metes and bounds in a 1979 easement agreement created by the parties' predecessors and benefits all of the parcels. A 12-foot-wide road was subsequently constructed on the easement in 1980. The dispute in this case centered on the portion of the roadway and easement that cross the defendant's parcel.

In 2000, the defendant built a fish farm on her property near the roadway. The county required the defendant to take measures to control erosion as a condition to issuing permits. As part of the erosion control plan, the defendant relocated the road approximately 28 feet west of the old roadway. The new gravel road lay in the westernmost 15 feet of the 60-foot easement, and there was a steep embankment on the downhill side of the new road where the old road had a gradual shoulder. In addition to relocating the road, the defendant placed a retaining pond, culverts, and vegetation within the easement but outside the relocated roadway.

In response to the defendant's activities, the plaintiffs brought a claim for interference with the roadway easement. The plaintiffs sought injunctive relief requiring the defendant to restore the roadway to its original condition and location and, alternatively, damages in the amount of $75,000, the estimated cost of restoring the easements. At trial, the plaintiffs argued that the defendant could not unilaterally relocate the road nor place a permanent encroachment on any part of the easement. They also argued that the new road was constructed of soil and organic matter, rather than rock, which made it unstable and unsafe in icy conditions. Although the plaintiffs testified that their passage had been delayed by as much as 20 minutes during construction of the road, none reported significant interference with their use of the road after construction was completed. The defendant's engineer expert testified that the new road had been built well and was better than the original road.

The trial court rejected the plaintiffs' claim, concluding that the plaintiffs had failed to prove that the defendant had substantially interfered with their easement rights. Specifically, the court found that the roadway easement had been used only for ingress and egress and that the defendant had not materially interfered with the plaintiffs' access to their respective properties. The court found no persuasive evidence that the defendant did anything but recreate a stable and good road.

On appeal, the court of appeals summarily rejected the plaintiffs' arguments that the manner in which the defendant constructed the new road had substantially interfered with their easement rights. Although the plaintiffs contended that the new road may not be safe in snowy and icy conditions, the court found the plaintiffs' evidence speculative. "Because there is no persuasive evidence that any vehicle has slipped off the road—or that a substantial risk of such an event exists on the new road—there is no basis to find that the steeper edge presents a greater hazard." 201 Or App at 123. Similarly, the court concluded that the plaintiffs had failed to show that the road was inadequate or unstable. "Although there is evidence that the road is susceptible to erosion, the record does not establish that it probably will fail." 201 Or App at 122.

The plaintiffs also argued that when an easement is described by metes and bounds, the easement holder has an absolute right to use the entire easement. In support of their argument, the plaintiffs pointed to *Tooker v. Feinstein*, 131 Or App 684, 886 P2d 1051 (1994), *adh'd to as modified on recons*, 133 Or App 107, 889 P2d 1356, *rev den*, 321 Or 94 (1995). In that case, the defendant held a metes and bounds easement across the plaintiff's property and built a retaining wall for a driveway on the easement. The *Tooker* court agreed that the scope of the easement was determined by its metes and bounds description in the deed and subdivision plat. The plaintiffs asserted that *Tooker* stands for the proposition that the holder of an easement described by metes and bounds has the right to use the entire easement and, more importantly, to preclude the servient estate owner from placing permanent encroachments on any part of it.

However, the court referred to its decision in *Clark v. Kuhn*, 171 Or App 29, 15 P3d 37 (2000), as more instructive.

> [A]n easement holder can make only such use of an easement as is reasonably necessary to accomplish the purpose for which the easement is granted[,] and the remaining dominion over the land upon which the easement lies continues with the servient landowner. The reasonable necessity of a proposed use of an easement is a fact-based inquiry and must be determined from the circumstances of each case.

Clark, 171 Or App at 33. In *Clark*, the defendant held a 25-foot-wide easement for right-of-way purposes that was described in metes and bounds. He sought to improve the existing one-lane, gravel road, which did not occupy the entire easement area, by expanding it to two lanes and

paving it. The proposed improvements would have required removing obstructions from the easement area, including trees, large rocks, and a dirt berm that the servient owner had placed there. The *Clark* court held that using the entire 25-foot easement for a paved, two-lane road was not essential to the defendant's ingress and egress to his property; therefore, the defendant had to leave most of the obstructions in place.

The court rejected the plaintiffs' argument that the court's holdings in *Tooker* and *Clark* were inconsistent.

> Read together, [*Tooker* and *Clark*] demonstrate that the holder of an easement described by metes and bounds has the right to use the entire easement to the extent that it is reasonably necessary to accomplish the purpose of the easement. In turn, the intended purpose of the easement defines how much of the easement the dominant estate holder may use.

201 Or App at 120. The court noted that the easement holders in *Tooker* had demonstrated that the retaining wall was necessary for the driveway.

In this case, the purpose of the easement was to establish a roadway to provide access to the various benefited parcels. The court concluded that the plaintiffs' right to use the easement is limited to what is reasonably necessary to accomplish that purpose. To the extent that the easement area was not needed for the road, the defendant retained the right to control and use it, including the right to place encroachments on the unused part of the easement. The court noted that the plaintiffs did not contend that they needed to use the entire 60-foot easement for roadway purposes or that the encroachments on the easement interfered with their ingress and egress. Consequently, the court found that the defendant had not substantially interfered with the plaintiffs' access to their respective properties by extending the eastern embankment and placing the pond, culverts, and vegetation on the easement.

The court next addressed the plaintiffs' argument that the defendant had substantially interfered with their easement rights by relocating the road without their consent. Although Oregon courts have not squarely addressed this issue, the court found guidance from existing case law:

> [T]hree overarching principles apply to expressly created easement rights in Oregon: (1) the terms of the granting instrument, if unambiguous, define the location and the intended purpose of the easement; (2) the dominant estate holder's right to use the easement is limited to what is reasonably necessary to accomplish the intended purpose of the easement; and (3) the servient estate holder retains the right to use the burdened property in ways that do not unreasonably interfere with the dominant estate holder's reasonably necessary use of the property.

201 Or App at 121.

Following these principles, the court concluded that a servient estate owner's right to relocate a road is limited by the location of the easement and the dominant estate holder's reasonably necessary use. Therefore, when the boundaries of the easement and the actual road are the same, the servient owner may not relocate the road without the consent of the dominant estate holder. If, however, the road does not occupy the entire easement, then the servient estate owner may unilaterally move the road within the boundaries of the easement, provided that the change does not unreasonably interfere with the dominant estate holder's use of the road.

Applying this rule, the court reasoned that the defendant was entitled to relocate the road within the boundaries of the easement unless the change substantially interfered with the plaintiffs' use of the road for ingress and egress. The court rejected the plaintiffs' contention that it was necessary for the road to remain where it was originally built:

> There was no evidence that a safe and stable road could not be constructed elsewhere within the boundaries of the easement. Because plaintiffs suggest no other reason that it was reasonably necessary for the road to remain in its original location, we conclude that defendant retained a conditional right to relocate it within the easement boundaries.

201 Or App at 122.

It should be noted that in her answer to the complaint, the defendant asserted a counterclaim for breach of the roadway easement agreement, arguing that she had improved the road and that the plaintiffs were obligated to contribute to the costs that she incurred in doing so. The court rejected the counterclaim, concluding that the roadwork had primarily benefited the defendant's property and was well beyond what was required simply to maintain the easement.

This case presents a common scenario: parties in a dispute over the use of an access easement that contains a detailed legal description but vague statements of the easement's purpose and the relative rights of the parties. Under these circumstances, the starting point is recognition that everyone's rights to the road are limited to some degree and mutual agreement is the preferred route. Otherwise, your client's road leads to the courthouse.

Raymond W. Greycloud

D'abbracci v. Shaw-Bastian, 201 Or App 108, 117 P3d 1032 (2005).

■ *LANDOWNER PURSUES WRONG MEANS OF ENFORCING VISIBILITY PROVISIONS OF RESTRICTIVE COVENANT*

In *Jantzen Beach Associates v. Jantzen Dynamic Corp.*, 200 Or App 457, 115 P3d 943 (2005), the Oregon Court of Appeals reversed a trial court judgment awarding the plaintiff damages of $750,000 on its claim of assumpsit. The plaintiff's claim arose from the defendants' violation of a restrictive covenant that prohibited interference with the visibility of the plaintiff's land from North Hayden Island Drive in Portland. The trial court concluded that the defendants had been unjustly enriched as a result of the violation of the covenant and awarded damages to the plaintiff. Both parties appealed.

In 1988, the plaintiff bought Parcel A from Westwood Corporation, Developers and Contractors (Westwood). Westwood had purchased the parcel from Hayden Corporation. As part of its purchase from Hayden corporation, Westwood obtained a restrictive covenant that attached to land (Parcel B) owned by Hayden and adjacent to Parcel A. The purpose of the restrictive covenant was to prevent the construction of any buildings or improvements on a portion of Parcel B that would block the view of Parcel A from North Haden Island Drive, as depicted in an attachment to the restrictive covenant. The covenant was to run with the land and be binding on successors.

In 1995, defendant MBK bought a portion of Parcel B, including the area subject to the restrictive covenant. MBK then entered into a ground lease with defendant Circuit City to construct a huge retail building, half of which was built within the area subject to the restrictive covenant. MBK then sold its interest in that portion of Parcel B to Defendant Jantzen Dynamic.

The plaintiff's operative complaint at trial raised two theories of recovery: tortious interference with real property rights and assumpsit/implied contract. Prior to trial, the plaintiff elected to pursue only its claim for assumpsit/implied contract. Thus, that was the only claim that went to the court.

The defendants moved for judgment on the pleadings under ORCP 21 B. In that motion, the defendants acknowledged that the Circuit City building violated the restrictive covenant but argued that, under Oregon law, the plaintiff's sole claim for relief was for violation of the restrictive covenant, the claim on which the plaintiff had not proceeded. The motion was denied and trial proceeded on the plaintiff's claim for assumpsit/implied contract, resulting in an award to the plaintiff. On appeal, the defendants argued that the trial court had erred in denying the motion for judgment on the pleadings.

In reaching its decision, the court of appeals analyzed the common-law action of assumpsit. Relying on *Davis v. Tyee Industries, Inc.*, 294 Or 467, 469-70, 668 P2d 1186 (1983), the court explained the history of the creation of the action of assumpsit. General assumpsit provided a remedy in a variety of situations in which, although there was no contract between the parties, the law would create a promise to pay in order to avoid unjust enrichment. Thus, if someone paid money to a party that should have been paid to a second party, the law created an implied-in-law contract that required the second party to pay the money to the first party. The court noted that a party who obtained property by fraud, duress, trespass, or other tort could be sued either in tort or in assumpsit. The other party could waive the tort and sue in assumpsit. The court held that was exactly what occurred here.

The court then focused on the specific allegations in the plaintiff's complaint. Because the challenge was to the trial court's denial of the motion for judgment on the pleadings, the court of appeals scrutinized the plaintiff's complaint to determine whether a proper claim had been pled. To proceed in assumpsit, the plaintiff must have alleged that the defendants obtained and converted the plaintiff's property.

The court noted that the plaintiff's property interest arose from the terms of the restrictive covenant and was appurtenant to Parcel A. Consequently, "the property interest reflected in the restrictive covenant is not severable from the land, nor is it personal to Plaintiff." 200 Or App at 464. The court next examined the nature of the interference with the plaintiff's view easement as alleged in the plaintiff's complaint. A valid assumpsit claim involving real property must allege that the wrongdoer appropriated a tangible property interest in the course of a trespass to real property. The reasonable value of the property appropriated may be recovered based on the tort committed or under an implied contract theory to recover the amount of the unjust enrichment.

Here, however, the defendants did not convert the benefit of the plaintiff's view easement to their own use or sell it to a third party. Instead, the defendants interfered with the physical space of the view easement. The court noted that this distinction was an important one. "Where there is mere use of a property interest without appropriation of tangible property during the trespass, the traditional view has been that an assumpsit will not lie." *Id.* (citing Dobbs, *Remedies* § 5.9, at 372). Thus, the plaintiff's claim failed because it did not allege an appropriation of the plaintiff's tangible real property interest.

Although the defendants had raised additional assignments of error and the plaintiff had filed a cross-appeal, the court did not consider these arguments because they were mooted by the disposition of the first issue.

The gist of the holding was that "assumpsit is a remedy to recover on what the law implies is a contract to make restitution for something tangible that belonged to the Plaintiff and was appropriated by Defendants." *Id.* at 467. Thus, continued the court, the trial court erred in denying the defendants' motion for judgment on the pleadings.

Because the defendant acknowledged that the Circuit City building violated the covenant, had the plaintiff proceeded on a different theory, a different result would have been possible.

Gary K. Kahn

Jantzen Beach Assocs. v. Jantzen Dynamic Corp., 200 Or App 457, 115 P3d 943 (2005).

■ *ALASKA LOSES BATTLE OVER SUBMERGED LANDS*

In *Alaska v. United States*, 545 U.S. ___, 125 S. Ct. 2137 (2005), the United States Supreme Court rejected the State of Alaska's claim to submerged coastal lands. In 1998, Congress voted to phase out commercial fishing in Glacier Bay and the Tongass National Forest for the purpose of protecting marine wildlife. Since then, the National Park Service has progressively limited fishing and cruise ship activity. Alaska protested by filing a complaint claiming title to submerged lands in certain enclaves around the Alexander Archipelago and the area within Glacier Bay. Ownership of these submerged lands would give the state control of commercial fishing and other activities on the water directly above, and possible mineral and other valuable resource rights on the lands below.

The United States Supreme Court has original jurisdiction over controversies between states and the federal government. Alaska invoked the Court's jurisdiction to decide its submerged lands claims against the United States. A special master appointed by the Supreme Court to evaluate Alaska's claims recommended that summary judgment be granted in favor of the United States. The Supreme Court affirmed that decision.

Alaska's submerged land claims rested on the equal footing doctrine and the Submerged Lands Act of 1953. The equal footing doctrine provides that new states enter the Union with the same sovereign powers and jurisdiction as the original thirteen states. Under this doctrine, a new state generally acquires title to the beds of inland navigable waters. The Submerged Lands Act of 1953 declares that states generally have title to all lands beneath inland navigable waters and beneath offshore marine waters within their "boundaries," which generally extend three miles from the coastline. Under both the equal footing doctrine and the Submerged Lands Act, the United States may prevent title to submerged lands from passing to a state at statehood by expressly retaining title to the lands. Therefore, Alaska would have a valid claim for the submerged lands around the Alexander Archipelago Islands and Glacier Bay if it could demonstrate that the tidelands were inland or within three geographical miles of Alaska's coast, and that the federal government had no express title to the submerged lands.

With respect to the retention of title by the United States, Justice Kennedy's majority opinion states:

> It is now settled that the United States can defeat a future State's presumed title to submerged lands not only by conveyance to third parties but also by setting submerged lands aside as part of a federal reservation "such as a wildlife refuge." To ascertain whether Congress has made use of that power, we conduct a two-step inquiry. We first inquire whether the United States clearly intended to include submerged lands within the reservation. If the answer is yes, we next inquire whether the United States expressed its intent to retain federal title to submerged lands within the reservation. "We will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.'"

545 U.S. at ___, 125 S. Ct. at 2155 (citations omitted) (quoting *Idaho v. United States*, 533 U.S. 262, 273, and *United States v. Alaska*, 521 U.S. 1, 42-43 (1997)).

Here, the special master's summary judgment recommendation rested on two conclusions that track the two-part test described above. First, he concluded that in creating Glacier Bay National Monument, the United States had reserved the submerged lands underlying Glacier Bay and the remaining waters within the monument's boundaries. Second, he concluded that section 6(e) of the Alaska Statehood Act (ASA) expressed congressional intent to retain title to those submerged lands in federal ownership. Section 6(e) of the ASA conveys to Alaska "all real and personal property" of the U.S. that is "used for the sole purpose of conservation and protection of the fisheries and wildlife in Alaska." However, section 6(e) excepts from this conveyance "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." Alaska argued that the exception language section was only applicable to specific refuges referenced in the initial clause of section 6(e). The Supreme Court rejected this argument, holding that the exception language operates as an "affirmative and independent expression of intent" to retain those lands. 545 U.S. at ___, 125 S. Ct. at 2160.

The Court also agreed with the findings of the Special Master concerning Alaska's claims for submerged lands in certain off-shore enclaves within the archipelago. Alaska had argued that the islands were part of the Alaskan mainland under the historic inland waters theory. Under this theory, the Supreme Court recognized that island waters are inland waters if a state demonstrates that the United States exercised authority over them continuously and with acquiescence of foreign nations. The Supreme Court emphasized that the state must show that the federal government had established a right to exclude innocent passage of all foreign vessels. Based on review of the historical evidence the Court found the United States had not claimed exclusive control over these areas with the acquiescence of foreign nations, and therefore these areas did not pass to Alaska's jurisdiction upon statehood.

The U.N. Convention on the Law of the Sea recognizes

that an island group may be considered inland waters under the juridical bay theory if they are deemed connected to one another and also to the mainland. Article 7 of the Convention defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." Alaska argued that the Archipelago does indeed have two connected but unnoticed juridical bays. The Court rejected Alaska's argument that the archipelago islands formed two juridical bays in accordance with the Convention. The Court found this argument an untenable stretch of the plain facts because there was no clearly discernable bay formation and the alleged bays were not even "discovered" until after Alaska filed its complaint.

This case demonstrates that the Supreme Court is not willing to extend state submerged lands ownership to waters around island groups outside three miles of the mainland coast without strong evidence that the U.S. has controlled and excluded foreign vessels from those waters. Furthermore, physical features that make up a juridical bay must be clearly identifiable. Finally, the designation of federal preservation areas or monuments can be enough to rebut the presumption of state submerged land ownership. In this case, however, the state's own enabling act was sufficient evidence for the Court to make that determination and defeat Alaska's claims.

Christopher Schwindt

Alaska v. United States, 545 U.S. ___, 125 S. Ct. 2137 (2005).

■ CONTAMINATION, COVERAGE, AND COSTS: WHO COVERS THE CHECK?

Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London, 197 Or App 147, 104 P3d 1162 (2005), involved a number of insurance issues surrounding a parcel of land in Portland that suffered environmental contamination as a result of its current and former owners' industrial activities. Most notably, the court of appeals held that an insurer's duty to defend an insured was triggered by a Department of Environmental Quality (DEQ) action against the insured because the action was the legal equivalent of a "suit" under the applicable insurance policies. However, the court additionally held that the insurers had no obligation to reimburse the insured landowner for expenses sustained to prevent groundwater contamination. The court also ruled that the cross-appellant, Certain Underwriters at Lloyd's of London (Lloyd's), one of the defendant insurers, was not entitled to attorney fees under ORS 746.350 and ORS 746.320, which provide unauthorized insurers with attorney fees in limited situations.

In 1988, the plaintiff, Schnitzer Investment Corporation, discovered environmental contamination on its riverfront industrial property. In 1995, after a series of investigations, studies, and interactions with DEQ, Schnitzer agreed to undertake steps to remedy the property's soil contamination while simultaneously monitoring the property's groundwater, which had previously evidenced no levels of contamination exceeding DEQ's limits. This monitoring was discontinued with DEQ's approval after four years because it indicated no additional groundwater contamination.

The defendants were a collection of insurance companies that issued policies to Schnitzer and its predecessors. These primary and secondary policies insured Schnitzer against any property damage claims that Schnitzer became legally obligated to pay. Perhaps most critically, these policies contained an "owned property" exclusion. This provision limited coverage to property that the insured owned, occupied, or rented. The different policies were agreed to be substantially similar for purposes of their coverage, although their individual language differed somewhat.

Shortly after the cessation of groundwater monitoring, Schnitzer filed suit in an attempt to recover the monies that it had expended during the cleanup and monitoring of the property, as well as the attendant legal expenses. The trial court granted summary judgment to the defendants, but rejected Lloyd's request for attorney fees. Subsequently, Schnitzer appealed and Lloyd's cross-appealed.

The court of appeals cited *St. Paul Fire v. McCormick & Baxter Creosoting*, 126 Or App 689, 870 P2d 260, modified on recons, 128 Or App 234, 875 P2d 537 (1994), *aff'd in part, rev'd in part on other grounds*, 324 Or 184, 923 P2d 1200 (1996), in ruling that the DEQ's requirement that Schnitzer remedy the pollution constituted a "suit" within the insurance policies' duty to defend. Noting that the policies did not define "suit," the court applied the ordinary meaning of the word and further determined that the duty to defend attached when a particular primary insurance company received a letter from Schnitzer notifying it of the DEQ's actions, requesting defense and indemnification under the applicable insurance policy, and including a copy of DEQ's previous communications with Schnitzer. In addition, the court concluded that the scope of the duty to defend included the costs associated with monitoring the groundwater because under ORS 537.110 the groundwater belongs to the public, so that the policy's owned property exclusion was inapplicable.

All of the parties agreed that the owned property exception excluded indemnification for the defense of claims related to soil contamination and for the expenses associated with remedying that contamination. Regarding the issue of groundwater, the court made several key factual findings: (1) the groundwater was not contaminated beyond safe levels when Schnitzer began its remedial actions; (2) at that time, the soil contamination was unlikely to migrate into the groundwater; (3) the DEQ had required the plaintiff to take steps to prevent further groundwater contamination, but did not require it to rem-

edy any existing groundwater contamination; and (4) the subsequent monitoring revealed no further groundwater contamination.

Based upon these findings, the court determined that the insurers were not obligated to pay for the costs associated with preventing further groundwater contamination because Schnitzer was not obligated to perform remedial measures to clean the groundwater. The insurance policies only obligated the insurers to pay if the plaintiff became legally obligated to pay sums as property damages. Although Schnitzer did pay to monitor the groundwater and to prevent further groundwater contamination, it never paid to actually clean the groundwater. Thus, the insurers were not obligated to indemnify Schnitzer for groundwater cleanup costs that it did not incur.

In its cross-appeal, Lloyd's invoked ORS 746.350 and ORS 746.320 to argue that the trial court had incorrectly denied its request for attorney fees. ORS 746.350 provides that an unauthorized insurer may be awarded attorney fees if it was served in the manner provided for in ORS 746.320(1)-(4). ORS 746.320 contains a detailed scheme of service, but it also includes a provision that states, "Nothing contained in this section shall limit or abridge the right to serve any process upon an insurer in any other manner then permitted by law." ORS 746.320(5). Lloyd's argued that this provision allows for an award of attorney fees whenever an unauthorized insurer is served in a manner permitted under law and not just in the scheme contained in ORS 746.320(1)-(4).

Unfortunately for Lloyd's, the court of appeals thought otherwise. Utilizing statutory interpretation and legislative history, it reasoned that the language of ORS 746.320(5) is not a positive grant of authority for rewarding attorney fees when an unauthorized insurer is served in any legal manner. Instead, the court stated that section 5's language merely constitutes a savings clause insuring that the provisions of ORS 746.320(1)-(4) do not become the sole method of serving an unauthorized insurer. Accordingly, Lloyd's was not entitled to attorney fees under ORS 746.350 because it was not served in the manner specifically enumerated in ORS 746.320(1)-(4) and, consequently, the trial court did not err in denying Lloyd's motion.

Ben Martin

Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London, 197 Or App 147, 104 P3d 1162 (2005).

■ *NINTH CIRCUIT APPLIES OREGON STATUTE OF FRAUDS TO ALLEGED FINDER'S FEE IN REAL ESTATE TRANSACTION*

A recent unpublished memorandum opinion of the Ninth Circuit Court of Appeals may be of interest to Oregon practitioners, especially those who may be involved in actions regarding real estate commissions. The court in *Hulsey v. Lindeman*, No. 04-35239 (July 26, 2005), applied the Oregon Statute of Frauds, ORS 41.580(1)(g), to deny the claim of a finder's fee in a real estate transaction.

The court stated, "Hulsey argues that the district court erroneously applied Oregon's Statute of Frauds to an alleged oral contract he had with Lindeman to pay Hulsey a finder's fee if Hulsey found a buyer for Lindeman's property." The court reviewed several cases that provided exceptions to the statute of frauds, found that they all involved provisions of the statute other than ORS 41.580(1)(g), and affirmed the lower court's ruling.

Alan K. Brickley

Hulsey v. Lindeman, No. 04-35239 (9th Cir. July 26, 2005) (unpublished opinion).

■ *STATE HOLDS TITLE TO LAND BELOW HIGH WATER MARK OF CERTAIN SEGMENTS OF JOHN DAY RIVER*

In *Northwest Steelheaders Association, Inc. v. Simantel*, 199 Or App 471, 112 P3d 383 (2005), the Oregon Court of Appeals affirmed a trial court holding that the state of Oregon, and not private property owners, holds title to the lands lying below the ordinary high water mark in two segments of the John Day River.

Controversy surrounding title to the beds and banks of the river along the Simantel and Schlect properties surfaced after a fisherman refused to leave the bank where the Simantels' property is located, across the river from the Schlect property. A criminal trespass was alleged. Although the trespass charge was ultimately dismissed, in March 1999 the Northwest Steelheaders Association and the fisherman filed an action seeking declaration of navigability and state ownership of the beds and banks of the relevant river segments, and the Simantels brought a counterclaim for trespass against the fisherman. Another plaintiff, who had been threatened with criminal prosecution for fishing from a sandbar in the river where the Miani property is located, joined the lawsuit and Miani was joined as a defendant. Under ORS 19.41(3), review was *de novo* because it involved a declaration of real property rights.

Schlect, who was not involved in the Simantels' trespass claim, sought to be dismissed from, and accordingly not bound by, the lawsuit. The court of appeals held that a determination of navigability, by its nature, applies to the entire river bed, so a determination of navigability would necessarily affect the Schlect property, and that Schlect was a necessary party.

The court of appeals discussed the "equal footing doctrine" and navigability as a concept for determining title to riverbed land.

> The original states, by virtue of their sovereignty, succeeded to title held by the English crown to the beds of

> the navigable waters within their boundaries. When additional states where admitted to the union, they were admitted on an equal footing with the original states, and, therefore, they also acquired title to the beds of their navigable waters except any portions which had passed into private ownership prior to statehood.

Land Bd. v. Corvallis Sand & Gravel Co., 283 Or 147, 151, 582 P2d 1352 (1978). Prior to statehood, the federal government, as owner of the land from which the new states were formed, could alienate title to the beds of navigable waters, but it was not the federal government's general policy to do so as part of its disposition of public lands. Accordingly, pre-statehood federal patents conveying land running to or bounded by navigable waters are generally construed as conveying title only as far as the high water mark. Land below the high water mark of navigable waters, unless it was conveyed by a properly authorized grant clearly expressing that intention, was retained by the federal government and passed to the state upon admission to statehood. The federal government had no power to convey the property below the high water mark of navigable rivers after statehood.

The court of appeals explained that whether a particular river segment is "navigable" for purposes of determining title under the "equal footing" doctrine is a question of federal law. The test was established by the United States Supreme Court in *The Daniel Ball*, 77 U.S. 557, 563 (1870): "Those rivers . . . are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." A subsequent case, *United States v. Utah*, 283 U.S. 64, 75, 83, 51 S. Ct. 438 (1931), confirmed that the test is disjunctive-the river must be actually used or susceptible of such use-and that the test is applied to the conditions of the river at the time of statehood.

The court of appeals went on to explain that use of a water highway does not have to be extensive or commercially profitable. For example, nine boats used by a livestock owner to periodically haul his livestock from mainland to an island, and vice versa, were sufficient to show that Utah's Great Salt Lake was navigable. *Utah v. United States*, 403 U.S. 9, 11, 91 S. Ct. 1775 (1971). Mode of trade or travel is also construed flexibly, and can be nearly any mode as long as it was common at the time of statehood. *United States v. Utah*, 283 U.S. 64, 76, 51 S. Ct. 438 (1931). For instance, evidence of canoe travel proved a common mode of trade or travel in *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir.), *cert. denied*, 474 U.S. 968 (1985). Floating timber from upstream logging operations to downstream mills also sufficed in *Oregon v. Riverfront Protection Association*, 672 F.2d 792, 795-96 (9th Cir. 1982). Furthermore, navigability is not necessarily destroyed by obstacles to free passage, such as flood deposits of logs and wood or sandbars. United States v. Utah, 283 US at 84, 86.

Miani's predecessors in interest obtained title by federal patent granted in 1898, and Simantel's predecessors in interest obtained title by federal patent granted in 1906-both after Oregon was admitted to the Union in 1859. The property description in at least one of the patents purported to include the riverbed.

In determining whether the relevant portions of the John Day River were navigable, the court noted hydrologic data indicating that in 1859, the river's summer flow was nearly twice what it is today and that the river was used by Native Americans for canoe travel. Evidence at trial established that modern boats of similar draft use the river without difficulty, and for most of the 1890s, a pleasure boat sternwheeler cruised roughly ten miles downstream from the Miani property. Similarly, other evidence showed the river was used in the 1920s to move timber downriver. The court of appeals deemed the evidence of actual post-statehood use of significance because it corroborated susceptibility to navigation at the time of statehood. The court of appeals concluded that the river segments at issue were *susceptible* to travel and trade by craft common at the time of statehood. Based on the hydrologic data and evidence of post-statehood use, the court concluded that the river segments were capable of sustaining at least three kinds of commerce at the time of statehood: Native American trade using canoes, log runs, and sternwheeler traffic.

As for *actual* use, the court considered evidence concerning the occupation of the lower basin of the John Day River by the Western Columbia River Sahaptin; the importance of the John Day fisheries to them as a food source; their use of areas along the drainage basins of tributaries for gathering berries, skins, and other resources; their network of trade relations throughout the Columbia River basin; historians' documentation of their use of dugout canoes on rivers throughout their traditional territory; and evidence that Lewis and Clark encountered a number of Western Sahaptins in canoes at the mouth of the John Day River.

The court concluded that the plaintiffs had proven actual use in the lower John Day River in the vicinity of the Schlecht and Simantel properties. The court considered evidence of the Northern Paiute's occupation of the upper John Day River drainage and other evidence and concluded that the plaintiffs did not prove actual use upstream in the vicinity of the Miani property. Yet, because the segments of river at issue were at least susceptible to use at the time of statehood, the court held that both segments were navigable, and therefore Oregon holds title to the land lying below the ordinary high water mark of both segments.

Susan C. Glen

Northwest Steelheaders Ass'n, Inc. v. Simantel, 199 Or App 471, 112 P3d 383 (2005).

Cases from Other Jurisdictions

■ DIVIDED MICHIGAN SUPREME COURT DETERMINES PUBLIC RIGHTS ALONG SHORES OF GREAT LAKES

Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 1 (2005), involved a dispute between the plaintiff, a member of the public who wished to walk along the littoral shores of Lake Huron, and the defendants, who held title to land along the water's edge. To resolve the dispute, the court was obliged to revisit the public trust doctrine in Michigan. The whole court agreed there is such a doctrine and that it enables the public to use land within its boundaries for walking, fishing, hunting, and the like. However, the members of the court disagreed on the exact boundaries of this public trust area and about the application of the Great Lakes Submerged Lands Act (GLSLA), which addresses public and private property rights along the shores.

The court found a public right to use the shores of the lake under the public trust doctrine, even if title to those lands was alienated. The majority concluded that those trust rights extended in this case to the ordinary high water mark of the lake (*i.e.*, where "the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics"). This case involved the area between the lake and its ordinary high water mark. The Michigan Court of Appeals held that the state held in trust any submerged and submersible lands, subject to the exclusive use of the property by the property owner up to the edge of the lake. The Michigan Supreme Court reversed this decision.

The majority opinion traced the history of the public trust doctrine back to Justinian's *Institutes*, which codified Roman law. The court distinguished *jus publicum*, involving public rights in navigable waters and lands covered by those waters, from *jus privatum*, referring to private rights held individually, which were subject to the public trust doctrine. Only *ius privatum* is acquired by title to littoral property; public trust rights remain with the state.

In examining the scope of the public trust doctrine, the court found little help in the GLSLA, which claims for the state all lands below the ordinary high water mark. The act specifically recognizes that all private rights are limited by the State's *jus publicum* and is ineffective to change the public trust interest, although it provides a mechanism to establish private property claims, again subject to public trust interests. The limits of the doctrine are established at common law, but that common law is interpreted by the several states, so that public trust and *jus privatum* lands may overlap. In determining otherwise, the Court of Appeals was found to have erred.

The Supreme Court determined that the ordinary high water mark of the lake frontages formed the landward boundary of the public trust area. The court found Wisconsin case law persuasive in interpreting Michigan common law to define "ordinary high water" in a nontidal body of water, like Lake Huron. The court also found that walking along the lakeshore is consistent with the public trust so that the state must protect trust lands from private land uses that are inconsistent with that doctrine; however, the state may not acquire the *jus privatum* in any overlapping lands without just compensation. The right of passage and repassage along the lakeshore dates from the Northwest Ordinance of 1787 before the U.S. Constitution was signed. The court found that no compensation is owed for what the state already holds title to. The court of appeals opinion was thus reversed.

There were two other opinions, one by Justice Young and the other by Justice Markman, that concurred in part and dissented in part from the majority opinion. Justice Young upheld the public trust notion of the majority but did not recognize the public trust to extend to walking along the dry portions of the lakeshore generally, nor the use of the ordinary high water mark as the landward extent of the public trust. Justice Young said that the ordinary high water mark was normally utilized as the basis for the extent of navigability. The area covered by the public trust doctrine, in his view, extends only to the wet sands area and covers only submerged and submersible lands, with the remaining landward property under the exclusive ownership and right of use of the landowner.

Justice Markman dissented from the use of the ordinary high water mark as the boundary of the public trust interest, and objected to the use of Wisconsin law in place of what he characterized was "settled" Michigan law. He noted that this was the first dispute of its kind to come before the Michigan Supreme Court and suggested that the court's decision threatened the stability of property law.

Like Justice Young, Justice Markman would have limited the application of the public trust doctrine to submerged and submersible lands and contended that the addition of non-submerged lands, including temporarily exposed lands, makes the public trust doctrine subject to much speculation. Moreover, Justice Markman believed that the ordinary high water mark doctrine was not applicable to non-tidal waters, such as lakes, and was used primarily for navigation and commerce, rather than determining rights along non-tidal shorelines. He suggested that the use of the ordinary high water mark in a previous case with respect to navigability had been mistakenly imported into the public trust doctrine for non-tidal property and that there was no true "high water" or "low water" marks along the Great Lakes in any scientific sense. He asked rhetorically about the kind of "distinct mark" that must be present to characterize the ordinary high water mark and how continuous it must be. While its use may make some sense as to the areas affected by trade, Justice Markman said it makes no sense where the land-water interface is unrecognizable. Justice Markman's reading of

the law would limit the public trust doctrine to submerged and submersible lands, so that pedestrians along the lakeside would be able to use only the "wet sands" area.

This was apparently a hard fought and lengthy battle that resulted in new law regarding public and private rights along the shores of Lake Huron. Issues involving access to lakeshores must be resolved by the courts of each state. The three opinions in this case totaling more than 100 pages show that the resolution of this issue is a daunting task.

Edward J. Sullivan

Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 1 (2005).

■ *CONVERSION OF FOREST LAND TO AGRICULTURAL USE IN COLUMBIA RIVER GORGE NATIONAL SCENIC AREA EXEMPT FROM SCENIC RESOURCES REVIEW, SAYS WASHINGTON COURT OF APPEALS*

In *Friends of the Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Board*, 129 Wn. App. 35, 118 P.3d 354 (2005), Division II of the Washington Court of Appeals addressed the issue of whether scenic resources review is required for conversion of forest land to new agricultural use in the Columbia River Gorge National Scenic Area. Deferring to the Washington Department of Natural Resource's interpretation of state law incorporating certain guidelines pertaining to forest practices in the Scenic Area, the court held that conversion of forest land to new agricultural use in the Scenic Area is exempt from scenic resources review.

The case involved 40 forested acres in Skamania County owned by Appellant Ostroski. 30 of the 40 acres lie within a special management area (SMA), a portion of which Ostroski planned to convert to new agricultural use, including growing hay and raising cattle. To achieve the conversion, Ostroski planned to remove trees and build temporary logging roads. At the direction of DNR, Ostroski submitted a State Environmental Policy Act (SEPA) checklist to the Skamania County Planning Department and sought review of his proposal's compliance with the SMA forest practice requirements from the United States Forest Service.

The Forest Service determined that although the proposed use was technically a forest practice, the governing standards did not address conversions from forest to agricultural use, and concluded that because the land would be taken out of forest production, DNR should review the proposal only for the final agricultural uses. This meant DNR would review the application for potential impact to cultural and natural resources, but not scenic or recreational resources. The county issued a modified determination of non-significance (MDNS) specifying conditions of approval and agreeing with the Forest Service that Ostroski's proposed timber harvest was exempt from review for compliance with scenic resource guidelines. Ostroski then submitted a forest practices application to DNR, which issued a conditional approval incorporating some of the Forest Service and county conditions.

Friends of the Columbia Gorge appealed Ostroski's DNR permit to the Washington Forest Practices Appeals Board, arguing that DNR was required to apply all SMA restrictions, including scenic resource review, before issuing a permit for conversion of forest to new agricultural use. On cross motions for summary judgment, the board interpreted the applicable law and found that though the legislative intent to allow conversion under the Scenic Act was clear, the Act was ambiguous about how to effect such a conversion. The board determined it should therefore defer to DNR's interpretation of the portions of the Management Plan implementing the Scenic Act that are incorporated into state regulations under the state Forest Practices Act. The board granted DNR's and Ostroski's motions for summary judgment.

Friends appealed the board's decision to the Thurston County Superior Court, and moved for a temporary restraining order, which the court granted. Friends then moved for an injunction. At the hearing, the superior court reversed the board's decision, finding that the permit application must be reviewed per the SMA forest practice guidelines for cultural, natural and scenic resources impacts. The superior court agreed with the board that the process for conversion for forest to agricultural use was unclear, but ruled that it did not owe special deference to DNR. The court converted the temporary restraining order into a permanent injunction and entered a stipulated final judgment. DNR and Ostroski appealed the superior court's decision.

In determining whether the proposed conversion of forest land to new agricultural use was exempt from scenic resources review, the court of appeals first examined the regulatory framework creating the applicable forest practice guidelines.

The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p, enacted by Congress in 1986, created certain areas subject to land use and development regulations in the Columbia River Gorge National Scenic Area, a 292,600-acre region encompassing lands in three Oregon counties and three Washington counties. The Act authorized the creation of the bi-state Columbia River Gorge Commission and requires the commission and U.S. Forest Service to develop various land use designations and policies and to integrate these rules into a Management Plan implementing the Act. For lands within designated Special Management Areas (SMAs), the Act also requires the Forest Service to develop additional Management Plan guidelines that must ensure that timber production and construction of roads used to harvest forest products take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area.

Most pertinent per the court of appeals, the Act further requires the Management Plan and implementing county land use ordinances to include a provision to "protect and enhance forest lands for forest uses and to *allow, but not require, conversion of forest lands to agricultural lands*, recreation development or open spaces." 16 U.S.C. § 544d(d)(2) (emphasis added).

The Washington Forest Practices Act, Chapter 76.09 RCW, requires the state Forest Practices Board to adopt forest practice rules, which are implemented by DNR. Current state rules incorporate by reference the Management Plan SMA forest practices, with the caveat that to the extent state forest practice rules are inconsistent with the SMA guidelines, the SMA guidelines control. WAC 222-20-040(5)(b). DNR therefore applies the SMA guidelines when it administers the permitting process for forest practices in the SMA portions of the Scenic Area.

The Forest Land section of the Management Plan provides that some uses within the SMA are allowed without review, including "new agricultural and open space uses . . . except where there would be potential impact to cultural or natural resources." This provision, referred to by the parties as the "agricultural use rule," precipitated the controversy over whether scenic resources review applies to SMA forest-to-agriculture use conversions because it expressly omits scenic resources.

The parties agreed that the operative law governing Ostroski's permit application was the state Forest Practices Act and implementing regulations, which DNR is charged with administering and enforcing. However, the parties disagreed about which portions of the Management Plan were incorporated into the state forest practices regulations, and over DNR's interpretation of those rules. Specifically, the parties disputed application of the agricultural use rule.

Friends argued that because it is an agricultural rule, it was not incorporated into state law, so the board erred in upholding DNR's application of the rule in exempting the project from scenic resource review. DNR and Ostroski challenged Friends' characterization of the agricultural use rule, arguing that because the rule is in the SMA portion of the Forest Land section of the Management Plan under the heading "SMA Guidelines," it therefore constitutes an SMA forest practices guideline that was thus incorporated into state law. Friends responded that regardless of where the rule was located, it was not incorporated because state law expressly incorporated only those rules created under 16 U.S.C. 544(f), which require scenic resources review. Noting that the agricultural use rule does not require such review, Friends argued that the agricultural use rule could not have been created under 544(f) and thus did not meet the regulatory definition of guidelines incorporated into state law.

The court of appeals disagreed with Friends and stated that if Friends believed the Management Plan itself did not comply with federal Scenic Act mandates, its remedy was to petition for rulemaking directly under the APA, not to challenge the rule indirectly by contesting DNR's application of the rule as it had done here. Accordingly, the court declined to address whether the agricultural rule as applied here was consistent with the Scenic Act, and held that DNR had properly assumed the agricultural use rule to be valid, incorporated into state law, and applicable to Ostroski's permit application.

Friends also took issue with the classification of Ostroski's permit application as a new agricultural use, rather than a forest practice. Friends observed that Ostroski's planned conversion would initially involve harvesting timber and constructing logging roads. Thus, Friends argued that the board had erred in deciding that Ostroski's permit did not constitute a forest practice subject to scenic resources review. DNR and Ostroski argued that the whole permit, including the final use, must be considered when determining which guidelines apply. Moreover, DNR argued that the Scenic Act and Management Plan did not directly account for the dual nature of Ostroski's conversion proposal, that the lack of an express provision exempting such agricultural conversion from the SMA forest practices guidelines was an ambiguity, and that DNR had to resolve this ambiguity.

The court of appeals agreed that the permit involved both forest and agricultural activities, or a dual classification, for which the Scenic Act did not specify applicable guidelines. DNR asserted that applying all forest practice restrictions to agricultural conversions would result in a de facto prohibition, and because the Scenic Act and Management Plan allow such conversions, DNR could imply an exemption from forest practice restrictions to effectuate the Act's purpose to allow agricultural uses of forest land without the imposition of the scenic resource restrictions. Friends disputed DNR's assertion that application of the scenic guidelines would be fatal to this or other conversion proposals.

Friends argued that DNR's interpretation would result in a loophole that would undermine the Scenic Act's purpose to protect scenic resources. Further, Friends asserted that if applications for forest-to-agricultural use conversions were not classified as forest practices, applicants could avoid scenic regulations and clearcut in the SMAs by applying for new agricultural uses and then abandoning the planned agricultural uses once the permits are granted.

The court disagreed with Friends that such a result could occur, given that the Management Plan had recently been revised to resolve the question of which guidelines apply to a conversion, and that the MDNS issued by the county specifically provided that in the event the conversion was not complete within one year of the completion of the logging of the property, then reforestation requirements would be required. Further, the court found that forest practices applications would still be subject to review for impacts to cultural and natural resources.

The court of appeals also found that the superior court had erroneously interpreted WAC 222-20-040(5)(b) to mean that where SMA forest practices guidelines within the Management Plan conflict, the stricter rule prevails. In fact, the appellate court stated that this section addresses a conflict between state forest practice rules and Management Plan rules, and because there was no such conflict implicated here, WAC 222-20-040(5)(b) did not apply and did not answer the question about which guidelines apply to a dual classification permit.

Finding that there was an ambiguity in the way the Management Plan could be interpreted, the court of appeals determined that it must defer to DNR's interpretation, because it was the agency charged with administering this portion of the plan. The court therefore affirmed DNR's and the Forest Practices Appeals Board's ruling that conversion from forest land to new agricultural use in the Scenic Area does not require scenic resources review.

Finally, Friends argued that DNR acted arbitrarily and capriciously when it granted Ostroski's permit without scenic resources review, in that DNR failed to follow DNR and Forest Service staff members' recommendations to review the permit under scenic resources guidelines, and that the board's statement that in the future the review process for conversions would be on a case by case basis illustrated that the agencies' approach was arbitrary. Applying the Washington Administrative Procedure Act, Chapter 34.05 RCW, the court of appeals found that Friends had not shown that DNR had acted without consideration of the relevant facts or circumstances when its approval of Ostroski's permit differed from the action its employees proposed. The court found this set of facts demonstrated that DNR had given the matter due consideration, not arbitrariness. Further, the court found that it was not clear from the board's comments what DNR would be evaluating on a case-by-case basis, and absent evidence of what would be reviewed, the court could not assume that DNR had acted arbitrarily. The court of appeals therefore affirmed the Forest Practices Appeals Board's decision upholding DNR's issuance of Ostroski's permit.

Lisa Knight Davies

Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd., 129 Wn. App. 35, 118 P.3d 354 (2005).

■ *11TH CIRCUIT SAYS COUNTY VIOLATES THE EQUAL TERMS PROVISION OF RLUIPA BY ALLOWING PRAYER GROUPS AND OTHER RELIGIOUS ACTIVITIES IN RESIDENTIAL ZONE ONLY THROUGH A SPECIAL EXCEPTION*

In *Konikov v. Orange County, Florida*, 410 F.3d 1317 (2005), the Eleventh Circuit held that a zoning ordinance violated the equal terms provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5. The challenged ordinance allowed single-family homes, accessory buildings, home occupations, model homes, and family day care homes within an R-1A zone but required a "special exception" for all other land uses within that zone including "religious organizations."

Defendant Orange County alleged that as part of his activities as a *Chabad* rabbi, the plainitiff held meetings on Friday nights and Saturday mornings, in addition to other meetings for Torah study and holiday celebrations. The county claimed that the plaintiff was operating a "religious organization" in violation of the R-1A zone requirements. After holding a hearing on the matter, the county code enforcement division determined that the plaintiff had not come into compliance with the requirements of the R-1A ordinance, created a lien on the property, and continued to fine him $50 per day for each day the violation continued. Rather than challenge the enforcement decision, the plaintiff filed a complaint seeking compensatory damages, seeking injunctive and declaratory relief under 42 U.S.C. § 1983, and claiming violations of RLUIPA.

First, the plaintiff claimed that the ordinance placed a substantial burden upon his religious exercise in violation of section (a)(1) of RLUIPA. The court quoted from the substantial burden standard established in *Midrash Sephardi, Inc. v. Town of Surfside*: "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." 366 F.3d 1214, 1227 (11th Cir. 2004). The zoning ordinance at issue required the plaintiff to apply to the Board of Zoning Adjustment for a special exception in order to operate a "religious organization." As such, the court denied this claim, concluding that the ordinance did not prohibit the plaintiff from engaging in religious activity nor coerce conformity of a religious adherent's behavior.

The plaintiff also made a facial challenge to the ordinance on the ground that it placed his religious assembly on less than equal terms with nonreligious assemblies in violation of section (b)(1) of RLUIPA. First, the court considered whether any other assembly-type uses were allowed in the zone that could be compared with the religious assembly use proposed. The only type of use that came close to qualifying was family day care homes, which were limited to 10 children. Finding these two uses somewhat similar, the court went on to consider whether the ordinance "subtly or covertly departs from requirements of neutrality and general applicability" and as such, would not survive strict scrutiny. *Midrash*, 366 F.3d at 1232. Permitting family day care homes is a neutral classification, the court concluded, because it did not target religious groups. Rather, the exception for family day care homes acknowledged the fundamental right to freedom of personal choice in marriage and family life. *See Moore v.*

City of East Cleveland, 431 U.S. 494, 499, 97 S. Ct. 1932, 1935 (1977). Thus, the state had a compelling justification for treating family day care homes differently from other groups. The court went on to find that the classification was narrowly tailored to regulate only the interest of protecting choice in the context of the family. Thus the classification of family day care homes withstood strict scrutiny and did not violate RLUIPA's equal terms provision on its face.

The plaintiff went on to suggest that in finding a violation of the ordinance, the code enforcement board treated him as a "religious organization" that was not allowed, while a group having comparable community impact such as a "social organization" would be allowed. In making this evaluation, the court relied heavily on the record, focusing primarily on the enforcement board's evaluation of the frequency of meetings, the number of attendees, the number of vehicles at the plaintiff's residence, advertising for meetings on websites and brochures, and evidence that the services were open to the public at large and not a finite group. By looking at these factors, the court determined that the enforcement board had interpreted the term "religious organization" to involve publicity and meeting with some regularity for religious purposes. The court contrasted this interpretation with the enforcement board's interpretation of nonreligious organizations such as those that further a social or family-related purpose such as a cub scout troop meeting. In other words, a group meeting occurring with the same frequency as the plaintiff's would not violate the code, so long as religion is not discussed. As such, the enforcement board's application of the ordinance treated religious assemblies on less than equal terms without compelling justification in violation of RLUIPA.

The plaintiff's final argument was that the zoning ordinance was void because it failed to give fair notice to those wishing to discuss or study religion in their home and lacked enforcement standards to such a degree that it could lead to arbitrary or discriminatory enforcement. The ordinance does not define the term "religious organization." In concluding that the ordinance was not void, the district court looked to the ordinance's definition of "religious institution" and equated the term "religious organization" with that definition. The court remanded this issue to the district court because it was not clear why the district court had substituted a term that is not necessarily equivalent to an undefined term before concluding that the scope of the ordinance was clear.

As to the arbitrary enforcement issue, the court found compelling the plaintiff's evidence showing that the enforcement board members had disagreed about how many meetings a week could constitute a violation and that this disagreement could lead to discriminatory implementation. The court concluded that the plaintiff had established vagueness in the code and the district court's dispositions on these claims were reversed.

This case demonstrates that it is possible for local governments to fall afoul of RLUIPA through their zoning classifications and enforcement actions, and thus subject themselves to liability.

Carrie Richter

Konikov v. Orange County, Fla., 410 F.3d 1317 (11th Cir. 2005).

■ *MASSACHUSETTS SUPREME COURT FINDS NO TAKING IN CASE INVOLVING SEASIDE LOT*

In *Gove v. Zoning Board of Appeals of Chatham*, 444 Mass 754, 831 NE.2d 865 (2005), the plaintiff's lot was for sale contingent on approval of construction of a single-family home, but the defendant zoning board denied the proposed home. The trial court dismissed the plaintiff's claim of a taking under the federal and Massachusetts constitutions, and the Massachusetts Appeals and Supreme Courts both affirmed.

The lot at issue ("lot 93") was on a beachfront, but a breach in a barrier island made that lot susceptible to ocean flooding. The area was located within an area mapped for coastal flooding, and there were three major sea surges in the twentieth century, none of which were 100-year storms. Lot 93 was bisected by a tidal creek and is 4 to 8 feet above sea level. After the plaintiff inherited the lot in 1975, the defendant adopted a zoning bylaw, placing the site in a "conservancy district" that prohibited residential construction. The plaintiff filed this suit following the denial of a building permit and after attempting to sell the lot.

The court rejected the plaintiff's claim brought under the first prong of *Agins v. Tiberon*, 447 U.S. 255, 260 (1980), that the bylaw failed to substantially advance a legitimate state interest. The court noted that this test had been disapproved as a takings criterion in *Lingle v. Chevron USA*, 125 S. Ct. 2074, 2083 (2005). Framed as a due process challenge, the court found that the claim failed as well, given the strong record supporting the regulation and judicial deference to the regulatory decision maker.

The court then turned to whether the plaintiff had been denied all beneficial economic use of their property and, if so, whether background principles of property or nuisance law supported that prohibition. The testimony of the plaintiff's witnesses was that the lot was still worth $23,000, which the court found to be more than a token value even without consideration of other uses that might be allowed outright or conditionally in the conservancy district. Thus, the *per se* test of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), was not met. The court then turned to the three-factor analysis of *Penn*

Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (the economic impact of the regulation; the extent to which it interferes with plaintiff's distinct, investment-backed expectations; and the character of the governmental action).

The court said it was satisfied that the prohibition of residential construction did not leave the value of the land outside the range of normal fluctuations on the value of coastal property, noting that the site was marginal and had, for good reason, not been built upon. The court added that building was even more problematic because of the barrier island erosion. Before a recent uptick in coastal property values, the property would not have been a good investment-as the market itself had recognized when the plaintiffs were unable to sell it. The court concluded that the takings clause was not intended to pay owners for rights they never had. The offer to buy contingent on receipt of a residential building construction permit was, according to the court, "highly dubious at best" because such construction was prohibited and variances were also prohibited under the bylaw. The court concluded:

> This is not a case where a bona fide purchaser for value invested reasonably in land fit for development, only to see a novel regulation destroy the value of her investment. Gove did not purchase lot 93; she inherited the property as part of the devise from her mother in which she received other real property of significant value. By this we do not suggest that Gove's takings claim is defeated simply on account of her lack of a personal financial investment. Rather, Gove's failure to show any substantial "personal financial investment" in lot 93 emphasizes her inability to demonstrate that she ever had any reasonable expectation of selling that particular lot for residential development, or that she has suffered any substantial loss as a result of the regulations. In these circumstances "justice and fairness" do not require that Gove be compensated. To the contrary, it seems clear that any compensation would constitute a 'windfall' for Gove.

831 NE.2d at 874-75 (citations omitted).

The court also concluded that the character of the governmental action in this case, the safety regulation, failed the third factor of the *Penn Central* test. Combined with the probable lack of any legitimate property interest in the construction of a house, the court found no combination of factors in which a taking might be predicated. The trial court decision was thus affirmed.

This case applies the *Penn Central* factors to a site in which the local government's prohibition on home construction survived a takings claim, even though it prohibited a use that the zoning regulations once allowed.

Edward J. Sullivan

Gove v. Zoning Bd. of Appeals of Chatham, 444 Mass 754, 831 NE.2d 865 (2005).

■ MICHIGAN COURT OF APPEALS REJECTS ENVIRONMENTAL REGULATORY TAKINGS CLAIM

K&K Construction, Inc. v. Department of Environmental Quality, 267 Mich. App. 523, 705 N.W.2d 365 (Mich. Ct. App. 2005), involved a takings claim brought when a wetlands regulation allegedly lowered the value of the plaintiffs' property. The court used the three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), as the Michigan Supreme Court had instructed the trial court to do in a previous iteration of this case. *K&K Constr., Inc. v. Dep't of Natural Res.*, 456 Mich. 570, 588; 575 N.W.2d 531 (1998). Those factors are the economic impact of the regulation on the claimants, the extent to which the regulation interferes with the claimant's distinct investment-backed expectations, and the character of the governmental regulation. The court of appeals interpreted these tests to include consideration of the average reciprocity of advantage (*i.e.*, whether the plaintiff had been "singled out" to bear burdens that ought to be borne by the public as a whole), what the landowner could reasonably expect to do with the land on acquisition, and whether there were valuable land use rights left following imposition of the regulation.

In this case the plaintiffs were denied a permit to fill a wetland, an area protected under state and federal law. The court concluded that wetland regulations are ubiquitous and provide for an average reciprocity of advantage, that the plaintiffs had valuable rights to use their property, and that the plaintiffs were experienced land developers who were on actual and constructive notice of applicable wetlands regulations when they acquired the property.

This case was originally filed in the Michigan Court of Claims in 1988. That court found a taking and the Michigan Court of Appeals affirmed. However, the Michigan Supreme Court reversed that determination, holding that the lower courts had looked only at the single parcel alleged by the plaintiffs to have been taken rather than looking at all contiguous lands owned by them, and that the plaintiffs had not been deprived of all reasonable, viable, economic use of their property. The Supreme Court instructed the trial court to use the *Penn Central* analysis on remand, as well as the "parcel as a whole" rule.

The case involved four adjacent parcels totaling 82 acres. The plaintiffs were prohibited from undertaking their development plans because they did not seek a fill permit. When they later did seek a permit, it was denied, as was a subsequent permit application. The property was partially developed with commercial uses. The trial court segregated consideration of one parcel, found it worthless as a result of the wetlands regulations, and awarded $6 million. The defendant opted under the applicable Michigan statute to mitigate damages by issuing a permit for a smaller project and the trial court reduced the damages from $6 million to $3.25 million and added a "tem-

porary taking" claim for which it awarded $325,000, a decision that was subsequently reversed by the Michigan Supreme Court.

On remand, the trial court found the Michigan Supreme Court had not disturbed its previous findings of the before-and-after value comparisons-$6 million versus nothing-notwithstanding the commercial development that had taken place on the subject parcel. It then purported to undertake a *Penn Central* analysis and came to a similar conclusion as in its previous decision: that the defendant was liable to the plaintiffs for $5.9 million plus costs, interest, and attorney's fees for a total of $16.5 million. The plaintiffs challenged the rate of interest and the denial of their lost profits, which they alleged would have been greater because of their real estate experience.

The court rejected the plaintiffs' contentions that the mitigation permit would have been revoked if the defendant prevailed, given that the defendant took the position in the first appeal that the permit was valid and that the plaintiffs could rely upon it After the remand, the plaintiffs claimed that the permit had expired and asked to amend their complaint, which the trial court initially denied because of the defendant's position and because the plaintiffs were attempting to accrue additional damages. The trial court then reversed itself and awarded "full damages" on the commercial parcel, finding the defendant's handling of the reissued permit "personally offensive." The standard of review on appeal was whether there was any "clear error" in the findings of fact, while the constitutional issues were reviewed *de novo*.

The appellate court found that the trial court had failed to comply with the instructions in the remand order in several respects. First, the parcel on which a taking had been found had other commercial uses allowed on it, yet the trial court said that because its rulings on valuation had not been specifically overturned, it would apply them once again on remand. This was error because even with respect to the one parcel at issue, there were valuable, commercial uses allowed. Therefore, there was no *per se* taking. Second, the Michigan Supreme Court had ordered the trial court to consider other adjacent parcels under the same ownership when making its *Penn Central* analysis. The court acted inconsistently with the remand instructions. Third, to the extent that the trial court had considered the value of the remaining land, it found that land insufficient to "offset" the loss of value on the commercial parcel. Moreover, the trial court erred in applying *Penn Central* in a brief (one-page) conclusory manner, rather than the "difficult, crucial and dispositive analysis" the supreme court required and therefore did not properly apply the law to the facts.

The court emphasized the importance of wetlands in the federal and state legislative schemes, the integrity of which was delegated to the defendant to protect, and the need to conserve public funds. The court also noted the mitigation scheme to reduce potential damage awards. Finally, the court found that the plaintiffs had erred in making a claim under the revised permit by their own conduct and failing to seek alternative relief.

The court reaffirmed the application of *Penn Central* to the facts of this case in the absence of any categorical taking. While none of the three factors was found dispositive, the character of the governmental action is most important because the wetland regulation served an important public interest. Therefore, the other two factors must be equivalent to a physical invasion to overcome this third factor.

The court said that a reduction in value alone was insufficient to show a taking, noting *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Even using the plaintiffs' figures, a two-thirds reduction in value would be insufficient, standing alone, to show a taking. Further, while notice on acquisition of the property following adoption of a regulation does not necessarily bar a taking claim under the "distinct investment-backed expectations" factor, such notice must be taken into account in weighing whether a taking occurred.

In this case, the state wetlands protection legislation had been in place for seven years when the plaintiffs, self-described experienced real estate builders and developers, acquired the property. The court concluded that the plaintiffs' stated expectations for the development of the site, given the wetlands regulations, were not reasonable. In addition, there had already been significant development of the parcel as a whole and other development was permitted but not yet undertaken. The court found no significant negative impacts on the plaintiffs' reasonable investment-backed expectations. As to the character of the governmental action, the court decided that this factor fell on the side of the spectrum involving a governmental program adjusting the burdens and benefits of economic life to carry out a conception of the public good, rather than a physical invasion. The court also noted that the regulation provided an average reciprocity of advantage and did not force the plaintiffs alone to bear the burdens of the regulation. Because the burdens were spread over all wetland owners and benefited these land owners and the public generally, the trial court decision was reversed.

This case involves application of the parcel as a whole rule (incorporated recently into Oregon constitutional law through *Coast Range Conifers, LLC v. State ex rel. Bd. of Forestry*, 339 Or 136, 117 P3d 990 (2005)), as well as the use of the *Penn Central* analysis, both of which are explained well by the court's decision.

Edward J. Sullivan

K&K Constr., Inc. v. Dep't of Envtl. Quality, 267 Mich. App. 523, 705 N.W.2d 365 (Mich. Ct. App. 2005).

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