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Highlights

Appellate Cases—Takings

■ *MEASURE 37: THE SAGA CONTINUES . . .*

In *Macpherson v. Department of Administrative Services*, 340 Or 117, 130 P3d 308 (2006), the Oregon Supreme Court reversed the trial court and held Measure 37 constitutional.

In January 2005, 1000 Friends of Oregon, five county farm bureaus, and a number of individuals and businesses filed a declaratory judgment action in Marion County Circuit Court challenging the constitutionality of Measure 37. The named defendants, three state agencies, and three counties were joined by various intervenors, including Measure 37's chief petitioners. On motions for summary judgment from both sides, the trial court ruled that the measure was invalid on one federal and four state constitutional grounds. The state and intervenors appealed directly to the Oregon Supreme Court, pursuant to ORS 250.044.

As a preliminary matter, the Oregon Supreme Court considered and rejected arguments from intervenors that, for various reasons, the case was not justiciable. The plaintiffs had standing to bring a declaratory judgment action because at least one of them made sufficiently "plausible and concrete" allegations that he would suffer harm from a neighbor's successful Measure 37 claim, including increased traffic and pollution. The court found that the case presented an actual controversy based on "present facts" and was, therefore, ripe for decision. There was no requirement that the plaintiffs bring an action under the Administrative Procedures Act (ORS Chapter 183) or otherwise exhaust administrative remedies before challenging the constitutionality of the measure. The court then moved on to the merits, discussing and rejecting in turn each of the trial court's constitutional holdings and additional theories advanced by the plaintiffs.

The Marion County Circuit Court held that Measure 37 unconstitutionally "impose[d] limitations on government's exercise of plenary power to regulate land use." 340 Or at 126 (quoting *Macpherson v. Department of Administrative Services*, No. 05C10444 (Marion Co Cir Ct Oct. 14, 2005). By forcing state and local governments to either forego enforcement of land use regulations or compensate qualified claimants, it required them to "pay to govern." *Id.* The Oregon Supreme Court held the trial court "misunderstood the nature of the plenary legislative power." *Id.* The state legislature, or the people directly through the initiative and referendum, have the power to enact any law not prohibited by the federal or state constitutions. The plaintiffs cited no constitutional provision that either expressly or impliedly forbids enactment of this type of law. In addition, the measure does not prevent the legislature or the people from enacting new land use statutes, or even amending or repealing the measure itself. "Simply stated, Measure 37 is an ***exercise*** of the plenary power, not a ***limitation*** on it." 340 Or at 128 (emphasis in original).

The trial court held that Measure 37 violated the "equal privileges and immunities" clause of the Oregon Constitution, Article I, section 20, by favoring those who acquired their property before the imposition of a land use regulation (the "preowners"), over those who acquired their property after the regulation was in force (the "postowners"). If these were "true classes", i.e., classes that were not created by the challenged legislation itself, then there must be a rational basis for treating them differently. Based on its prior conclusion that the measure improperly impedes the exercise of plenary power, the trial court held there was no legitimate state interest served by it, and, therefore, no rational basis for the disparate treatment of the two classes. The Supreme Court did not reach this last issue, because it concluded that "preowners" and "postowners" are not "true classes" subject to scrutiny under Article I, section 20. While the facts of the temporal relationship between date of ownership and enactment of regulations obviously exist independent of the law, "the date that an owner acquired property has no significance apart from Measure 37." 340 Or. at 130. Nor does the fact that the two classes are "closed" necessarily result in a violation of Article I, section 20.

The trial court held that Measure 37 violated Article I, section 22, of the Oregon Constitution, which provides that "operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly." It reasoned, in line with its equal privileges and immunities holding, that this section was violated because the measure impermissibly suspends land use laws for only a portion of the populace. The Oregon Supreme Court's simple answer was that no laws are "suspended." "The measure is, in effect, an amendment of the land use regulations in those particulars. No law is 'suspended'; all laws not amended remain in effect." 340 Or at 132.

The trial court held that Measure 37 violated the separation of powers provision of the Oregon Constitution, Article III, section 1, because a legislature cannot delegate powers it does not possess. Since the legislature, through the voters, had created invalid classes and improperly suspended the application of the land use laws, it likewise could not delegate the power to do so to other branches of government. Because the court had reversed those predicate holdings, it also rejected this conclusion.

The plaintiffs made two other separation of powers arguments, which had not been adopted by the trial court. They contended that the Measure 37 provision that "the governing body responsible for enacting the land use regulation" could decide to waive its regulation improperly allowed a legislative body, rather than the executive, to determine whether a law should be enforced. The court disagreed with this theory, noting that, particularly in the case of cities and counties, it is well established that one governing body may sometimes perform legislative, executive, and adjudicative functions. The court also rejected the plaintiffs' argument that the measure improperly delegated legislative authority without standards to control its use, holding that the judicial review of state and local decisions furnishes an adequate safeguard against the arbitrary exercise of power.

The trial court held that Measure 37 violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The trial court reasoned that the measure did not afford procedural due process because it did not require a public hearing before the decision on a claim, which could result in irreparable harm to a neighbor. The Oregon Supreme Court pointed out that because this case is a facial challenge to Measure 37, the plaintiffs' argument could prevail only if the plaintiffs could demonstrate that the measure "affirmatively permits the government to deprive the plaintiffs of their property without affording procedural due process." 340 Or at 139. Because the measure does not prohibit the state or local governments from providing such a hearing, there was an insufficient basis for a facial challenge. And because the law could be applied constitutionally, the facial procedural due process challenge failed. The court specifically stated it was not deciding whether a pre-decision hearing is constitutionally required.

The trial court also held that the measure lacked substantive due process on the basis that there was no legitimate reason for enacting it because there was no legitimate state interest in impeding the exercise of the plenary power. Because the court had rejected this underlying premise, the trial court's rationale for a substantive due process violation was eliminated.

The plaintiffs made an additional argument that the state has no legitimate interest in using public money to pay private parties for their economic loss due to land use regulations when those regulations are presumably in the public interest and do not constitute a taking. The court disagreed and held that the measure bore a reasonable relationship to a legitimate state interest—compensating landowners for diminution of their property value by land use regulations or relieving them of the burden of those regulations. Even if the government is not required to provide such relief, neither the United States nor Oregon Constitutions forbid it.

The Oregon Supreme Court also considered an argument that the trial court had not found persuasive: that allowing a claimant to bring an action for compensation in trial court constitutes an invalid waiver of sovereign immunity. The theory was that Article IV, section 24, of the Oregon Constitution, authorizing the state to waive sovereign immunity, does not extend to accepting liability for economic damages caused by regulation. The court held that while the government might not be required to allow compensation for such damages, there was no prohibition against it doing so in Article IV, section 24, or anywhere else in the Oregon Constitution.

Having rejected all challenges to the constitutionality of Measure 37, the court remanded the case for entry of judgment for defendants and intervenors. Although this decision settled the constitutionality of the measure, it answered none of the many questions about its interpretation or application (e.g. transferability, what constitutes ownership, state/local regulation interaction). This decision only clears the path for the many more appellate decisions to follow.

Michael Judd

Macpherson v. Department of Administrative Services, , 340 Or 117, 130 P3d 308 (2006).

■ *NO "SELF-HELP" FOR RIPENESS ON AN INVERSE CONDEMNATION CLAIM*

In late December the Oregon Court of Appeals issued a decision on the ripeness prerequisite for a regulatory taking claim on a very unusual set of facts. *Murray v. State of Oregon*, 203 Or App 377, 124 P3d 1261 (2005), concerned a 20.5 acre parcel in Wasco County subject to the Columbia River Gorge National Scenic Area Act ("the Gorge Act"). The plaintiffs purchased the property in 1990 knowing it fell within the regulatory requirements of the Gorge Act. One of those was the requirement of an archaeological survey in conjunction with any development application review.

Beginning in 1990, the property owners submitted a series of development applications to the Gorge Commission for a variety of uses, including a residence, a partition, a barn, and a quarry. In each instance, except for the barn, the Gorge Commission denied the applications in part because the property owners did not include the required archeological survey. Notwithstanding the denials, the property owners began conducting surface mining and quarry operations on the property

in an area that contained significant Native American artifacts. The Gorge Commission obtained a preliminary injunction in Wasco County Circuit Court. Ignoring the injunction, the property owners "used a tractor with ripper blades on the portion of the property where it was believed that cultural resources were present" and sent a letter to the court saying "I will not pay any attention to any directive, statement, judgment or order regarding me mining on my property." 203 Or App at 384. The trial court then issued a permanent injunction against the property owners barring the quarry operation and any other activities until required permits had been obtained.

The property owners then sued the state of Oregon on an inverse condemnation claim alleging, in relevant part, that the permanent injunction constituted a taking. The state responded to the regulatory taking element of the claim by moving for summary judgment on ripeness, arguing that the property owners had never completed the development application process. The trial court denied summary judgment and later awarded the property owners $220,000 in damages. The state appealed and the Oregon Court of Appeals reversed.

In doing so, the court of appeals agreed with the state that the property owners' regulatory taking claim was not ripe because they never completed the application process by submitting the archeological survey. The court of appeals then addressed the property owners' conduct and found that ignoring the applicable regulations and having an injunction entered against them instead did not ripen their claim.

> Plaintiffs' actions prevented the regulatory agency from making such a decision. Ignoring an administrative regulatory body and taking actions completely contrary to the regulations and orders of that body has never been a proper alternative means of creating a final determination in order to make ripe for judicial review, nor should it be now.

203 Or App at 392.

Because the court of appeals held that the ripeness issue was dispositive, it did not reach the question of whether the state was a proper defendant. The Gorge Commission, not the state, was the plaintiff in the injunction proceeding that formed the core of the property owners' inverse condemnation claim. Although the Gorge Commission used Oregon's state court in seeking the injunction, the Gorge Commission is not an Oregon state agency. Rather, it is a bi-state entity created by a Congressionally approved compact between Oregon and Washington.

Mark J. Fucile

Murray v. State of Oregon, 203 Or App 377, 124 P3d 1261 (2005).

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Appellate Cases—Land Use

■ COURT ADDRESSES IMPACTS OF PROPOSED HIGHWAY BYPASS ON RESIDENTIAL AND AGRICULTURAL LAND

In the final days of 2005, the Oregon Court of Appeals issued a pair of opinions involving a proposed highway bypass between the cities of Dayton, Dundee, and Newberg. In *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 124 P3d 1249 (2005), the court invalidated Dundee's bypass-related amendments to its comprehensive plan because the city had relied on a buildable lands inventory (BLI) that was not itself part of the comprehensive plan. One week later, the court held that the Land Use Board of Appeals (LUBA) had misconstrued the rules for exceptions to the statewide land use planning goals in evaluating Yamhill County's bypass-related exceptions. *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323, 126 P3d 684 (2005).

The Oregon Department of Transportation (ODOT) proposed an eleven-mile bypass to alleviate congestion on State Highway 99W, particularly where the highway narrows from four lanes to two in the city of Dundee. Several jurisdictions passed ordinances to facilitate location of the bypass. A number of parties, including Columbia Empire Farms, Inc. (Columbia Empire), whose farm would be trisected by the bypass, and 1000 Friends of Oregon appealed Dundee's and Yamhill County's decisions to LUBA, which upheld the decisions on all counts. Columbia Empire appealed.

In *City of Dundee*, Columbia Empire argued that the city had violated Goals 2 and 10 when it amended its comprehensive plan. Goal 2's purpose is "[t]o establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions." To implement this purpose, Goal 2 requires cities and counties to adopt comprehensive plans and make planning decisions in accordance with such plans. Goal 10, whose purpose is "[t]o provide for the housing needs of citizens of the state," requires governments to inventory buildable land available for residential use and to provide for adequate numbers of needed housing units in their comprehensive plans.

The city's comprehensive plan, initially adopted in 1977, designated 430 acres of land for future residential development and required a reexamination of the city's urban growth boundary every five years. A 1988 BLI, which had been incorporated into the comprehensive plan, concluded that only approximately 30 of the 430 acres would remain available in 2005. In contrast, a 2003 BLI, which had not been incorporated into the comprehensive plan, concluded that between 97 and 155 acres would remain available through 2020. The city relied on the 2003 BLI in approving the bypass-related amendment to its comprehensive plan.

Columbia Empire objected to the city's express reliance on the 2003 BLI given that it was not a part of the comprehensive plan. The court of appeals agreed, holding that a local government violates Goal 2 when it bases a planning decision on a study not incorporated into its comprehensive plan—even if the comprehensive plan contemplates such a study. The court explained the policy reasons behind its ruling:

> That is not a matter of mere abstract concern. Rather, it goes to the heart of the practical application of the land use laws: The comprehensive plan is the fundamental document that governs land use planning. Citizens must be able to rely on the fact that the acknowledged comprehensive plan and information integrated in that plan will serve as the basis for land use decisions, rather than running the risk of being "sandbagged" by government's reliance on new data that is inconsistent with the information on which the comprehensive plan was based.

203 Or App at 216.

In *Yamhill County*, Columbia Empire argued that the county violated several statutes and Land Conservation and Development Commission (LCDC) rules when the county adopted three ordinances approving exceptions to Goals 3, 11, and 14 and amending its comprehensive plan and zoning ordinance. An "exception" is "a decision to exclude certain land from the requirements of one or more applicable statewide goals." OAR 660-004-0000(2). Goal 2, Part II and ORS 197.732 allow local governments to adopt exceptions if certain requirements are met. The statute allows three types of exceptions, and Yamhill County involved the third type, which is governed by the following statutory criteria:

> (A) Reasons justify why the state policy embodied in the applicable goals should not apply;
>
> (B) Areas which do not require a new exception cannot reasonably accommodate the use;
>
> (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
>
> (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

ORS 197.732(1)(c). Columbia Empire made arguments under all four of these criteria.

The court first addressed an argument involving both criterion A (the "reasons" standard") and criterion B (the "areas" standard) of ORS 197.732(1)(c). OAR 660-012-0070(4), (5), and (6), which implement criteria A and B, require local governments to determine the reasonableness of non-exception alternatives and locations by evaluating them against thresholds chosen by the local government. Yamhill County identified and used five thresholds, including the Oregon Highway Plan (OHP) mobility standards. Columbia Empire objected to the use

of the OHP mobility standards and argued that they resulted in an improper narrowing of the analysis so that only farm land would be deemed reasonable for use. The court disagreed and upheld the use of the OHP mobility standards.

Moving to an argument solely involving criterion A, the court then held that LUBA erred in concluding that OAR 660-012-0070(4), an LCDC rule governing exceptions for transportation improvements on rural land, contained the exclusive criteria for evaluating compliance of such projects with criterion A. Rather, OAR 660-004-0020(2)(a) also applied. That rule in part requires local governments approving exceptions to "set forth the facts and assumptions used as the basis for determining that a state policy embodied in a goal should not apply to specific properties or situations including the amount of land for the use being planned and why the use requires a location on resource land." The court directed LUBA to apply this rule on remand.

Criterion B requires an analysis of whether non-exception sites could reasonably accommodate the use. With regard to this criterion, Columbia Empire again objected to the use of the OHP mobility standards and argued that their use resulted in the inappropriate rejection of certain alternatives that would not have require a goal exception. The court disagreed, again upholding the use of the OHP mobility standards and noting that the county and LUBA had both rejected the nonexception alternatives proffered by Columbia Empire as not specific enough to require consideration. OAR 660-004-0020(2)(c) states that "[a] detailed evaluation of specific alternative sites is not required unless such sites are specifically described with facts to support the assertion that the sites have significantly fewer adverse impacts."

Criterion C requires an analysis of the long-term environmental, economic, social, and energy consequences. The court held that LUBA erred in concluding that OAR 660-012-0070(7) contained the exclusive standards for evaluating compliance with criterion C. According to the court, analysis under OAR 660-004-0020(2)(c) was also required. That rule expressly requires, among other things, an analysis of the impacts on resource lands, including "the facts used to determine which resource land is least productive; the ability to sustain resource uses near the proposed use; and the long-term economic impact on the general area caused by irreversible removal of the land from the resource base." The court directed LUBA to apply OAR 660-004-0020(2)(c) on remand.

The court upheld the county's analysis under criterion D. That criterion requires the local government to ensure that "[t]he proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." Columbia Empire argued that the county had violated OAR 660-012-0070(8)(c), which implements criterion D, by failing to require ODOT to implement adequate mitigation measures to ensure that the bypass would be compatible with Columbia Empire's farming operation. Specifically, Columbia Empire argued that the county should have required measures as a condition of approving the exception. The court noted that the agencies were planning the bypass in two phases and that the design aspects of the bypass would be completed during the second phase. The court also noted that the county had expressly stated that mitigation matters would be addressed during the design phase at future public hearings and in future land use decisions. Given these representations by the agencies, the court upheld the two-phased approach, stating that it saw "little practical or substantive difference between a condition calling for future mitigation and an announced phasing of an improvement project that incorporates mitigation as part of future land use decisions." 203 Or App 340–41.

Nathan Baker

1000 Friends of Oregon v. City of Dundee, 203 Or App 207, 124 P3d 1249 (2005); *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323, 126 P3d 684 (2005).

■ *POWER GENERATION FACILITY IN KLAMATH COUNTY WINS SUPREME COURT APPROVAL*

In *Save Our Rural Oregon v. Energy Facility Siting Council (In re COB Energy Facility)*, 339 Or 353, 121 P3d 1141 (2005), neighbors and community activists once again learned how difficult it is to successfully challenge a siting of a major energy facility. The Oregon Supreme Court approved the Oregon Energy Facility Siting Council's issuance of a site certificate for a natural gas fired power generation facility located in Klamath County. The court reviewed the Energy Facility Siting Council's final order for errors of law and lack of substantial evidence in the record to support the challenged findings of fact. ORS 469.403(6); ORS 183.482(7). In both respects, the court rejected the petitioners' arguments and approved the Council's decision, not dissimilar to what it did two years earlier in *Friends of Parrett Mountain v. Northwest Natural Gas*, 336 Or 93, 79 P3d 809 (2003).

The COB Energy Facility LLC (COB) submitted an application for a site certificate (ASC) for its proposed 1,150 megawatt natural gas fired plant. In order to construct the proposed facility, COB had to go through a lengthy administrative process, including public hearings, in order to obtain from the Energy Facility Siting Council (the Council), aka EFSC, a site certificate which authorized the applicant to construct and operate its energy facility. The site certificate is a land use "green light," binding state, county, and city governments and requires state agencies and local governments to issue all appropriate permits without further proceedings. ORS 469.401. Of course, the proposed facility must comply with the statewide planning goals. ORS 4690.503(5). The criteria to determine such compliance is found in ORS 469.504, which was the focus of the judicial review brought by the neighbors.

The petitioners, 22 Klamath County residents who lived near the site of the proposed facility, and two organizations representing those residents, sought judicial review, raising the following challenges to the Council's proposed order on the following basis: (1) the Council misinterpreted ORS 469.504, (2) the order lacked substantial evidence to support taking exceptions to Goal 3 and Goal 4, (3) the Energy Department should have promulgated rules to define certain statutory terms before issuing the proposed order, (4) the Council incorrectly deter-

mined that the facility met the Klamath County conditional use criteria, (5) the facility should not have been sited on EFU land, and (6) the proposed order lacked substantial evidence regarding compliance with geologic and water standards.

The court began with an analysis of ORS 469.504(5) with the following admonition for the reader: "Cautioning the reader at the outset that this statutory interpretation exercise involves mind numbing detail, we begin our analysis with the text of ORS 469.504(5)." 339 Or at 363. Rather than subject RELU Digest readers to that analysis, suffice to say that the supreme court rejected the petitioners' argument and interpretation. In its detailed "exercise" of ORS 469.504(5), the court concluded that the Council could review a proposed energy facility for compliance with both local land regulations and statewide planning goals.

The court next turned to petitioners' argument that the Council had erred in applying the criteria for taking exceptions to statewide land use planning goals under ORS 469.504(2). That statute provides that if the Council finds that the application for the site certificate does not meet statewide planning goals, it may approve the application by taking an exception pursuant to the criteria in ORS 469.504(2). First, the petitioners argued that the Council's legal analysis in granting an exception to Goal 3 was flawed, because it did not include an alternatives analysis. Petitioners argued that ORS 469.504(2) should be construed similar to ORS 197.232, which requires an alternative analysis. While agreeing that the two statutes are similar, the court concluded that an alternatives analysis was not required to be made by the Council in deciding whether or not the proposed facility met the requirements for an exception to Goal 3.

Next, the petitioners attacked the evidentiary record, contending that there was not substantial evidence to support the Council's finding under ORS 469.504(2)(c) justifying the exception to Goal 3. ORS 469.504(2)(c) requires a demonstration that there are reasons which justify why the goal policy does not apply, that the adverse impacts of the facility will be mitigated, and that the proposed facility is compatible with adjacent uses. The court had no difficulty brushing these arguments aside, reiterating the rule set forth in ***Friends of Parrett Mountain***. 336 Or at 96. The court reviewed challenged factual findings of the Council for substantial evidence in the record. Substantial evidence in the record exists "when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). The court, as it did in ***Friends of Parrett Mountain***, reviewed the evidence and concluded that there was substantial evidence in the record to support the challenged factual findings.

The petitioners next claimed that the Council erred in allowing an exception to Goal 4. The court again reviewed the record and concluded that substantial evidence supported those findings.

The court then analyzed petitioners' contention that the Council was legally obligated to engage in rule making before approving the final order. At the outset, the court noted that petitioners could not directly challenge the Council's denial of their request for rule making, since the appeal before the court was on direct review from the Council's final order. However, the court, in determining whether the Council had properly approved the application for the site certificate, agreed to consider the issue. The petitioners, in arguing for the required rule making, focused on three critical ORS 469.504 terms, "notwithstanding," "significant," and "mitigated," contending they were too ambiguous and undefined in describing the standards addressing the siting, construction, operation, and retirement of facilities. The court rejected petitioners' argument and their reliance upon ***Marbet v. Portland General Electric***, 277 Or 477, 561 P2d 154 (1977).

Petitioners claimed that there was not substantial evidence in the record to support the Council's finding that the proposed facility met the Klamath County development code conditional use criteria. However, the court pointed to evidence in the record relating to testimony from the applicant's agricultural and soils expert. The court had no difficulty in finding that the evidence in the record supported the Council's finding of fact that the applicant had met the conditional use criteria of Klamath County's land use regulations.

The application was for constructing and operating an energy generation facility, waste water management areas, a natural gas pipeline, an electrical transmission line, and a water supply system. The petitioners argued that permitting the construction of these structures on exclusive farm use land violated the requirements of ORS 215.283 and ORS 215.296. The Council determined in its order that the generation portion of the project was a conditional use under ORS 215.283(2)(g), and that the other portions of the project, i.e., the waste water management area, the natural gas pipeline, the electrical transmission line, and the water supply system were uses as of right under ORS 215.283(1)(y) and ORS 215.283(1)(d). The petitioners argued that the ancillary uses were not uses as of right, but rather were conditional uses. The court rejected petitioners' interpretation, relying upon its decision in ***Brentmar v. Jackson County***, 321 Or 481, 496, 900 P2d 1030 (1995).

The petitioners urged that the Council was incorrect in determining that the applicant had inadequately analyzed the geologic and soil stability of the proposed site. The court noted that the Council had received evidence from both the applicant's expert and petitioners' expert. Again, the court found that there was substantial evidence in the record to support the Council's determination that the applicant had adequately geologically analyzed this site. The court stated, "[i]n making [a] determination [of substantial evidence], the probative weight to be accorded the testimony of expert witnesses is for the trier of fact to apportion." ***Friends of Parrett Mountain***, 336 Or at 105. The court, as it did in ***Friends of Parrett Mountain***, supra, deferred to the Council's determination of which expert to believe.

Finally, petitioners challenged the Council's decision as part of its final order to direct the Water Resources Commission to issue a water permit to the applicant. Again, the court found substantial evidence in the record to support the Council's determination that existing water rights would not be injured by the new facility.

To fully appreciate the difficulty in challenging the issuance of a site certificate by the Energy Facility Siting Council, the reader is encouraged to read this case and the *Friends of Parrett Mountain* case together.

Jack Hoffman

Save Our Rural Oregon v. Energy Facility Siting Council (In re COB Energy Facility), 339 Or 353, 121 P3d 1141 (2005).

■ MID-COUNTY FUTURE ALT. IS OVERRULED; TRIPLE ANNEXATIONS ARE CONSTITUTIONAL

Sixteen years after its original decision, the Oregon Court of Appeals overruled *Mid-County Future Alt. v. Portland Metro Area LGBC*, 82 Or App 193, 199–201, 728 P2d 63 (1986) *rev. dismissed*, 304 Or 89, 742 P2d 47 (1987). In *Morsman v. City of Madras*, 203 Or App 546, 126 P3d 6 (2006), the Oregon Court of Appeals held that the triple majority method of annexation is constitutional.

Mr. Morsman owns a 60-unit mobile home park outside the city of Madras in an existing developed industrial park that includes a mix of uses including the city's sewage treatment plant, an airport, and other residential properties. The city of Madras sought to annex this area by way of a "cherry-stem" annexation. The "stem" includes a 300' section of public right-of-way known as the Warm Springs Highway connecting the industrial park or "cherry" to the city limits. The territory is located entirely within the urban growth boundary.

The city sought annexation by way of ORS 222.170(1) and adopted an ordinance to that effect on February 25, 2003.

A somewhat complicated procedural history followed this decision including several trips up and down the appellate ladder as well as additional hearings before the city. During this process petitioners argued the triple-majority rule was unconstitutional.

The triple majority rule states:

> "the legislative body of the city need not call or hold an election in any contiguous territory proposed to be annexed if more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the contiguous territory consent in writing to the annexation of their land in the territory and file a statement of their consent with the legislative body * * *."

ORS 222.170(1).

Petitioners argued on appeal that ORS 222.111(5) confers upon the electorate of the territory a right to vote on annexation while the triple-majority rule selectively takes that right away from resident electors who do not own property. As such this statutory scheme unlawfully discriminates against resident electors who do not own property in violation of Article I, section 20, of the Oregon State Constitution, the privileges and immunities clause.

The court of appeals examined whether petitioner was part of a class that is part of a protected class. The protections afforded under the privileges and immunities clause apply only to a "true class." In defining a "true class" the Oregon Supreme Court distinguishes between "classes that are created by the challenged law or government action itself and classes that are defined in terms of characteristics that are shared apart from the challenged law or action." *Tanner v. OHSU*, 157 Or App 502, 520–21, 971 P.2d 435 (1998). Examples of true classes include gender, ethnic background, legitimacy, past or present residency, and military service.

However whether a person is a member of a "true class" does not end the inquiry. A governmental action might be upheld notwithstanding the distinctions drawn along class lines unless the affected group is also one, which exhibits "characteristics that are historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Tanner*, 173 Or App 97, 103, 20 P3d 247 (2001); *Tanner*, 157 Or App at 522–23. This subset of a "true class" is referred to as a "suspect class."

Petitioners argued that resident electors in a territory who do not own property are members of a "suspect class." Historically this class was subject to discrimination because over time political power has been distributed on the basis of the ownership of real property. The court of appeals disagreed, finding:

> Although, even in modern times, there exist laws that favor property owners over those who do not own property, petitioners have adduced no authority for the proposition that persons in the latter group are the subject of the sort of adverse social or political stereotyping or prejudice that characterizes a suspect class.

263 Or App at 557.

Finding no support for petitioner's theory of a "suspect class" the court of appeals revisited its decision in *Mid-County Future Alt. v. Port. Metro Area LGBC*, 82 Or App 193, 199–201, 728 P2d 63 (1986) rev. dismissed, 304 Or 89, 742 P.2d 47 (1987) ("Mid-County Future Alt."). In *Mid-County Future Alt.* the court of appeals applied a "balancing test" to determine whether a triple-majority annexation served a legitimate public interest. The court concluded that the state's justification to eliminate the administrative burden of an election was not sufficient when it was weighed against the privilege to vote.

Following Mid-County Future Alt. the Oregon Supreme Court in *Hale v. Port of Portland*, 308 Or 508, 524, 783 P2d 506 (1989), rejected the "balancing test" in favor of the less demanding rational basis test. The court of appeals recognized this in *Sherwood School Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 386–87, 6 P3d 518 (2000), but did not reach the issue as it applies to the triple-majority rule.

Under the rational basis test "a statute must be upheld as long as it is tied to a legitimate governmental purpose, regardless of whether that purpose is set out in the statute or legislative history, or was even considered by the legislature." *Kane v. City of Beaverton*, 202 Or App 431, 438, 122 P3d 137 (2005). The burden, therefore, falls "on the one attacking the legislative arrangement to negative every conceivable basis which might support it, . . . whether or not the basis has a foundation in the record." *Id*. at 439. Not surprisingly the triple-majority rule met the low threshold under the rational basis test because it provides a "method [that] eliminates the administrative burden of an election where consent procedures already have established that a proposed annexation is favored by the property owners of the territory." 203 Or App at 559.

Petitioners asserted a similar argument under the federal Equal Protection Clause—because ORS 222.111(5) creates a general right to vote on municipal annexations, the triple-majority rule may not selectively take that right away from resident electors who do not own property. The court of appeals again disagreed and found that ORS 222.111(5) by its terms does not grant a general right to vote on municipal annexations and as such, petitioner is not a member of a "suspect class." As with the privileges and immunities analysis, the court upheld the rule under the rational basis test.

Finally, petitioner argued there is a federal right to vote on municipal annexations based on *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed. 2d 583 (1969). In *Kramer* the United States Supreme Court considered whether a limitation on voter registration to property owners and persons with children for a school board election was constitutional. The court of appeals held there is no federal right to vote on municipal annexations. First, the court extended the holding in *Kane v. City of Beaverton*, 202 Or App 431, 438, 122 P3d 137 (2005), that a federal right to vote does not exist for an island annexation to municipal annexations. Second, the court distinguished the Supreme Court's decision in *Kramer* as applying only to limitations on voter registration and not a legislative choice to establish a right to vote in the first instance.

The Court summarized the case as follows:

> "Petitioners are not members of a suspect class, and the triple majority scheme satisfies the rational basis test required by Article I, section 20, of the Oregon Constitution. Because the triple majority annexation method provided in ORS 222.170(1) does not create a generalized right to vote on municipal annexation decisions, because no such right exists under the United States Constitution, and because the statutory scheme satisfies the rational basis standard, it does not violate the Equal Protection Clause of the Fourteenth Amendment."

203 Or App at 563.

Chris Gilmore

Morsman v. City of Madras, 203 Or App 546, 126 P3d 6 (2006).

■ *NINTH CIRCUIT UPHOLDS LAKE OSWEGO'S SIGN ORDINANCE*

In *G.K. Ltd. Travel v. City of Lake Oswego*, 463 F.3d 1064 (9th Cir. 2006), the plaintiffs, landowners and sign installers, sued the defendant city over the rejection of their proposal to change the text on an existing pole sign to advertise their business. The defendant's sign code was enacted to reduce visual clutter and protect travelers' safety. It "grandfathered in" existing pole signs until May 21, 2004, but required those pole signs to conform to existing city regulations if the copy were changed. The plaintiffs applied for a variance to the requirements in 2001, but the variance was denied.

The plaintiffs filed suit in federal district court and argued that the city's sign code was unconstitutional facially and as applied. The plaintiffs claimed the size and type of signs allowed in the nonconforming use provisions were impermissible content-based regulations in that if these provisions were struck, the remainder of the sign code would be unenforceable. The plaintiffs also claimed that the pole sign ban was unconstitutional because such advertising was a "unique form of communication." In addition, the plaintiffs raised several facial challenges over the code's administrative processes. The city asserted that its sign code was derived from the state's land use system. The trial court largely granted the city's motion for summary judgment, finding exemptions for signs involving public notices, warning signs, and traffic and identification signals, as well as "no solicitation" signs, to be content-based as was a permit exception for charity fundraising. The trial court struck these portions of the regulations (and the city did not appeal this action), but otherwise upheld the code. On appeal, the court undertook a de novo review.

As to the regulation of pole signs, the court rejected the plaintiffs' contention that it was unconstitutional to ban all pole signs because they were a "potential medium of expression" analogous to the ban of all signs in residential zones in *City of Ladue v. Gilleo*, 512 US 43, 54 (1994). Aside from finding the analogy of *Ladue* unpersuasive, the court also found the ban justified without reference to the content of the signs and also found the exceptions not based on content. The court also rejected the notion that the triggering of the application of the code by a change of copy necessarily involved a review of content, given the May 21, 2004 ending date had already passed for bringing all pole signs into conformity. That issue was thus moot.

As to the significance of the governmental interest, the court found that prevention of visual clutter and traffic safety were sufficient grounds and deferred to the city council's judgment of whether those ends could be advanced by the regulations, pointing to the extensive discussion from the adoption of the sign policy as "strong evidence" of the need for the regulations and the form those regulations might take. Moreover, the court found the regulations were narrowly tailored to meet those interests by limiting the length and proportions of those signs. The court also found adequate alternative forms of communication through other signs allowed under the code and other media, and concluded that a ban on a particular plaintiff's pre-

ferred method of communication is not *per se* void. The pole sign regulations were thus upheld.

The court turned to whether the regulations were content and viewpoint-neutral, which plaintiffs asserted as a facial challenge even if they were not affected by the allegedly invalid provisions. The court found nothing in the record to demonstrate the city intended to adopt content or viewpoint-based regulations and noted that sign aesthetics may be regulated in a content-neutral manner. The court said that a regulation is content-based if the regulator must read the message to determine whether it is regulated. Claims that regulations are content-based arise most frequently with regard to regulatory exemptions from permit requirements, temporary signs, such as those relating to elections, and nonconforming uses and design review regulations.

As to specific allegations, the court first considered whether the exemption of "public signs, signs for hospital and emergency services, legal notices, railroad signs and danger signs" from the permit and fee process were valid. The city asserted that these signs were not exempt because of their content, but because of the speaker. The court found the city's interpretation reasonable. Additionally, the court found the exceptions were limited and did not prefer certain subjects or viewpoints over others.

Similarly, the sign code's event-based exception for temporary signs, such as political advertising and yard sales, specifically stated that content was not to be regulated. The code allowed any sign within certain size regulations and stated that event signs could only be up for a certain period. The fact that there is a "triggering event" such as an election or house sale did not render the ordinance content-based. In this case, as well as the case of a nonconforming use, the fact that an enforcement officer must read the sign does not render the ordinance invalid—only if the ordinance singles out certain speech for different treatment.

Reading the sign to determine compliance with the code's grandfather provision could be evidence of an improper purpose; however, it was not dispositive. Because the triggering event in this case was the change in the copy, one need not read the content to determine whether the sign was "grandfathered." As to the design review provisions relating to the "clarity and readability" of signs, the court accepted the city's limited construction of those terms, which referred only to legibility and not intelligibility, and found that interpretation to be reasonable.

The court then turned to the remaining factors involving First Amendment limitations on the sign regulations to determine whether these content-neutral regulations were otherwise valid. The court had already found that elimination of visual clutter and traffic safety were significant governmental interests and that the pole sign regulations were narrowly tailored. As to alternative media, the court refused to classify pole signs as a medium of its own and again considered alternative channels of communication to include other signs and other media available so that the commercial land owner might communicate effectively with the public. The court concluded that the code was a valid time, place, and manner restriction narrowly tailored to serve the city's interest without impermissibly limiting alternative channels of communication.

The court then turned to whether the ordinance limited noncommercial protected speech more than commercial speech, concluding that the city's sign regulations relating to temporary signs in residential zones did not do so. None of these restrictions reflected a preference for any particular kind of speech, noting the specific dimensional requirements for signs and the specific prohibition of regulation of content in the ordinance.

The court also rejected the plaintiffs' prior restraint claim, which was directed to the requirement that before one may erect a sign, one must secure a permit, and accepted the city's argument that any discretion exercised was not on the basis of content. The plaintiffs also contended that the code contained inadequate procedural protections. The court upheld the city's sign permit system and noted that the United States Supreme Court did not require expedited review when content-neutral regulations were at issue.

As to the plaintiffs' contention that the code allowed for unbridled discretion, the court noted that most criteria in the challenged code were objective and that those that were not (such as compatibility with the environment) were specifically defined to avoid content consideration (such as limiting the foregoing term to colors, proportion, size and style of lettering and the like). The court also noted that the city required a permit or reasons for denial to be issued within fourteen days and provided for an appeal to the City Council. The code also required detailed findings based on specific non-content regulated criteria. The court also noted the lack of facts showing a pattern of abuse by the city. While there was some elasticity in the ordinance, perfect clarity and precise guidelines were not required. The court also rejected the plaintiffs' vagueness claims by noting that at most the plaintiffs' energy was focused upon arguing that the code does not articulate what signs are prohibited. In fact, the code clearly defines the kinds of signs that are permitted.

In this case, plaintiff knew that pole signs were not allowed without a variance, and the city did not present a specter of arbitrary and discriminatory enforcement. Moreover, it was the signs, and not the messages, which were the basis for enforcement under the code, and the standards were found to be sufficient. The trial court decision was thus affirmed.

This case illustrates the limits of the First Amendment on sign regulations and demonstrates that the drafting and administration of sign standards is not a hopeless task.

Ed Sullivan

G.K. Ltd. Travel v. City of Lake Oswego, 463 F.3d 1064 (9th Cir. 2006).

■ COURT OF APPEALS EXPLAINS A STATUTORY PROVISION PROTECTING LAND SALE CONTRACT PURCHASERS

Waite v. Dempsey, 203 Or App 136, 125 P3d 788 (2005), involved a dispute about the validity of a judgment lien against a parcel of property and the operation of ORS 93.645. The Oregon Court of Appeals construed ORS 93.645 and concluded that it did not apply to the facts of the case. Accordingly, the court of appeals affirmed the trial court's decision in favor of the defendant holders of a judgment lien against the property.

The parties stipulated to the relevant facts. In March 1999, Wigrich Farms (Wigrich) entered into a contract with a developer, Krohn Homes, Inc., to develop a parcel of property that, at the time, was owned by a third party. The terms of the contract required Krohn Homes, Inc. to purchase the property, construct an office building on it, and, when the building was substantially complete, transfer title to the property to Wigrich. Robert Krohn, president of Krohn Homes, Inc. executed the contract on behalf of Krohn Homes, Inc., but was not personally a party to the contract. Krohn Homes, Inc. subsequently went bankrupt, but Krohn continued to do business with Wigrich as if nothing had happened. Krohn personally purchased the development property in July 1999, and he and Wigrich recorded the contract between Krohn Homes, Inc. and Wigrich in November 1999.

Meanwhile, the defendant brought an action against Krohn and Krohn Homes, Inc. on an unrelated matter and obtained a judgment against Krohn in January 13, 2001 that was entered in the Marion County judgment docket on February 6, 2001. On February 16, 2001, Wigrich transferred its interest in the development property to the plaintiffs, and the following week Krohn delivered a warranty deed to the development property to Wigrich.

In October 2003, the defendant obtained a writ of execution on her money judgment ordering the Marion County sheriff to sell the property that Krohn had delivered to Wigrich and that Wigrich had, in turn, delivered to the plaintiffs. The plaintiffs filed an action for declaratory judgment and injunctive relief, and obtained a stay pending a determination as to who had priority of interest in the development property. The question before the court of appeals was what the reference to "seller" in ORS 93.645 means—the person selling the property under a land sale contract or the seller of the property.

The court of appeals cited the methodologies of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993) and *State v. Stubbs*, 193 Or App 595, 600, 91 P3d 774 (2004) (prior judicial construction of a statute is relevant in determining meaning of statute), as its guides in determining the meaning of seller. ORS 93.645 provides:

> The interest of the purchaser, the heirs and assigns of the purchaser, under a contract for the purchase and sale of realty, if such contract or memorandum thereof has been recorded in deed records, shall have priority over the lien of any subsequent judgment against the seller of the property, the heirs and assigns of the seller, and conveyance in fulfillment of said contract shall extinguish the lien of any such judgment.

It was undisputed, according to the court, that the phrasing of ORS 93.645 makes it clear that it applies to protect the interests of a purchaser who buys realty pursuant to a land sale contract. 203 Or App at 141. Further, according to the court, the bare phrasing suggests that the seller is the person selling the property under the land sale contract. That conclusion was supported by *Bennett v. Boyd*, 89 Or App 659, 662 n.2, 750 P2d 531, *rev. denied*, 305 Or 671 (1987) as well as the legislative history of the provision described in *Wyllie v. Von Ruden*, 76 Or App 598, 601–02, 711 P2d 137 (1985). Id. at 141–42. Thus, in the words of the court, ORS 93.645 "protects purchasers under a recorded land sale contract against judgment liens entered against the seller under such a contract after the recording but while the contract is being paid and before conveyance has occurred." *Id.* at 142–43.

The court then explained that the statute simply did not apply to the facts of the case, because Krohn Homes, Inc. never owned the property. Rather, Robert Krohn personally acquired the property and conveyed it to Wigrich after the defendant had already obtained a judgment lien against Krohn. When Krohn conveyed the property to Wigrich, he did so subject to any judgment liens that had attached to it at the time. The court of appeals rejected the plaintiffs' further argument that Krohn should be regarded as the seller under the March 1999 agreement, because there was no evidence that Krohn was an heir or assignee of Krohn Homes, Inc.'s interest in the agreement. 203 Or App at 143–44. Finally, the court refused to follow the reasoning of a California Court of Appeals decision, *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal App 2d 666, 53 Cal Rptr 551 (1966), because of differences in the wording of the California statute as well as the factual circumstances of case.

Waite v. Dempsey thus makes it clear that ORS 93.465 protects purchasers under a recorded land sale contract against judgment liens entered against the seller under such a contract after the recording but while the contract is being paid and before conveyance has occurred.

Susan Safford

Waite v. Dempsey, 203 Or App 136, 125 P3d 788 (2005).

■ WASHINGTON UPHOLDS RESTRICTIVE COVENANT IMPOSING DENSITY LIMITATION

In *Viking Properties Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), the Washington Supreme Court, reversing the summary judgment of the superior court, held that unenforceable racial provisions of a restrictive covenant are severable from the remainder of the covenant and upheld the covenant's residential density limitation of one dwelling per one-half acre, despite current land use regulations.

The dispute in *Viking Properties* arose between developer Viking Properties, Inc. (Viking) and the homeowners of a residential subdivision in the city of Shoreline, Washington, when the developer attempted to force the homeowners to release a pre-existing restrictive covenant. Each homeowner owned a lot in the subdivision, subject to the same 1937 restrictive covenant containing four provisions: (1) The property could not be sold or rented to non-White/Caucasian persons; (2) No non-White/Caucasian persons could occupy the property unless such person was a servant employed by a White/Caucasian occupant; (3) No buildings could be constructed on the property except for a single-family detached dwelling on each one-half acre; and (4) Appurtenant structures (such as garages, garden houses, and servants quarters) could be constructed.

In July 2002, Viking, aware of the restrictive covenant, bought a 1.46 acre lot in the subdivision and immediately sent letters to each of the homeowners, requesting them to execute a total release of the restrictive covenant. The letter also informed the homeowners that they would be sued if they refused. All of homeowners denied Viking's request to release the covenant, and Viking subsequently filed a declaratory judgment action in the King County Superior Court, requesting that the court declare the covenant unenforceable in its entirety.

In its suit, Viking made three arguments against the enforceability of the density restriction in the covenant. First, Viking argued that the covenant's racial restrictions were invalid and could not be severed from the density restriction, thereby invalidating the whole covenant. Second, Viking maintained that the density provision was unenforceable because it conflicted with the public policy favoring higher density restrictions, as set forth in the Growth Management Act (the "GMA"), the city of Shoreline's comprehensive plan, and the city's zoning regulations. Third, Viking challenged judicial enforcement of the covenant as a violation of its substantive due process rights because Viking could not simultaneously comply with the city's zoning regulations and the covenant.

Agreeing with all three of the developer's arguments, the trial court granted Viking's summary judgment motion. After the homeowner's motion for reconsideration was denied, they appealed to the Washington Supreme Court. After de novo view, the Washington Supreme Court reversed the summary judgment on all three issues and remanded the case back to the superior court.

The Washington Supreme Court began its discussion with the proper interpretation of restrictive land covenants. The court noted that where the construction of covenants did not involve a dispute with the maker of the covenants, but rather involved only current homeowners, its role is to ascertain and give effect to the purposes intended by the covenants and arrive at an interpretation that "protects the homeowner's collective interests."

While all parties agreed that the racial provisions of the covenant were unenforceable, Viking argued that these racial provisions were not severable from the covenant, and therefore the whole covenant—including the density restrictions—was unenforceable. The court rejected this argument and held that the racial provisions were severable, despite the absence of a severance clause, because the plain meaning of covenant indicated two logical and distinct purposes: racial restrictions and density restrictions. Upholding the density restrictions without the racial restrictions, therefore, did not distort the meaning of the covenant, as Viking argued, but instead was a logical common-sense construction of the covenant and also the best interpretation to guard the homeowners' collective interests. The court also rejected Viking's arguments that a restrictive covenant should be liberally construed only when the covenant's purposes are in harmony with current land use regulations and that the allowance of "appurtenant structures" permitted construction of additional dwellings.

Proceeding to Viking's second argument that the covenant's density restriction violated public policy, the court first observed that the purposes of the GMA and the comprehensive plans were not to regulate site specific land use activities, but instead to provide communities with a flexible land use framework and land management goals. If it were to accept Viking's argument that the land use regulations required higher density, the court would be forced to prioritize the density goals over GMA's other goals, such as protecting property rights and preserving open spaces, despite the legislature's specific prohibition of this prioritization.

The court also rejected Viking's claim that the growth management hearings boards had adopted a "bright line minimum" of four units per acre, stating that these boards are quasi-judicial agencies serving a limited role under GMA and therefore lack the authority to establish such a minimum. Further, while zoning regulations call for minimum density, the court found nothing in the regulations to compel property owners to develop parcels to any minimum density. Significantly, the court noted that the city conceded it had no authority to enforce or invalidate such density covenants, and the city planning manager had even determined that the city would process building permits on a lot with area that exceeded the minimum densities as a nonconforming lot, thereby confirming the restrictive covenant was not in conflict with the development regulations.

Finally, the court determined that enforcing the covenant would not violate Viking's substantive due process rights. Although Viking claimed the covenant would be "unduly oppressive" because it would force Viking to violate the city's comprehensive plan and zoning regulations, Viking conceded it was currently in compliance with both the city's regulations and the restrictive covenant. Most importantly, according to the court, Viking failed to claim that enforcing the covenant would deny Viking reasonable use of the property.

While Justice Sanders agreed with the majority opinion, he authored a concurring opinion to resolve what he perceived to be a conflict between the restrictive covenant and the zoning regulations requiring a minimum of four units per acre. He reconciled his understanding of the minimum density land use regulations by interpreting them to be "hortative" and "aspirational" and therefore not requiring properties to be developed to meet such minimum density requirements. Justice Sanders further noted that the rules of interpretation required strict construction of land use regulations in favor of the property

owner. Accordingly, such density requirements are meant to be aspirational because requiring an owner to develop property to meet the minimum density requirement does not favor an owner. He concurred with the majority opinion regarding the density restriction because the owner-favorable construction of the regulation supported upholding the covenant.

Gretchen Barnes

Viking Properties Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005).

Appellate Cases—Other Jurisdiction

■ IN WASHINGTON A LAND USE DECISION IS "ISSUED" WHEN YOU HEAR ABOUT IT

The Washington Supreme Court recently decided ***Habitat Watch v. Skagit County***, 155 Wash.2d 397, 120 P.3d 56 (2005). Beginning in 1993, Skagit County issued a series of special use permits for construction of a golf course. Each permit was effective for two years, after which the permit contained provisions for "automatic permit reversion." The owner failed to meet the deadlines and instead applied for and received four permit extensions. This controversy arose from the last two extensions, which were granted without notice, hearing or publication. As far as the public knew, the special use permit had long since expired.

In May 2002 a member of Habitat Watch became aware of logging activity at the site. Through a public records disclosure request, Habitat Watch learned of the permit extensions and petitioned the county for revocation of the special use permit. After the county denied the petition, it issued a grading permit for the project. Habitat Watch appealed the validity of prior extensions and the grading permit under the Land Use Petitions Act (LUPA), Chapter 36.70C RCW.

The superior court dismissed the LUPA petition for, among other things, the failure to appeal the extension decisions within 21 days from date those decisions were issued. The Washington Supreme Court granted direct review and affirmed the dismissal. The court noted that, as in pre-LUPA cases, "even illegal decisions must be challenged in a timely, appropriate manner." 120 P.3d at 61. In other words, a decision which is void ab initio may become valid if it is not properly appealed.

In Washington, LUPA is the "exclusive means" of challenging final land use decisions. LUPA is triggered by "issuance" of a final land use decision and establishes a uniform and mandatory 21-day deadline for such challenges. The decision is "issued" under LUPA in a variety of ways, but at the latest, it is issued when the decision is entered in the public record.

In this case, the court expressed confusion as to when and how the decisions were "issued," including the date on which the decisions became matters of public record. Nevertheless, the court held that "at the very latest, the written decisions were issued when the county made them publicly available . . . in response to Habitat Watch's public disclosure request." 120 P.3d at 62. The failure to seek review under LUPA within 21 days of the public records disclosure justified dismissal of the action. The court rejected the attempt to reopen those past decisions through the revocation petition and the grading permit challenges, finding these challenges to constitute an impermissible collateral attack.

Keith Hirokawa

Habitat Watch v. Skagit County, 155 Wash.2d 397, 120 P.3d 56 (2005).

■ RLUIPA DOES NOT APPLY TO EMINENT DOMAIN DECISIONS

Faith Temple Church v. Town of Brighton, 17A.D.3d 1072, 794 N.Y.S.2d 249 (4th Dep't 2005) focused on the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and whether a local government's use of eminent domain to condemn a church-owned property fell under the act's restrictions. Faith Temple Church sued the Town of Brighton and some of its officials in federal district court in an attempt to enjoin the town's use of eminent domain to condemn a piece of church-owned property. The town wanted to expand an adjacent park onto the disputed property, a scheme which was outlined in its current comprehensive plan. The church sought to build on the acquired parcel to ease the burden on its crowded facilities.

Initially, the town began its eminent domain proceeding pursuant to New York state law. The church then filed suit in both state and federal courts in an attempt to block the condemnation. The Appellate Division of the New York State Supreme Court dismissed the church's petition. The church did not appeal this decision.

In its federal suit, the plaintiff church based its claims on the United States Constitution, the New York Constitution, and RLUIPA. In response, the town moved for partial summary judgment on the RLUIPA claims, and the court issued the instant opinion granting that request.

In brief, Congress passed RLUIPA after the Supreme Court ruled that key provisions of the similar Religious Freedom Restoration Act of 1993 were an unconstitutional exercise of congressional power. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). RLUIPA's relevant provisions prohibit governmental "land use regulation" that substantially burdens religious exercise, unless the government meets a strict scrutiny test. 42 U.S.C. §2000cc(a)(1). Additionally, it defines "land use regulation" in terms of a zoning or landmarking law, or the application of such a law, that restricts a claimant's use of land in which the claimant holds an interest. 42 U.S.C. §2000cc–5(5).

In its opinion, the court initially listed RLUIPA's relevant provisions regarding land use regulations and determined that no "landmarking law" was involved in the town's eminent domain proceedings. The court then reasoned that eminent domain proceedings do not constitute a "zoning law" or "the

application of such a law" under RLUIPA because: (1) New York towns are authorized to enact zoning laws and to implement eminent domain proceedings under different provisions of state law, (2) zoning law and the doctrine of eminent domain are separate legal doctrines with distinct developmental histories, and (3) RLUIPA's plain language does not mention eminent domain, and the court cannot assume that Congress neglected such a well known land use concept when it drafted, considered, and passed the statute.

Secondly, the court refused to consider any of the parties' arguments that were based on RLUIPA's legislative history. This refusal was founded on cases such as ***Ratzlaf v. United States***, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed. 615 (1994), which held that, when analyzing a statute's effect, a court cannot resort to that statute's legislative history if it finds that the statutory text is clear. Thus the court concluded that it would not consider arguments founded in RLUIPA's legislative history regarding the act's applicability to eminent domain.

However, after refuting the use of legislative history in interpreting RLUIPA, the court immediately proceeded to discuss RLUIPA's legislative history and its potential relationship to eminent domain. First, it noted that Congress's primary purpose in enacting the law was to prevent local governments from using their zoning authority to discriminate against religious groups. Accordingly, the court restated that the act contains no mention of eminent domain.

Second, the court speculated that Congress may have had sound reasons for excluding eminent domain from RLUIPA. It reasoned that, from a local government's perspective, zoning laws "painlessly" restrict a landowner's use of its property by not requiring the government to compensate the landowner for the prohibited use. Eminent domain, on the other hand, requires both just compensation from the public purse, as well as a determination that a proposed taking is for a public use. The court reasoned that these two practical limitations on eminent domain might have caused Congress to conclude that municipalities would not use the power of eminent domain to discriminate against religious groups. Therefore, the court concluded that there was no legislative need to include eminent domain within RLUIPA's purview.

Thirdly, the court ruled that RULIPA's "application of a zoning law" provision is inapplicable given the statute's plain language and the attenuated connection between the town's eminent domain proceedings and its zoning laws. Finally, on the basis of RULIPA's plain language, the court rejected the church's assertions that the act is a remedial statute and should therefore be given broad effect to prohibit the condemnation.

Ben Martin

Faith Temple Church v. Town of Brighton, 17A.D.3d 1072, 794 N.Y.S.2d 249 (4th Dep't 2005).

■ *NINTH CIRCUIT FINDS AESTHETIC REGULATIONS OF CELL TOWERS UNLAWFUL*

Sprint PCS Assets, LLC v. City of La Cañada, Flintridge, 435 F.3d 993 (9th Cir. 2006), involved plaintiff's five applications to install wireless facilities within the defendant city, two of which were denied. Plaintiff's challenge was based on the Federal Telecommunications Act ("FTA") and California public utilities law. Plaintiff appealed from a trial court action upholding the denial on aesthetic grounds notwithstanding the FTA. The city's 2001 ordinance regulating right-of-way construction required that such construction (1) not block access, (2) not overly concentrate structures in the right-of-way, (3) preserves the "existing character of the surrounding neighborhood, and minimizes public views of the above-ground structure," and (4) not result "in a negative aesthetic impact." 435 F.3d at 994. Two of plaintiff's facilities were denied on the last three aesthetic grounds. The trial court found no substantial evidence supported the city's findings on the over concentration criterion, a ruling the city did not appeal. However, the trial court did find substantial evidence for the "minimizing public views" and "negative aesthetic impact" requirements. The Ninth Circuit said it would review the legal issues ***de novo***, but consider whether substantial evidence existed under state law in a deferential manner.

The FTA requires that denial decisions be in writing and be based on substantial evidence under state and local law, but does not place additional substantive limits on the process of regulating telecommunication facilities. The court described "substantial evidence" as being "less than a preponderance, but more than a scintilla of evidence." 435 F.3d at 996. California law prohibits local regulation of telecommunication facilities, except to exercise reasonable control over the time, place, and manner of such placement. The only substantive statutory standard was that the placement of such facilities not "incommode" the public use of the right-of-way. ***Id***. The city contended visual blight falls within this standard, but the court found that the standard focused on the use, rather than the enjoyment, of the roads. More recent California legislation addressed the time, place, and manner of regulation and how roads "are accessed." The court found the former standard not to increase the city's regulatory latitude significantly and the second to reinforce the focus on the use of roads, rather than their appearance. The court concluded that California law did not permit local governments to deny applications for telecommunication facilities on aesthetic grounds. The FTA does not give local governments additional authority over the placement of such facilities beyond the authority granted under state legislation. Because state law did not permit denial on the grounds used by the city, the local denials were invalid under the FTA as well. The court concluded no evidence, substantial or otherwise, supported the denials and reversed the trial court.

This is not an unusual case. The FTA merely requires that denial of the placement of telecommunication facilities be in writing and supported by substantial evidence. Here there was neither reason nor substantial evidence under California state law to support the denial.

Ed Sullivan

Sprint PCS Assets, LLC v. City of La Cañada, Flintridge, 435 F.3d 993 (9th Cir. 2006).

LUBA Cases

■ ANNEXATION

In a race to annex contested unincorporated territory, the city of Damascus battled the city of Happy Valley and Metro in a trio of related appeals. Damascus and Happy Valley adopted separate annexation ordinances and each jurisdiction appealed the other's ordinance to LUBA. Happy Valley also appealed the Damascus ordinance to the Metro Boundary Appeals Commission (MBAC) and, following MBAC's decision, Damascus appealed MBAC's decision to LUBA. This 3-part battle required LUBA to address issues involving its jurisdiction, the adequacy of and evidentiary support for MBAC's findings, and the priority of competing annexation actions.

LUBA's Jurisdiction

In *City of Happy Valley v. City of Damascus*, LUBA No. 2005-118 (1/26/2006), Happy Valley challenged an ordinance adopted by Damascus that annexes territory lying between the two cities. In its opinion, LUBA addressed Damascus' dispositive motion to dismiss the appeal for lack of jurisdiction.

Damascus asserted that LUBA lacked jurisdiction to review the ordinance because it was not final. Both Damascus and Happy Valley, as well as the disputed territory subject to the annexation ordinance, are within the boundaries of the Metropolitan Service District (Metro). Under applicable state law, "boundary changes within a metropolitan service district are subject to the requirements established by the district," including a requirement for a three-person commission to hear appeals of contested boundary changes. (ORS 268.354(1)) Consistent with the statute, Metro adopted substantive and procedural requirements for processing boundary changes, including establishment of a three-person Metro Boundary Appeals Commission (MBAC) to hear appeals. The appeal process is available by right to a "necessary party" and, once an appeal of a boundary change has been filed with MBAC, the boundary change decision "shall not be final" until MBAC resolves the appeal. (Metro Code (MC) 3.09.070(c)).

LUBA agreed that the appealed annexation ordinance is not a final decision subject to LUBA's jurisdiction. Happy Valley is a necessary party, and its separately filed appeal of the annexation to MBAC is a contested case. Under Metro's code, the Damascus annexation ordinance will not become final until MBAC has heard and decided Happy Valley's appeal. In granting Damascus's motion to dismiss, LUBA rejected Happy Valley's arguments that Metro lacked the authority to delay the date the Damascus ordinance becomes final and that the Metro code should be interpreted to delay the effective date of the ordinance, but not its finality. LUBA concluded that nothing in state law prevents Metro from delaying the finality of an appealed boundary change. Additionally, LUBA noted the prudential reasons for avoiding a situation where both MBAC and LUBA are simultaneously reviewing the same boundary change. Absent a final annexation ordinance to review, LUBA granted Damascus' motion and dismissed the appeal.

Adequacy of Findings

The city of Damascus appealed the MBAC's denial of its annexation ordinance in *City of Damascus v. Metro*, LUBA No. 2005-154 (1/26/2006). The MBAC's decision and LUBA's ruling remanding the decision are based on events that occurred before and after the city of Damascus was incorporated and are briefly outlined.

In June 2001 Happy Valley and Clackamas County signed an Urban Growth Management Agreement (UGMA), which identified an area east of Happy Valley as its "Area of Interest" and authorized Happy Valley to annex land in this area without opposition from the county. The voters of Happy Valley later approved a five-year waiver of the city's charter requirement for city-wide elections on proposed annexations in November 2002, and the city subsequently began accepting petitions for annexation in its Area of Interest. Anticipating the incorporation of Damascus, in April 2004 the city of Happy Valley and the Committee for the Future of Damascus signed a Memorandum of Understanding (MOU) that identified 177th Street as the eastern boundary for Happy Valley annexations within its Area of Interest until Damascus was incorporated. Some of the area east of 177th Street was proposed to be included in Damascus and was also included in Happy Valley's Area of Interest in the UGMA. Happy Valley adopted a resolution in May 2004 approving the proposed incorporation of Damascus. A map referenced in the resolution, presumably the map attached to the MOU, shows the western boundary of Damascus as running generally along 177th Street and shows unincorporated territory to the west of 177th Street between Damascus and Happy Valley.

Additionally, in May 2004, the Committee for the Future of Damascus, Happy Valley, and others signed the Damascus Fire House Study Group MOU (Fire House MOU), which purported to coordinate planning and governance decisions for a large area of unincorporated land in the Damascus/Boring area and is a focus of this dispute. Among other things, the Fire House MOU stated that the committee would have two opportunities to incorporate Damascus by November 30, 2006, and to include in it the area east of 177th Street. Other cities, including Happy Valley, agreed not to seek annexation of this territory until after November 2006. The voters approved the incorporation of Damascus in November, 2004 and the subsequent annexation activity by both Happy Valley and Damascus culminated in the three LUBA appeals.

In its appeal to LUBA, Damascus challenged the MBAC's interpretation of applicable criteria under the Metro code. Damascus argued that MBAC erred by considering applicable case law in deciding that Happy Valley had initiated annexation of disputed territory first and that Damascus' later adopted annexation ordinance was invalid. The Metro Code contains a criterion that requires a boundary change to be consistent with "applicable criteria" "under state law." Relying on the Oregon Supreme Court's decision in *Landis v. City of Roseburg*, 243 Or 44, 411 P2d 282 (1966), MBAC concluded that Happy Valley was the first jurisdiction to "initiate" annexation proceedings in the disputed area when its voters suspended the requirement for annexation elections in November 2002 and, therefore,

that Damascus' 2005 annexation ordinance was invalid. LUBA acknowledged that the court's case law did "not fit neatly into what most people would describe as 'applicable criteria for [a] boundary change,'" but concluded that Metro was not precluded from interpreting its code to include considerations of which jurisdiction was the first to initiate annexation proceedings. (Slip Op at 15)

Damascus also asserted that the MBAC erred by finding that the challenged annexation ordinance was not consistent with the Fire House MOU. Under Metro Code section 3.09.050(d)(2), the MBAC must find that the proposed annexation is consistent with "agreements . . . between the affected entity and a necessary party." The MBAC concluded the Damascus ordinance was inconsistent with the Fire House MOU because it purported to annex territory west of 177th Street in violation of the MOU, which set 177th Street as the western boundary for Damascus. LUBA agreed with Damascus that the cited Metro code provision could not provide a basis for denying the annexation because Damascus had not been incorporated at the time the Fire House MOU was signed and was not a party to the MOU.

Finally, Damascus contended the MBAC wrongly denied the annexation ordinance when it found the city's annexation report failed to address the Fire House MOU under Metro Code section 3.09.050(b)(3). This section requires a city to prepare a report on the proposed annexation that describes how the annexation is consistent with "urban planning agreements and similar agreements of the affected entity and of all necessary parties." LUBA agreed that the Fire House MOU was an urban planning agreement or a similar agreement of necessary parties and that Damascus' report failed to address this MOU. However, LUBA concluded that the requirements for reports under Metro Code 3.09.050(b) were not approval criteria for boundary changes and that a failure to satisfy these requirements was not a basis for denying a boundary change. Since the MBAC did not explain in its decision why it interpreted the report requirements to be approval criteria, LUBA concluded that the decision must be remanded to allow MBAC to interpret its code.

First to Initiate Annexation

In the final appeal of the trilogy, ***City of Damascus v. City of Happy Valley***, LUBA No. 2005-125 (Jan. 26, 2006), Damascus appealed Happy Valley's adoption of an ordinance annexing 115 acres of land in eight separate areas in August 2005. The area annexed consisted of 20 tax lots, three of which Damascus claimed to have annexed through adoption of the annexation ordinance challenged in ***City of Happy Valley v. City of Damascus***. Damascus argued that it was the first to initiate annexation in those areas and that Happy Valley's ordinance was void and should be reversed.

Both Happy Valley and Damascus relied on two Oregon Supreme Court cases, ***Landis v. City of Roseburg***, 243 Or 44, 411 P2d 282 (1966) and ***City of Tualatin v. City of Durham***, 249 Or 536, 439 P2d 624 (1968), to support their claim of priority to the contested areas. The ***Landis*** case involved Roseburg's annexation of two areas proposed to be included in the new city of Edenbower while incorporation proceedings were underway. Roseburg annexed the two areas and the voters subsequently rejected the proposed incorporation. After suit was filed to void the annexations, the circuit court and supreme court held that the incorporation proceeding was initiated first when the county court adopted an order calling for an election. Roseburg initiated the annexations approximately two weeks after the county court's action when the city council adopted ordinances calling for public hearings on the annexations. For the county court, the effect of being first to institute proceedings was that "the authorized body which first institute[d] proceedings acquire[d] exclusive jurisdiction of the subject area and [could] proceed to final conclusion unfettered by subsequent proceedings of another authorized body." 243 Or at 48–49. Based on this priority, the county court could have sought to enjoin Roseburg from proceeding with the annexation, but did not do so. Accordingly, the supreme court reversed the trial court's ruling that the Roseburg annexation was void. The county's failure to enjoin Roseburg from completing the annexation proceedings and the voters' rejection of the proposed incorporation meant that the county's claim of priority to the disputed territory was now moot.

The T***ualatin v. Durham*** case involved separate annexations by the two cities each of which included the same fragment of the I-5 freeway in the area annexed to their respective jurisdictions. Again, the issue before the court was which city first initiated proceedings and acquired exclusive jurisdiction over the area that included the I-5 fragment. The supreme court held that Tualatin prevailed because it adopted a resolution accepting property owner consents to annexation and setting an election date for the annexation before Durham initiated its annexation proceedings. As a result, the court declared Tualatin's annexation valid and Durham's annexation invalid.

Applying these cases to the current dispute, LUBA noted that both Happy Valley and Damascus appeared to agree that Damascus initiated its annexation in May, 2005, when its city council adopted an ordinance calling for an election in the areas it proposed to annex. LUBA rejected Happy Valley's assertions that it initiated annexation proceedings: (1) when it signed an Urban Growth Management Agreement with Clackamas County in June 2001 and identified the disputed territory as within its Area of Interest; (2) when its voters approved a five-year waiver of the charter requirement for voter approval of all annexations in November 2002; or (3) when it mailed annexation petitions to property owners and subsequently received and processed signed petitions from property owners. Neither supreme court decision suggests that the first two actions are anything more than preliminary activities and insufficient to "institute" annexation proceedings. Although the receipt and processing of signed annexation petitions presents a closer question, LUBA determined it was an issue that need not be decided because

Happy Valley received only one of the signed petitions before May 2005, and it did not involve one of the three disputed tax lots. Accordingly, LUBA held that Damascus initiated annexation before Happy Valley and Happy Valley's annexation ordinance was invalid.

LUBA decided remand, rather than reversal, was the appropriate remedy. Although its determination that Happy Valley's ordinance was invalid was limited to three disputed tax lots, LUBA believed it lacked the authority to affirm in part and remand in part. However, it noted that on remand it appeared Happy Valley could readopt its annexation ordinance without the three disputed tax lots that are part of Damascus' annexation proceedings.

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