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Highlights

Appellate Cases – Land Use

■ *OREGON UPHOLDS TIME, PLACE, AND MANNER RESTRICTION IN REGARDS TO OUTDOOR ADVERTISING, BUT OUTLAWS DIFFERING TREATMENT OF ON/OFF PREMISE ADVERTISING*

In *Outdoor Media Dimensions, Inc. v. Oregon Department of Transportation*, 340 Or 275, 132 P3d 5 (2006), the Oregon Supreme Court considered the relationship between Article I, section 8 of the Oregon Constitution which provides, in part, that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever" and Oregon's regulation of signs along highways under the Oregon Motorist Information Act (the "OMIA") in connection with five consolidated cases.

Petitioner, Outdoor Media Dimensions, Inc., is an outdoor advertising company that owns signs visible from state highways. In each of the five cases, the state cited petitioner for displaying outdoor advertising signs without a permit in violation of the OMIA and ordered removal. Petitioner challenged each citation on several state and constitutional grounds. The agency upheld the citations and ordered the removal of the signs. On review, the Oregon Court of Appeals affirmed each agency decision.

In this case, Petitioner appealed the court of appeals decision arguing that various provisions of the OMIA facially violated federal and state constitutions and that, to the extent that those provisions were not facially unconstitutional, they were unconstitutional as the state applied them to petitioner. Petitioner claimed the OMIA's permit and fee requirements violated Article I, section 8, because they were impermissible prior restraints and, coupled with OMIA's other restrictions on signs, violated Article I, section 8, as they improperly restricted petitioner's right to erect the kind of sign that it wished where it wished. The state countered that the permit and fee requirements were not impermissible prior restraints because they were content neutral and had adequate standards to guide official discretion in the issuance of permits. The state asserted that petitioner could not sustain a prior restraint claim because no prior restraint occurred in petitioner's cases. Petitioner displayed its speech without a permit, and the state only took action afterwards. Further, the state argued that petitioner never applied for or obtained permits for the erection or maintenance of its signs, and therefore was not subject to any prior restraint.

City of Portland v. Welch, 229 Or 308, 367 P2d 403 (1961), and *State ex rel Sports Management News v. Nachtigal*, 324 Or 80, 88, 921 P2d 1304 (1996), illustrate the purpose of the prohibition on prior restraints: to bar the state from deciding in advance what expression it will permit. In those cases, the government had the authority to decide, in advance, what movie scenes or magazine content would be permitted. In contrast, the OMIA's permit and fee requirements focus on covering the cost of a content-neutral permit scheme and are implemented in a content-neutral and non-arbitrary manner. Thus, the Oregon Supreme Court concluded that the permit and fee requirement lack official censorship, and therefore do not constitute impermissible prior restraint of expression in violation of Article I, section 8.

In addition to the prior restraint claim, petitioner argued that the fee requirement violated "Article I, section 8, because it 'necessarily deters Oregonians from expressing themselves freely on any subject' and that any 'regulation of the placement of speech on otherwise lawful structures violates Article I, section 8.'" 340 Or at 287. Implicit in this argument was a state prohibition against any time, place, and manner regulation, such as OMIA's size, location, permit, and fee provisions. The cases of *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), recently reaffirmed in *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005), established the framework to evaluate an Article I, section 8, challenge. *Robertson* distinguished "between laws that focus on the content of speech or writing and laws that focus on proscribing the pursuit or accomplishment of forbidden results," holding that the former violates Article I, section 8, unless prohibition comes within a well-established historical exception. In

addition, the court has stated that there is room for "regulation imposed for reasons other than the substance of [a] particular message." *City of Portland v. Tidyman*, 306 Or 174, 182, 759 P2d 242 (1988). This case stands for the proposition that Article I, section 8, does not bar every content-neutral regulation of the time, place, and manner of speech. *See also State v. Henry*, 302 OR 510, 525, 732 P2d 9 (1987) (holding that expression cannot be outlawed solely on grounds that it is obscene, but "not rul[ing] out reasonable time, place and manner regulations of the nuisance aspect of materials or laws to protect unwilling viewers or children."). The OMIA permit scheme, on its face is neutral as to the content of speech, and is not a means for the state to permit some speech and prohibit other speech based on content. Therefore, the court concluded that because the OMIA permit scheme on its face does not discriminate on the basis of the subject or content of speech, the OMIA does not effectuate government censorship of speech.

As to protected expression, petitioner argued that the OMIA's permit requirement, burdens protected expression so that it violates Article I, section 8. The court rejected petitioner's contention, holding petitioner had ample avenues to communicate its message, both on highway signs and by other means, thus the requirement to apply for a limited number of permits was not a complete ban of expression. Accordingly the court found that OMIA's permit and fee requirements do not unconstitutionally restrain the free expression of opinion or restrict the right to speak, write, or print freely on any subject whatsoever. Rather, such permit and fee requirements are content-neutral time, place, and manner restrictions that do not violate Article I, section 8.

Finally, petitioner contended that the OMIA violated Article I, section 8, on its face by exempting on-premise signs from the permit and fee requirements imposed on off-premise signs. Petitioner argued that under *Robertson*, the legislature may not enact restrictions that focus on the content or subject matter of expression unless the scope is rooted in a historically recognized constitutional exception. In other words, petitioner asserted that the OMIA restricted expression based on "content" or "subject." The state countered that the on/off-premise distinction was a content-neutral time, place, and manner regulation and suggested that "[a]ny message can be an on-premise one, and any message can be an off-premises one, thus the OMIA suppresses no message and/or viewpoint." The court rejected the state's argument, noting that the OMIA would allow a sign with the message "Buy Gas Here", but would prohibit the same sign carrying the message "Eat At Joe's: 10 Miles Ahead." The on/off restriction, the court concluded, on its face, prohibits certain speech based on its content, and thus OMIA's differing treatment of on and off premises speech violates Article I, section 8.

The words of Article I, section 8, and the court's consistent interpretation of those words expressly forbid the enactment of laws that restrict otherwise permissible speech because of its subject. *See Bank of Oregon v. Independent News*, 298 Or 434, 439, 693 P2d 35, *cert den* 474 US 826 (1985). The broad breadth of Article I, section 8, compelled the court to conclude that the provision was not intended only to prevent content-based restrictions that were motivated by intent to censor offensive, disruptive, or potentially harmful speech. The dissent accepted a limited reading of Article I, section 8. However, the majority concluded that OMIA's different treatment of on/off-premises signs is a restriction on the content of speech for the purposes of Article I, section 8, and constitutes an impermissible restriction on the content of speech.

This case illustrates that reasonable time, place, and manner restrictions may be imposed for reasons other than the message of the speech. However, the distinction between on/off premises regulation because of its content may be an impermissible restriction on the "subject" of expression under Article I, section 8.

Lisa Gramp

Outdoor Media Dimensions, Inc. v. Oregon Department of Transportation, 340 Or 275, 132 P3d 5 (2006).

■ *THE CITY OF WEST LINN'S PARKS AND RECREATION FACILITY SYSTEM DEVELOPMENT CHARGE AMENDMENTS WITHSTAND SCRUTINY BY THE COURT OF APPEALS*

In *Home Builders Association of Metropolitan Portland v. City of West Linn*, 204 Or App 655, 131 P3d 805 (2006), petitioners challenged through writ of review the city's decision to increase the system development charges (SDC) for parks and open space. Underpinning this decision was a determination that adequate park land was not available to serve the estimated population growth coupled with an increase in costs associated with providing suitable parks. Before the trial court, petitioners argued that the city could charge an SDC for parks but not for open space. The trial court agreed and remanded the case. The city then amended the SDC resolution and eliminated the land qualifying as open space that was not also suitable for parks or recreation use. Petitioners appealed this amended decision, and the trial court affirmed.

Before the Oregon Court of Appeals, petitioners argued that the trial court lacked statutory authority to remand the decision back to the city under ORS 34.100 because, as the statute provides, a court may only "direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision." Applying the statutory interpretation analysis set out in *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1993), the court determined that the word "its" is ambiguous because it is not clear if it refers to the nearest antecedent noun, "the inferior court, officer, or tribunal," meaning that the trial court may only affirm a decision, or to the primary noun, "the court." The court resolved the ambiguity by reading the entire statute and giving effect to all provisions in the statute. Adopting petitioners' argument would make the affirmance expressly authorized in the first clause of the statute redundant. Thus, the city's interpretation and the courts' previous precedent allowing a trial court to remand in writ proceedings was upheld.

Secondly, petitioners argued that the trial court erred in affirming the city's decision when the city's methodology failed to include in its needs analysis parks that were not owned by the city, but were available to city residents, and that the city's comprehensive plan requires inclusion of these parks in the inventory. The city responded that it took other area facilities into account when it determined the level of service necessary and that nothing in the SDC statute requires a city to express the existing level of service in the same way as it may be stated in the comprehensive plan. The court agreed with the city that although ORS 223.304(2) requires applying a methodology for establishing fees, it does not require any particular formula. Similarly, nothing in the city's comprehensive plan required that the city adopt a particular formula for calculating need. So long as the city measured the existing level of service in the same way when it determined its current or future needs, its methodology did not violate ORS 223.304(2).

Next, petitioners argued that the trial court's conclusion lacked substantial evidence in that it showed that the city anticipated only 97 more residents than it had anticipated in its 2000 methodology, but provided an additional 129 additional acres of park land. The court responded that petitioners misunderstood the material facts underlying the city's 2002 SDC methodology. Its focus was not limited to the increase of 97 people over the present population estimates; nor did it decide that 129 additional acres were necessary to serve the existing needs. The city concluded that in order to serve all existing and expected city residents it needed an additional 129 acres of park space in addition to its existing inventory.

Petitioners claimed that the city's determination of future need failed to take into account future dedications and exactions or donations that would provide additional park land to the city. The court disagreed finding that under ORS 223.304(3) a developer may dedicate land for parks in lieu of paying the SDC. There was no evidence in the record to support petitioners' contention that donations, such as park user fees, had to be applied to the acquisition and development of capital improvements needed to increase park capacity for new users.

Petitioners argued that the city overestimated the amount of needed park lands because it intended to acquire residential lands for parks, thereby reducing population growth and reducing the need for parks. The problem with this argument was that it did not acknowledge that it was actual population growth, and not the estimated need, fueling the system. The more new residents come and pay the SDC, the greater the need for park land. New residents only pay for that amount necessary to expand the system to serve their needs. Viewed as a whole, the court concluded this approach was reasonable and supported by substantial evidence.

In their fifth assignment of error, petitioners argued that the city failed to show that all nonqualifying open space had been removed from the city's inventory for purposes of determining the existing level of service. However, the parks director submitted an affidavit stating that all areas not suitable for a park or recreation asset were excluded from the inventory. The court said this statement constituted substantial evidence.

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Finally, petitioners argued that the SDC was a taking in violation of Article 1, section 18 and Article XI, section 4 of the Oregon Constitution as well as the Fifth Amendment to the United States Constitution. The court refused to reconsider and overrule its previous decisions, such as *Homebuilders Assn. v. Tualatin Hills Park and Rec.*, 185 Or App 729, 735, 62 P3d 404 (2003); and *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, 400, 45 P3d 966, *rev den*, 334 Or 492 (2002), *cert den*, 538 US 906 (2003), where the court rejected these same arguments.

Carrie Richter

Home Builders Association of Metropolitan Portland v. City of West Linn, 204 Or App 655, 131 P3d 805 (2006).

■ *OAR 660-033-0030(5) HELD TO BE INVALID FOR EXCLUDING CONSIDERATION OF GROSS FARM INCOME IN DETERMINING WHETHER LAND IS "AGRICULTURAL LAND" UNDER GOAL 3*

In *Wetherell v. Douglas County*, 204 Or App 732, 132 P3d 41 (2006), the Oregon Court of Appeals held that OAR 660-033-0030(5) is invalid to the extent that it excludes consideration of gross farm income in determining whether land is "agricultural land" under Goal 3.

Petitioner Great American Properties Limited Partnership appealed a LUBA decision that remanded to Douglas County its decision to rezone a 162-acre parcel historically used for cattle grazing to permit subdivision into five-acre rural residential parcels. The property was designated "farm forest transitional" and zoned for "exclusive farm use-grazing." Until recently the property was part of a larger ranch and had been used for grazing livestock for about 70 years. In 1996 some logging was conducted, and in 2000 the owner sold the more productive part of the ranch to an individual who grew hay on it. Over the past 20 years the productivity of the property declined due to overgrazing, and lack of weed control, and brush clearing. At the time petitioner acquired the property in 2003, the previous owner had been grazing 21 heifers there.

In 2004 petitioner applied for plan and zone amendments to change the designation to nonresource "rural residential 5-acre" (5R) zoning. The county granted the amendments based in part on findings regarding whether they complied with Goal 3 ("to preserve and maintain agricultural lands") which defines "agricultural land" in western Oregon as land consisting of "predominantly Class I, II, III and IV soils . . . and other lands which *are suitable for farm use*" taking into consideration certain factors. Of critical importance in this case, Goal 3 defines "farm use" in ORS 215.203(2)(a) as the "current employment of land for the primary purpose of obtaining a profit in money". The county found that 78% of the property was comprised of Class VI-VIII soils. On the question whether the property nonetheless qualified as "agricultural land" under OAR 660-033-0020(1)(a)(B) ("land in other soil classes that is suitable for *farm use as defined in ORS 215.203(2)(a)*" considering certain factors) the county found that the property was poorly suited for grazing or haying with a view to making a profit in money although it could support cattle as a "lifestyle activity." In addition, it found the inherently infertile soils could not practicably be corrected with an intent to make a profit given the unproductive soils, lack of irrigation water, topography, and deferred maintenance. The county also found it was not "agricultural land" as "land necessary to permit farm practices to be undertaken on adjacent or nearby land," OAR 660-033-0020(1)(a)(C), nor was it "located within a farm unit," OAR 660-033-0020(1)(b).

Wetherell and Friends cross appealed to LUBA arguing among other things that the county erred in concluding that the parcel did not qualify as "agricultural land" under OAR 660-033-0020(1)(a)(B) or (C). LUBA sustained the challenge based on OAR 660-033-0020(1)(a)(B) and ruled sua sponte that notwithstanding the statutory definition of "farm use" incorporated by reference into Goal 3, the county must apply OAR 660-033-0030(5), which states that "profitability or gross farm income shall not be considered in determining whether land is "agricultural land" for purposes of Goal 3. On judicial review, they argued that OAR 660-033-0030(5) was invalid because it is inconsistent with an express provision of Goal 3—that is the goal's incorporation by reference of the statutory definition of "farm use" found in ORS 215.203(2)(a).

The court of appeals held that OAR 660-033-0030(5) was invalid to the extent that it excluded consideration of gross farm income in determining whether land was agricultural land. Goal 3 incorporates the definition of farm use found in ORS 215.203(2)(a), and that definition has been interpreted in *1000 Friends v. Benton County*, 32 Or App 413, 575 P2d 651, rev den, 284 Or 41 (1978), (holding that "profit" as used in ORS 215.203 does not mean profit in ordinary sense, but rather means gross income). Thus, LUBA erred in concluding that the county could not consider gross income, but correctly concluded that the county could not consider profitability, in determining the application of Goal 3 to the parcel. The court of appeals remanded to LUBA to modify the scope of the remand to the county regarding Goal 3 compliance and OAR 660-033-0020(1)(a)(B).

Jonathan Pinkstaff

Wetherell v. Douglas County, 204 Or App 732, 132 P3d 41 (2006).

Editor's Note: The Oregon Supreme Court granted review of the court of appeals' decision on June 20, 2006. *Wetherell v. Douglas County*, ___ Or ___, 139 P3d 288 (2006).

■ CITY OF PORTLAND ORDINANCE PROHIBITING "UNREASONABLE INTERFERENCE" WITH PARK PERMITTEES VIOLATES FIRST AMENDMENT

In *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006), the plaintiff was an evangelical Christian who regularly preached in public places in Portland, including Pioneer Courthouse Square and Waterfront Park. He would often preach at events that were open to the public, but were privately sponsored by organizers that had been issued city permits. His preaching, which often included disparaging remarks concerning women and homosexuals, was considered offensive to some event organizers. On at least six occasions, the Portland Police forced the plaintiff to leave events under threat of arrest for trespass, citing Portland City Code ("PCC") 20.08.060. That ordinance made it unlawful to "unreasonably interfere with a permittee's use of a Park." The plaintiff sued the city, alleging that his First Amendment rights had been violated.

The district court struck down the city's policy of allowing permittees to exclude others, on the grounds that it was not narrowly tailored to serve the city's legitimate interest in protecting the free speech rights of the permittees. The district court issued an injunction prohibiting the city from removing the plaintiff and others from event areas without probable cause and ordering the city to delete from its permits a rules of conduct section authorizing permittees to evict such persons. The city appealed, arguing that the policy was constitutional and that the injunction, as written, was vague and overbroad.

The Ninth Circuit Court of Appeals affirmed the district court's holding that the city ordinance was unconstitutional. In so doing it applied the test set out in *Ward v. Rock Against Racism*, 491 US 781 (1989): a time, place, or manner regulation of public space is valid if it is 1) content neutral, 2) narrowly tailored to a legitimate government interest, and 3) leaves ample alternative channels of communication. The court assumed for purposes of the appeal that the ordinance was content neutral and there was a legitimate government interest in protecting the permittees' speech. However, it held that the ordinance was not narrowly tailored because, although the events were open to the public, the permittees were given "unfettered discretion to exclude private citizens on any (or no) basis." *Gathright*, 439 F3d at 577. Because it was not narrowly tailored, the court did not reach the third prong of the *Ward* test.

The city argued that the ordinance was constitutional under *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995). *Hurley* involved organizers of a St. Patrick's Day parade who refused to allow a gay-rights organization to march in the parade. The United States Supreme Court held that the parade organizers had a First Amendment right not to be compelled to allow the gay-rights organization to march because it would have forced the organizers to communicate a message they did not endorse. The city argued that requiring permittees to allow the plaintiff's preaching forced the event organizers to communicate a message they did not endorse.

The Ninth Circuit distinguished *Hurley* by noting that *Hurley* involved an organization that wanted to participate in an event, not to merely witness it or oppose it. The court stated that there was a distinction between participation and merely being present in the same location. Here, the plaintiff did not want his speech included with that of the event sponsors, and there was no risk that his preaching would be attributed to the sponsors. The court emphasized that the preferred method to oppose offensive speech is not by censorship, but through more speech.

The court held that the district court did not abuse its discretion in issuing the injunction, even though a literal reading of its instruction to delete the rules of conduct section from its permits would lead to an absurd result if no rules were allowed. The court construed the injunction so that such a result would be avoided. However, the city had repealed and replaced PCC 20.08.060 during the course of the lawsuit, and the court remanded to the district court to reconsider the injunction in light of these recent developments.

Kimberlee A. Stafford

Gathright v. City of Portland, 439 F3d 573 (9th Cir 2006).

■ ROAD CONVEYANCE BY DEED OF FEE SIMPLE TITLE EFFECTIVELY PARTITIONED THE ORIGINAL PARCEL INTO TWO SEPARATE PARCELS

In *Lovinger v. Lane County*, 206 Or App 557, 138 P3d 51 (2006), the Oregon Court of Appeals held that a 1959 conveyance of a narrow strip of land to Lane County that eventually became Little Fall Creek Road was sufficient to create separate lots on each side of the road and that ORS 92.010(7)(d) did not apply retroactively. That statute provides that property divided by the sale or grant of a road continues to be regarded as a single parcel unless it is further subdivided or partitioned.

The facts of the case were not in dispute. The county approved a dwelling application on the ground that the original parcel had been partitioned into two separate parcels by a 1959 warranty deed transferring title of the narrow strip to the county, which bisected the original lot. To the north of the strip was a larger, 6.35 acre lot, eventually designated Tax Lot 203. To the south of the strip was a smaller, 1.2 acre lot that was eventually designated Tax Lot 200. A prior dwelling existed on Tax Lot 203. In 2004, the owner of Tax Lot 200 applied for approval of a forest template dwelling. The petitioner objected to the application on the ground that Tax Lots 200 and 203 had never been lawfully partitioned, and as a result still comprised a single "parcel" and, consequently, a single "tract." Under county code only one forest template dwelling may be located on a given "tract" of land. LUBA affirmed the county's decision, and the petitioner appealed to the court of appeals.

On judicial review, petitioner raised two arguments. First, petitioner argued that ORS 92.010(7)(d), which was enacted 30 years after the road was created, merely codified prior law and that prior law did not allow a land division to occur as a result

of the creation of a road. Second, petitioner argued that ORS 92.010(7)(d) applied retroactively.

The court examined prior law and drew a distinction between roads that were created through a dedication and roads that were created by a deed of fee simple title. The court noted that with respect to dedicated roads, "if the road were vacated title would vest in the owner of the tract through which the road ran." 206 Or App at 564. However, in this case, the strip of land was conveyed in fee title to the county and was later used for road purposes. Thus, the court treated the strip of land as a "separate ownership" that had the effect of "disconnecting," and hence partitioning the lot that was bisected by the road.

In another part of the decision, the court drew a distinction between roads that exist as easements and roads created when ownership in fee to the underlying land has changed hands. The court left some ambiguity about whether a dedication in fee title as opposed to a dedication of an easement for a road was sufficient to partition land under prior law. The court did not fully resolve the contours of the prior law, but limited its holding to the determination that conveyance by deed of fee simple title to a strip of land that was later used for road purposes was sufficient under prior law to partition the land.

Having determined that ORS 92.010(7)(d) changed the prior law, rather than codifying it, the court next examined whether ORS 92.010(7)(d) applied retroactively. First, the court determined that the text and context of the statute did not provide any conclusive evidence one way or the other of legislative intent concerning retroactivity. Next, following the *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1993), methodology, the court noted that the legislative history did not shed any light on what intentions, if any, the legislature might have had regarding retroactivity. Finally, the court turned to the canons of statutory construction and applied the rule that in the absence of any direct evidence of the legislature's intentions, the court presumes that statues are "substantive" in nature and apply prospectively.

The court concluded that ORS 90.010(7) was "plainly 'substantive'" because it defines the legal effect of a road with respect to partitioning. In the absence of a retroactivity clause or any legislative history to suggest the legislature intended it to be retroactive, the court held the statute applied prospectively and that LUBA's affirmance of the county's decision was not in error.

Steve Morasch

Lovinger v. Lane County, 206 Or App 557, 138 P3d 51 (2006).

Appellate Cases – Real Estate

■ *SELLERS' PERFECT CONDITION PRECEDENT: ATTORNEY APPROVAL*

The common practice of real estate lawyers to advise clients to add an attorney review clause to every earnest money agreement was upheld in flying colors by the Oregon Court of Appeals. In *Flynn v. Hanna*, 204 Or App 760, 131 P3d 844 (2006), the lessee holding a right of first refusal sued the lessor/seller for specific performance of an earnest money agreement that reserved the right in both parties to have the agreement approved by their attorney and accountant. The trial court had entered judgment against the seller, but the court of appeals soundly reversed, without remand of any issue.

Hanna leased a ranch to Flynn with a first right of refusal. Some years later, Hanna listed the property for sale for $400,000, and accepted a full-price offer from a third party, subject to Flynn's right of refusal and an addendum providing, "BUYER & SELLER reserve the right to have their attorney and accountant approve this transaction."

Flynn exercised his right of first refusal, "stepping into the shoes" of the buyer. When the appraiser later told Hanna that the price was too low, Hanna attempted to raise it to $525,000. Then Hanna was hospitalized, and the property was taken off the market. After Hanna recovered, Hanna had his attorney review the agreement. The attorney disapproved of the agreement for several bona fide reasons. Hanna timely notified Flynn that he would not be proceeding to close the transaction. Flynn sued Hanna for specific performance of the obligation to sell the ranch.

The court found that Flynn, upon exercise of the right of first refusal, assumed only the rights and obligations the buyer had under the earnest money agreement. Specifically, each party had the right to have his attorney and accountant approve the agreement, and each party was obligated to respect the other's right to do the same.

Flynn contended that since the approval clause did not require attorney approval, there was no failure of condition, and Hanna therefore could not avoid the agreement. The court disagreed. That Hanna had the discretion to seek attorney review did not mean that attorney disapproval would not relieve him from performance. However, if Hanna had not sought attorney approval, he could not have avoided the agreement based on lack of attorney approval.

Flynn argued that since Hanna's attorney disapproved of only certain matters, Hanna could avoid only those issues that the parties could not work out. The court rejected the argument, finding that the approval clause was unambiguous, intended to enable either party to avoid the agreement if anything was unsatisfactory, and did not require further negotiation.

Flynn argued further that Hanna was required to seek attorney review before Flynn was notified of the purchase offer because the agreement became binding and enforceable as to him upon exercise of his right of first refusal. Again the court

disagreed, ruling that Flynn acquired only the rights of the buyer, including the right to insist that Hanna obtain attorney review within a reasonable time. Hanna did obtain attorney review, and Flynn did not contend that Hanna waited more than a reasonable time before consulting his attorney.

Flynn contended further that Hanna improperly circumvented his obligation to sell by raising the price and taking the property off the market before consulting with his attorney. Flynn argued that these actions constituted a repudiation of the agreement, forfeiting Hanna's right to rely on attorney disapproval to avoid the agreement. Flynn argued also that Hanna acted in bad faith by seeking and using attorney disapproval to cure wrongful termination of the agreement. The court rejected these arguments. Hanna's obligation to sell the property never ripened because attorney approval never occurred. Hanna did not act in bad faith, but only upon the advice of his real estate agent that such actions were within his contract rights. Further, Hanna did not breach the duty of good faith and fair dealing because seeking attorney review was expressly permitted by the terms of the agreement, irrespective of whether his true motivation was to avoid the contract.

The court concluded that Hanna became no longer obligated to honor Flynn's first right of refusal and sell the ranch to him when both parties had discretion to seek attorney review, and Hanna's attorney in fact disapproved of the earnest money agreement. This case still leaves open the question if the same result in favor of the seller would have been reached: (1) if the attorney approval clause applied only to the buyer; or (2) if the parties disagreed whether the reasons for disapproval were bona fide, material and reasonable; or (3) if the disapproving attorney gave no reason for disapproval, on the grounds that the reasons are attorney work product not subject to disclosure?

Mary Johnson

Flynn v. Hanna, 204 Or App 760, 131 P3d 844 (2006).

■ *OREGON COURT OF APPEALS ADDRESSES OWNERSHIP OF JET FUEL STORED WITHOUT NOTICE IN A PRIVATE HANGER THAT WAS SUBSEQUENTLY CONVEYED TO A THIRD PARTY*

In *Bergeron v. Aero Sales, Inc.*, 205 Or App 257, 134 P3d 964 (2006), the Oregon Court of Appeals labored to identify the legal owner of several thousand gallons of jet fuel that had been stored in an underground tank beneath a private hangar near Salem. The court found that the original purchaser of the fuel retained better title than the owner of the hanger since he had neither abandoned, nor lost his chattel by surrendering possession to another party.

Faced with such a seemingly simply holding, a reader might conclude that a correspondingly simple fact pattern was present as well. Unfortunately, this was not the case, and, therefore, the actual names of the relevant parties will be utilized for the sake of clarity. Kasper, the owner of Aero Sales, Inc., purchased the fuel and thereafter stored it in the underground tank unbeknownst to Praegitzer, the owner of the hangar and the fuel tank at the time. Praegitzer subsequently sold the hangar and the fuel tank to Curtright. When Kasper learned that the hangar had been sold, he sought to remove the fuel. However, Curtright refused to allow him to do so, insisting that he had purchased the fuel along with the hangar and the fuel tank. The final party to this drama was Bergeron, whose involvement was limited to being the personal representative of Praegitzer's estate when this case was tried.

A litany of claims ensued, including (1) Praegitzer bringing a trespass action against Kasper for using Praegitzer's hangar without permission; (2) Kasper filing a counterclaim against Praegitzer for conversion of the jet fuel; (3) Kasper filing a third-party claim against Curtright for conversion of the jet fuel; (4) Curtright counterclaiming against Kasper for trespass and conversion; and (5) Curtright filing cross-claims against Praegitzer for indemnity and breach of contract. The parties then filed cross-motions for summary judgment on Kasper's conversion claims. The trial court granted the motions of Praegitzer and Curtright and denied Kasper's motion. The court then entered a judgment reflecting that outcome and dismissed Praegitzer's claim against Kasper as well as Curtright's counterclaims against Kasper and the cross-claims against Praegitzer.

Kasper appealed that decision, arguing that the trial court erred in both denying his motion for summary judgment on his conversion claims and by granting Praegitzer's and Curtright's summary judgment motions. The court of appeals affirmed the trial court's resolution of the cross-motions for summary judgment without further discussion. However, the court of appeals concluded that the trial court erred in granting Curtright's motion and in denying Kasper's motion and, therefore, reversed and remanded on Kasper's conversion claim against Curtright.

With such a holding, the substance of the court of appeals decision revolved around the tort of conversion. The court began by reasoning that since the tort of conversion required a right to control on the part of Kasper, the primary question concerned who was the legal owner of the fuel at the time of the controversy. If Kasper had a legal right to the fuel that was superior to Curtright's interest in it, Curtright would be liable for conversion. Conversely, if Curtright's interest was superior to Kasper's, then Curtright was not liable for conversion.

The court first turned to applicable Oregon statutes to determine the answer to this query. The general rule under ORS 72.4030(1) is that a purchaser can acquire only the title that his seller has to transfer. The court determined that two exceptions to this general rule were relevant to this controversy. First, a person with voidable title can transfer good title to a good faith purchaser for value. Second, where a party has entrusted goods to a merchant who deals in goods of that kind, the merchant can transfer all of the rights of the entrusting party to a buyer who purchases the goods in the merchant's ordinary course of business.

Regarding the first exception, the court relied on the context provided by ORS 72.4030(1)(a) to (d) in concluding that "voidable title" is the title obtained by a purchaser when the owner willingly parts with the goods, but the transaction is flawed in

some way. With this in mind, the court found no evidence in the summary judgment record to support a finding that Kasper assented to selling, or otherwise transferring, his interest in the jet fuel to Praegitzer. As a result, the court held that Praegitzer did not have voidable title and the first exception to the general rule was inapplicable to these facts.

The court then relied on ORS 72.4030(3) in determining that the second exception applies only where possession of the goods is entrusted to a "merchant who deals in goods of that kind." The court again turned to the summary judgment record to determine there was no evidence that Praegitzer dealt in jet fuel. Thus, even if Kasper "entrusted" the jet fuel to Praegitzer under ORS 72.4030(4), Praegitzer could not transfer Kasper's rights in the jet fuel to Curtright under ORS 72.4030(3).

Therefore, since neither relevant exception applied to this case, the court held that the general rule from ORS 72.4030(1) controls, and thereby the purchaser (Curtright) acquired only the title that the transferor (Praegitzer) had the power to transfer. The inquiry then turned to determining what interest Praegitzer had in the fuel by virtue of its storage in his fuel tank under his hangar. In making that determination, the court relied on the common law of personal property (specifically *Ferguson v. Ray*, 44 Or 557, 77 P 600 (1904)). In such situations the possession of the land carries with it general possession of everything attached to or under that land, and, in the absence of better title elsewhere, the right to possess it. Therefore, Praegitzer's rights in the jet fuel, whether labeled "title" or something else, were superior to those of everyone except one with "better title."

With that settled, the court determined that Kasper indeed had better title to the fuel after discounting the various legal methods that might have transferred better title to Praegitzer. First, the fuel was not a "treasure trove" (and thereby the property of the finder) because it was not "money or coin, gold, silver, plate, or bullion found hidden in the earth or other private place, the owner thereof being unknown." *Jackson v. Steinberg*, 186 Or 129, 134, 200 P2d 376 (1948), *reh'g den*, 186 Or 129, 205 P2d 562 (1949). Nor had Kasper abandoned the property, for there was no evidence that he intended to relinquish ownership of the fuel. *See State v. Pidcock*, 89 Or App 443, 448, 749 P2d 597, *aff'd*, 306 Or 335, 759 P2d 1092 (1988), *cert den*, 489 US 1011 (1989). Finally, Kasper had not "lost" the fuel because he had "intentionally left or deposited it in a designated place." *Ferguson*, 44 Or at 565. Thus, Kasper retained ownership of the jet fuel notwithstanding the fact that he stored it in someone else's tank located on someone else's property. Consequently, Kasper had "better title" to the fuel than did Praegitzer, and whatever title Praegitzer passed to Curtright was inferior to Kasper's title.

David W. Richardson

Bergeron v. Aero Sales, Inc., 205 Or App 257, 134 P3d 964 (2006).

Appellate Cases – Outside Jurisdiction

■ *CONSTITUTION DOES NOT BAR ALL SUITS AGAINST STATES IN FEDERAL COURTS*

In *Suever v. Connell*, 439 F.3d 1142 (9th Cir. 2006), the 9th Circuit vacated the district court's dismissal of a class action against the state of California. The 9th Circuit held that whether a state can be sued in federal court depends on the facts. The court held that the Eleventh Amendment did not shield the California controller from a class action by persons seeking return of property that they claimed the state unconstitutionally seized under California's escheat scheme. The key questions were whether the property at issue was an individual's property or the state's property and whether the relief requested was prospective or retrospective.

The court previously held that the Eleventh Amendment did not apply to funds that had been escheated, but not permanently escheated, because the state held such funds in custodial trust for the benefit of property owners—thus the funds were not state funds. The rationale was that claims requesting the return of individuals' property are less likely to offend a state's sovereign immunity than claims requesting the payment of government funds. "Hence, although the Eleventh Amendment ordinarily bars claims primarily requesting funds held in the State's coffers, sovereign immunity does not apply to claims alleging such funds are individuals' property that the state improperly seized through *ultra vires* or unconstitutional acts." 439 F.3d at 1147. That is, the acts complained of must be outside the scope of the acting official's scope of duties.

In addition to the permitted claims for return of the temporarily escheated property, the court remanded the case to the district court to assess which forms of relief were permissibly prospective or amounted to ongoing violations of federal law and which forms of relief were impermissibly retrospective.

Tod Northman

Suever v. Connell, 439 F.3d 1142 (9th Cir. 2006).

■ *WHEN IN DOUBT ABOUT WHERE TO FILE A SECURITY INTEREST, FILE EVERYWHERE (EXCEPT UNDER THE FACTS OF THIS CASE)*

In *In re: Emerald Outdoor Advertising, LLC*, 444 F.3d 1077 (9th Cir. 2006), the Ninth Circuit Court of Appeals resolved a priority dispute on Indian trust land interests between a deed of trust initially recorded only with the county auditor and a subsequent lease that was recorded only in the Bureau of Indian Affairs (BIA) Title Plant. The court held that because federal law requires compliance with state law, and because Washington is a race-notice state, priority lies with the deed of trust. Although the court resolved the dispute through detailed statutory construction, this decision proselytizes on a broader scale: "[w]hen there is uncertainty about where to file a security interest in order to perfect it, file everywhere." 444 F.3d at 1077.

This story begins with a parcel of tribal land held in trust by the United States Government, and occupied by Hargrove (a member of the Puyallup Tribe of Indians). Hargrove acquired a loan in 1994 in exchange for his execution of a deed of trust. In accordance with federal law, the mortgagor sought and received the approval of the mortgage from the BIA Puget Sound Agency, which required recordation in the Official Records of the Bureau of Indian Affairs. The certificate of approval was not recorded in the BIA Title Plant until 1998. However, the mortgage was recorded with Pierce County, the county in which the property was located. In 1995, Hargrove executed a lease with Emerald Outdoor Advertising, LLC, for the erection of advertising signs on the property. The lease was recorded in the BIA Title Plant, but not with the county auditor.

After a series of assignments of the deed of trust, Hargrove filed for bankruptcy. The bankruptcy court permitted foreclosure on the deed of trust in May 2002. The successful bidder at the foreclosure sale subsequently filed successive eviction actions in tribal court, the second of which was stayed by Emerald Outdoor's bankruptcy filing. The bankruptcy court found that the deed of trust was valid in 1994 with the issuance of the certificate of approval, and not when in was recorded in the BIA Title Plant in 1998. The bankruptcy court also determined that Emerald Outdoor's lease had been extinguished upon foreclosure, finding the lease junior to the deed of trust. On appeal, the district court agreed regarding the effective date of the deed of trust, but found that the lease had priority over the deed of trust, because the lease was filed in the BIA Title Plant before the deed of trust.

The Ninth Circuit Court of Appeals held in favor of the deed of trust. Focusing on 25 U.S.C. 483a(a), the court recognized that holders of Indian trust lands must obtain BIA approval to mortgage their land and record a certificate of approval with the BIA Title Plant. However, the deed of trust had been approved by BIA and recorded in the BIA Title Plant, even if not immediately. Nevertheless, this case did not concern mere *approval* by the BIA; the question of this case was how federal law directs that matters of *priority* be resolved. To protect mortgagees, 25 U.S.C. 483a(a) allows for foreclosure "in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the state . . . in which the land is located." The court appropriately found that the federal statute did not specifically speak to priority.

The Puyallup Tribe has adopted no laws governing foreclosure, and, therefore, Washington law governed the foreclosure proceedings at issue. The court recognized that Washington's foreclosure statute requires recording with the county auditor and necessarily incorporates rules for recording, lien perfection, and priority in its race-notice scheme. The court rejected the attempt to give too much import to the requirement of recording in the BIA Title Plant. Although the court agreed that BIA Title Plant recording was required, the court interpreted that requirement to facilitate the records maintenance function of the BIA, and not to determine priority for purposes of foreclosure under Washington's race-notice statute (leaving to the future its effect on other priority schemes, such as a pure notice statute).

Finding that the federal law was intended to accommodate and not to preempt state and tribal law, the court held that recording in compliance with Washington law, without regard for the recording date at the BIA Title Plant, established the priority of an interest in tribal land.

Keith Hirokowa

In re: Emerald Outdoor Advertising, LLC, 444 F.3d 1077 (9th Cir. 2006).

■ *NOTICE POSTED ON TRANSIT DISTRICT'S WEBSITE HELD SUFFICIENT FOR NOTICE OF PUBLIC HEARINGS PREREQUISITE TO CONDEMNATION HEARINGS*

Although property owners are entitled to notice of a condemnation proceeding, it is well established in Washington courts that an agency is not required to give personal notice for public meetings at which the necessity of condemnation would be considered. In *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), the condemnee challenged the adequacy of the public notice for a hearing to consider the necessity of a property acquisition that was posted on the agency's website.

Regional transportation entities are required to comply with the notice procedures applicable to first class cities, which "may include" written notice to or publication in a designated newspaper, public posting of future agendas, "or such other processes as the city determines will satisfy the intent of this requirement." RCW 35.22.288. Sound Transit was required to publish notice of public meetings held to discuss property acquisition.

The court focused on qualifying the "other processes" which "will satisfy the intent" of the notice requirement. The court noted the absence of applicable authority addressing the sufficiency of posting on a web site. However, the court was impressed by treatments of website posting as a means of distributing information, citing cases from federal and state courts in Colorado, California, and the United States Supreme Court.

In comparing the traditional notice fora of newspapers to the effectiveness of posting a notice on an agency website, the court rejected the practical differences between the two, arguing that "just as it is impossible to assure that anyone will look at any particular website, it is equally impossible to assure that anyone will purchase, much less read, a newspaper." 128 P.3d at 595. Without such a practical limitation on the use of web sites for the disbursement of public notice, the court held that a web posting was comparable to other types of notice that would meet the statutory notice requirements.

Keith Hirokowa

Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403, 128 P.3d 588 (2006).

■ *U.S. SUPREME COURT FINDS NO STANDING TO ATTACK STATE TAX BREAKS TO ATTRACT INDUSTRY*

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 2286, 164 L. Ed 2d 812 (2006) involved the expansion of a Jeep plant in Toledo, Ohio by the defendant, DaimlerCrysler Corp, as a result of state encouragement by local and state tax breaks. Ohio levies a franchise tax against companies doing business in that state, but provides a tax credit for companies that install new machinery and equipment. Some local governments follow suit. The plaintiffs challenged both the state tax credit under the Commerce Clause as well as local property tax credits.

The defendant entered into an agreement with the city of Toledo to expand its operations and secured the property tax waiver in addition to the state tax credit. The plaintiffs filed suit alleging that they had to pay disproportionately higher taxes as a result of these credits. The defendant removed the case to a federal court, though the plaintiffs resisted the removal, stating that they had doubts they could meet federal standing requirements. The trial court denied a motion to remand and decided the case adversely to the plaintiffs. However, the Sixth Circuit, which did not address the standing issue, found the state tax credit violated the Commerce Clause. The United States Supreme Court granted review.

The court decided the matter on standing grounds, stating that since *Marbury v. Madison*, 1 Cranch 137 (1803), when Justice Marshall held that the role of courts in a democratic society is a limited one, the United States Supreme Court exercises its jurisdiction only when an actual case or controversy is presented. Article III's case or controversy requirement is implemented through standing rules under which a plaintiff must allege personal injury fairly traceable to a defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. The burden is on a plaintiff to establish standing.

The court noted that it had usually denied standing to those who merely disagreed with governmental fiscal policies and were affected only in a minute way. The rationale against interference by federal courts applies with equal force to federal and state fiscal policy. In these cases, standing is denied because the alleged injury is neither concrete nor particularized, but rather a grievance suffered along with other taxpayers. In this case, it could also be argued that the injury of being affected at all was hypothetical because the tax breaks at issue, in the long run, could actually increase governmental revenues.

The plaintiffs argued that an exception to the general rule existed under the Commerce Clause, analogous to the exception to Establishment Clause challenges to state supported religious education, such as *Flast v. Cohen*, 392 U.S. 82 (1968). The limited exception for the Establishment Clause has never been extended beyond that clause. Furthermore, an extension of the exception to the Commerce Clause would leave no rationale to deny further expansions and would effectively extend judicial intervention into spending policy indefinitely.

The court also rejected the contention that the plaintiffs' status as municipal taxpayers gained them standing to challenge state expenditures, noting that the Sixth Circuit below had overruled their claim on the merits with respect to their objection to local tax breaks, and no standing issue on that matter was raised in this appeal. Their standing with regard to local tax policy did not extend to claims against the state of Ohio, even if some of the state franchise tax revenues would go to local governments. Similarly, the court declined to exercise supplemental jurisdiction over the claim against the state by virtue of the fact that it arose out of a common nucleus of operative of facts because it did not wish to extend its jurisdiction where standing was not present. The court noted it had taken the same position with regard to issues relating to ripeness, mootness, and policy questions. The court found no theory on which to base standing on the state tax credit issue and vacated that portion of the Sixth Circuit judgment on that issue, ordering dismissal of these claims.

Justice Ginsburg concurred, stating she would not endorse the sweeping standing decision of the majority and would simply state the taxpayer challenges to state tax policy were not justicable.

This case has real estate and land use implications as it effectively keeps federal courts out of state tax policies. States often attempt to attract industry by temporarily lowering taxes. There appears to be a possible exception for municipal taxpayer challenges, which the Supreme Court would not extend further. This decision does not speak to state constitutional or statutory limitations on the exercise of such policy, which is probably more a fruitful way for taxpayers to be heard.

Ed Sullivan

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 2286, 164 L. Ed 2d 812 (2006).

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