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Appellate Cases – Land Use

■ *ANOTHER SKIRMISH IN THE ANNEXATION WARS*

In *Leupold & Stevens, Inc. v. City of Beaverton*, 206 Or App 368, 138 P3d 23, (2006) the Oregon Court of Appeals affirmed LUBA's decision to uphold an annexation of territory by the city of Beaverton despite the owner's objection to the annexation.

The city adopted the annexation ordinance under ORS 222.750, which allows a city to annex land "with or without the consent of any property owner within the territory" if certain conditions are met. This controversial process is known as "island annexation."

At the court of appeals, the petitioner argued that Or Laws 2005, chapter 844, section 6 (hereinafter referred to as "the 2005 Law") rendered LUBA's and the city's decisions moot. The 2005 Law restricted island annexations under certain conditions, namely when (1) the area of land is larger than seven acres and is zoned for industrial use, (2) the land is owned by an Oregon-based business in operation for 60 years, and (3) the business entity employs more than 500 individuals.

Petitioner also argued that LUBA erred on the merits by not concluding that Oregon Laws 1987, chapter 737, section 3 (hereinafter referred to as "the 1987 Law") precluded the city from using ORS 222.750 to annex land without petitioner's consent. The 1987 Law required a property owner's permission for annexation when the property (1) has no electors, (2) is zoned for industrial uses, (3) has its own sewer and water lines that the owner paid for and installed, and (4) has an assessed valuation of more than seven million dollars.

The court of appeals began its decision by setting forth the relevant facts. Petitioner owned several lots surrounded by the city of Beaverton. One of the lots, known as Lot 700, was zoned industrial and had a value in excess of $7 million. On February 14, 2005, the city adopted a resolution pursuant to ORS 222.750 to initiate annexation of petitioner's lots, including Lot 700. Petitioner objected arguing that the 1987 Law precluded the city from annexing Lot 700 because it met the criteria set forth in the statute.

The city found that petitioner's evidence was inadequate to qualify Lot 700 for the protection of the 1987 Law because petitioner failed to demonstrate that it "installed" its own "sewer and water lines." The city interpreted the statutory terms "sewer and water lines" to mean only the large, shared, public lines that deliver water and collect waste. The city found that this term did not include "lateral" pipes that connect specific buildings with existing shared lines.

The city also found that petitioner's $25,890 expense to relocate a 21 inch public sewer line did not qualify under the 1987 Law because relocation of a line does not equal installation of line. On May 2, 2005, the city annexed Lot 700. Petitioner appealed to LUBA, which affirmed the city's interpretations of the 1987 Law.

While the LUBA appeal was pending, the Legislature adopted the 2005 Law, which applied retroactively to annexations that were approved on or after March 1, 2005. During oral argument, petitioner asserted for the first time that the 2005 Law precluded the city's annexation. Petitioner submitted an affidavit to support this assertion and the city objected, arguing that LUBA could only consider the affidavit in an evidentiary hearing. Petitioner did not respond to the objection nor ask for an evidentiary hearing. As a result, LUBA declined to address the applicability of the 2005 Law.

On appeal to the court of appeals, petitioner argued that the 2005 Law rendered LUBA's decision moot. The court disagreed, holding that mootness, as an aspect of justiciability, concerns the authority of the courts to exercise judicial power. The court cited *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004) for the proposition that a case only becomes moot when there is no longer a controversy and the court's exercise of authority would not "have some practical effect on the rights of the parties to the

controversy." 337 Or at 349. The court found that the controversy still existed and that the petitioner was asking the court to decide that it had prevailed on the merits of that controversy. The court declined to make this decision in the absence of predicate facts on the record.

In analyzing the 1987 Law, the court of appeals utilized the principles of statutory construction as described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). With respect to the definition of "sewer and water lines," the court examined the context of the case law and statutes that existed prior to enactment of the 1987 Law. The court found that LUBA correctly upheld the city's interpretation of this phrase to mean large, shared pipes rather than small, private lateral lines. With respect to the definition of "install," the court also agreed with LUBA's and the city's interpretation that relocation of a line is not the equivalent of installation.

This case provides one snapshot of the many issues swirling around Oregon's complicated annexation laws. Annexation sits right on the convergence of land use, property rights, and taxation. Therefore, it has become an issue with many political and ideological implications. After some high profile annexation battles, the Legislature devoted a significant amount of time to this issue in 2005. As a result, several bills were passed into law, including the legislation that was one of the issues in this case.

The 2005 Legislature also established an Annexation Work Group, which met several times during 2006, and on which this author had the privilege of serving. The Work Group produced a 51 page report (not including appendices) and forwarded it to the House Interim Committee on Land Use on August 2, 2006. It is unclear what the 2007 Legislature will do with the recommendations contained in the report. However, it is clear that annexation controversies will continue to generate much legislative interest and much new case law.

Harlan Levy

Leupold & Stevens, Inc. v. City of Beaverton, 206 Or App 368, 138 P3d 23 (2006).

■ AN ISLAND MUST BE CONTIGUOUS TO BE AN ISLAND

In *Costco Wholesale Corp. v. City of Beaverton*, 206 Or App 380, 136 P3d 1219 (2006), the Oregon Court of Appeals affirmed LUBA's decision to uphold one annexation by the city of Beaverton, but reversed and remanded another one. The city of Beaverton has petitioned the Oregon Supreme Court for review.

Both of the annexations at issue were done without the owners' consent pursuant to ORS 222.750, which provides:

> When territory not within a city is surrounded by the corporate boundaries of the city, or by the corporate boundaries of the city and the ocean shore or a stream, bay, lake or other body of water, it is within the power and authority of that city to annex such territory. However, this section does not apply when the territory not within a city is surrounded entirely by water. Unless otherwise required by its charter, annexation by a city under this section shall be by ordinance or resolution subject to referendum, with or without the consent of any owner of property within the territory or resident in the territory.

This statute is known as the "island annexation" statute.

Both petitioners' properties were surrounded by the city. The property of one petitioner (Bold) was completely contiguous with the city's boundaries. The property of the other petitioner (Wells) was adjacent to another property that was not part of the city, although the city surrounded them both in the aggregate.

The court found this difference to be significant. Using the methodology prescribed in *PGE v. Bureau of Labor and Industries*, 317, Or 606, 859 P2d 1143 (1993), the court analyzed ORS 222.750 to ascertain the meaning of "surrounded by." After examining the text and context of the statute, the court turned to legislative history.

The court found that the Oregon Legislature intended "surrounded by" to mean that the territory must be completely enclosed by and contiguous to the annexing city or contiguous to the city and a body of water. The court did not believe the legislature intended to allow a city to reach in and annex only a portion of an island. For this reason, the court affirmed LUBA's decision upholding the annexation of Bold's property, but reversed and remanded LUBA's decision upholding the annexation of Wells's property.

The court also ruled that the statute of limitations given in ORS 12.270 limits challenges to rights-of-way annexations to within one year from the effective date of the annexation of the right-of-way. The petitioners had collaterally challenged these rights-of-way annexations in this appeal because a successful challenge would have resulted in their properties not being surrounded by the city. This would have precluded the city's use of ORS 222.750.

This ruling is significant because a few cities have been annexing streets and other rights-of-way in order to surround territories that they would like to annex in the future. This process actually creates new "islands" that ORS 222.750 then allows the city to annex without owner consent. It was this process that caught the eye, and the ire, of the 2005 Oregon Legislature. The result was enactment of several new statutes, including Or Laws 2005, chapter 844, which is described in the accompanying case summary of *Leupold & Stevens, Inc. v. City of Beaverton*, 206 Or App 368, 138 P3d 23 (2006).

Harlan Levy

Costco Wholesale Corp. v. City of Beaverton, 206 Or App 380, 136 P3d 1219 (2006).

■ *PRESERVATION REQUIREMENTS OF ORAP 5.45 APPLY TO PETITIONS FOR JUDICAL REVIEW OF AGENCY ACTION*

In *Fraser v. Land Conservation and Development Commission*, 206 Or App 735, 138 P3d 932 (2006), the Oregon Court of Appeals reconfirmed that a party can not challenge the Land Conservation and Development Commission's (LCDC) consideration of a memorandum if that party failed to object to including the document during the proceedings below. Petitioners sought review of an LCDC order that affirmed a decision by the Department of Land Conservation and Development (DLCD) approving Wallowa County's periodic review work task decision. The court rejected all of petitioners' assignments of error without discussion, except for the claim that LCDC improperly considered untimely evidence from the county without providing petitioners a chance to review and respond to it.

On March 1, 2004, petitioner Pekarek filed written objections to a DLCD staff memorandum recommending that LCDC affirm the county's submission. On March 3, 2004, a county planner submitted a memorandum in response. Although the court reviewed the record, it could not find any indication that Pekarek objected to LCDC's consideration of the staff memorandum or asked for additional time to respond to it. Since Pekarek did not preserve the issue below, the court was prohibited from considering the issue. The preservation requirements of ORAP 5.45 "apply not only to appeals of trial court judgments but also to petitions for judicial review of agency action." *Thomas Creek Lumber v. Board of Forestry*, 188 Or App 10, 30, 69 P3d 1238.

Carrie Richter

Fraser v. Land Conservation and Development Commission, 206 Or App 735, 138 P3d 932 (2006).

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Appellate Cases – Real Estate

■ PRESCRIPTIVE EASEMENT CLAIM FAILS ONCE AGAIN IN THE OREGON COURT OF APPEALS

The case of *Webb v. Clodfelter*, 205 Or App 20, 132 P3d 50 (2006), is another in a continuing line of recent prescriptive easement cases in which the Oregon Court of Appeals has denied the granting of a prescriptive easement. There existed on the defendants' land three roads, generally referred to as "North Access Road," "South Access Road," and "Cut Off Road." A short summary of the facts indicated that the roads were in use by both the plaintiffs and the defendants from 1943 to 1986 for farm and ranch vehicles and equipment. In 1986 the parties entered into a conservation program that required they allow the property to revert to its natural state. This lead to a reduction in use of the roads, although the property continued to be used for weed eradication and recreational purposes.

From 1959 to 1998 the plaintiffs or their predecessors leased hunting rights to the Upland Bird Hunting Club. During hunting season club members used the roads with varying frequency to access hunting areas. Until 1995 there was no written permission from any of the defendants; however, in 1995 Wayne (Rocky) Webb gave his permission to cross all properties for hunting purposes.

The defendants never objected to the plaintiffs' use of the roads for farming or for personal use, although they were not happy about the hunting club use. From 1963 to 1970, the defendants and their predecessors attempted to exclude hunting club members, but in 1970 they decided to allow use of the roads as long as no one strayed onto their properties.

When it was determined that the club members were not honoring the agreement, all of the defendants agreed they would permit non-owners to use the roads only when they were accompanied by the owner. In 1995 or 1996, Clodfelter noted that a gate on his property had been damaged. In 1998 he placed a new gate, which has not been breached. This action was commenced by the plaintiffs in October 1998. The defendants counterclaimed for trespass.

The trial court held that the plaintiffs established a prescriptive easement over the north and south access roads, but not the cutoff road. Further, the court found in favor of the defendants on the trespass claim as it related to the cutoff road. The court of appeals reversed the trial court on both findings.

The primary issue was whether the plaintiffs proved that their use was adverse. The court identified the usual description regarding proof of prescriptive easements, after noting:

> Easements by prescription are not favored by the law. To establish the existence of such an easement, the plaintiffs must show, by clear and convincing evidence, that they or their predecessors used the roads in an open, notorious, adverse, and continuous manner for a period of ten years.
>
> It is generally said that the open and continuous use of a road for the prescriptive period is presumed to be adverse and under a claim of right. . . .
>
> When the road is preexisting, however, and the claimant's use is nonexclusive, that presumption may be rebutted by proof that the claimant's use of the road did not interfere with the servient owner's use of the road.

205 Or App at 26–27 (citations omitted).

The court went on to hold that the defendants adequately rebutted the presumption of adversity, primarily by showing the plaintiffs' use was permissive.

> In view of the nonexclusive nature of the plaintiffs' use and the evidence of the conditional permission given by the defendants, we are persuaded that, during most of the requisite period before the filing of the claims in 1998, club members' use of the roadways on the defendants' property was permissive.

205 Or App at 28.

Based on this and recent cases involving prescriptive easements, it seems that in order to prevail it will be necessary for a claimant, in addition to the "standard" proof to establish such an easement, to adequately show that: 1) they built the road and 2) that their use is exclusive.

Alan Brickley

Webb v. Clodfelter, 205 Or App 20, 132 P3d 50 (2006).

■ OREGON SUPREME COURT HOLDS THAT "APPRAISAL" DOES NOT INCLUDE DRAFT APPRAISALS FOR PURPOSES OF A CONDEMNATION PROCEEDING

In *State v. Stallcup*, 341 Or 93, 138 P3d 9 (2006), the Oregon Supreme Court reversed the Oregon Court of Appeals and held that a party to a condemnation action was not required, under ORS 35.346(5)(b), to disclose the draft appraisals prepared by its appraiser.

The state of Oregon sought to acquire a portion of the defendant's property on which a fast food restaurant was located. After failing to reach an agreement as to the amount of compensation, the state filed a complaint for condemnation, alleging the true value of the acquisition was $70,800.

The defendant received a September 2000 report from his appraiser entitled "Complete Summary Appraisal Report." The unsigned report was marked "draft" and lacked the maps, photographs, and tables to which the text referred. The report provided two different estimates of the value of the property. The first estimate of $80,591 was based on the assumption that the drive-through window of the restaurant would not be affected. The second estimate of $355,082 was based on the assumption that the drive-through would be affected. The defendant did not disclose these estimates to the state, but in his answer he alleged the value of the property to be condemned was $355,082.

In April 2001, the defendant's appraiser generated a second "Complete Summary Appraisal Report" estimating the value of the property to be $345,082. This report was followed by a report in November 2001, which estimated the value of the property to be $611,511. Both reports were signed and contained the photographs, maps, and tables that were not included in the September 2000 report. Neither report was stamped "draft." Both the April and November reports were disclosed pursuant to the compulsory pretrial disclosure requirements of ORS 35.346(5)(b). This provision reads:

> In the event the owner and condemner are unable to reach agreement and proceed to trial or arbitration . . . each party to the proceeding shall provide to every other party a copy of every appraisal obtained by the party as part of the condemnation action.

Following trial, the jury returned a verdict for the defendant in the amount of $135,000. Since the jury award exceeded the State's highest offer, defendant was entitled to attorney fees pursuant to ORS 35.346(7). Upon receiving a fee petition, the state discovered that Palmer had billed for four "complete summary appraisal reports," although only two had been disclosed. The state moved to set aside the judgment pursuant to ORCP 71B-C, based on newly discovered evidence that the defendant had not produced "every appraisal," as required under ORS 35.346(5)(b). The state asserted that the defendant relied on the September 2000 report in filing his answer. The circuit court denied the state's motion, concluding "draft" reports did not fall within the purview of the statute.

On appeal, the state argued that the trial court erred in concluding the reports were not subject to mandatory disclosure. The Oregon Court of Appeals examined the plain meaning of the word "appraisal" by applying the dictionary definition and ruled the term meant, "a valuation of property by the estimate of an authorized person." References throughout the statute to "a copy," led the court to conclude the statute only applied to written estimates of value by an authorized person. Consequently, the court of appeals concluded that an "appraisal" is "any written opinion by a qualified person regarding the valuation of the condemned property that a party obtains as part of the condemnation action" for purposes of ORS 35.346(5)(b). Finding that all four of the "Complete Summary Appraisal Reports" fell within the purview of the statute, the Oregon Court of Appeals set aside the judgment.

On review, the Oregon Supreme Court disagreed with the court of appeals' reliance on the dictionary definition of the term "appraisal," noting the court of appeals' failure to consider the context in which the legislature used the term. Instead, the supreme court examined other provisions of the Oregon statutes for an understanding of the term, including ORS 674.100(1)(b), which provides that "[r]eal estate appraisal activity is the preparation, completion and issuance of an opinion as to the value . . . of real property." Next, the court examined ORS 35.346(2), which states that if the property is worth less than $20,000, "the condemner, in lieu of a written appraisal, may provide . . . a written explanation of the bases and method by which the condemner arrived at the specific valuation of the property." Had the legislature intended "appraisal" to include all opinions of value, the court reasoned, a "written explanation" would not be "in lieu of" an appraisal. Finally, the court looked to OAR 161-025-0060, which requires that an "appraisal" conform with the requirements of the Uniform Standards of Professional Appraisal Practice ("USPAP"), which requires a "Summary Appraisal Report" to include a signed certification.

Based on the context of ORS 35.346(5)(b) and the language of other relevant Oregon statutes, the court concluded that "an 'appraisal' is a completed and issued opinion of value that complies with the requirements of the applicable Oregon Administrative Rules and is made by a person certified or licensed to issue such opinions." 341 Or at 103. Because the September 2000 report was unsigned, marked "draft," and lacked the photographs, tables, and maps to which the text referred, the court determined the report was incomplete. Accordingly, the September 2000 report was not subject to mandatory disclosure under ORS 35.346(5)(b). Therefore, the supreme court reversed the court of appeals' decision and affirmed the decision of the trial court.

The supreme court noted that the case did not require it to decide whether the September 2000 report would have been subject to discovery under ORCP 43 pursuant to a request for production of documents or whether it would have been protected as trial preparation material, attorney work product, or subject to other attorney client privilege.

Susan Glen

State v. Stallcup, 341 Or 93, 138 P3d 9 (2006).

■ *SQUATTER'S RIGHT: A CLAIM FOR ADVERSE POSSESSION IS UPHELD DESPITE QUESTIONS CONCERNING CONTINUOUS USE*

In *Lieberfreund v. Gregory*, 206 Or App 484, 136 P3d 1207 (2006), the Oregon Court of Appeals reviewed a quiet title action based on a theory of adverse possession. At trial the substitute plaintiff, Ron Kay, received an affirmative decision granting him judgment. The defendant appealed claiming that the plaintiff had not met the burden of proof for the elements establishing adverse possession and that he had not established privity with his predecessors in interest. The court of appeals upheld the decision of the trial court granting the plaintiff the property and dismissed the defendant's appeal.

The plaintiff and the defendant own adjoining parcels of land in Shady Cove. The property in dispute was a strip of land with a driveway, bordered by a small wall located between the plaintiff's and the defendant's property. The dispute arose when the plaintiff's predecessor in interest, the Lieberfreunds, surveyed the property prior to their purchase. The result of the survey indicated that the wall and the strip of land on the north side of the wall fell within the defendant's property line. Despite this fact, the Lieberfreunds purchased the property and then instigated a quiet title action based on adverse possession seeking declaratory judgment. Prior to resolution of the action, the Lieberfreunds sold the property to the plaintiff. At trial various

witnesses testified as to their beliefs regarding ownership and use. The plaintiff also offered photographic evidence showing use of the driveway and maintenance of the strip of land by his predecessors. In the end the court held that the plaintiff had established adverse possession.

To succeed on an adverse possession claim, a claimant must show actual, open, notorious, exclusive, hostile, and continuous possession of the property and an honest belief that the claimant is the proper owner of the disputed property. Adverse possession is codified in Oregon in ORS 105.620.

On appeal, the defendant claimed the plaintiff had failed to establish the actual, continuous, and hostile elements of his adverse possession claim and that he had failed to meet the statutory requirement of an honest belief of actual ownership.

The defendant's first argument was that since there were periods that the home was for sale and not occupied the ten year "continuous use" element of ORS 105.620 was not met. Second, the defendant argued that the evidence did not show that the plaintiff used the entire disputed strip and thus failed to prove the "actual" element. Third, the defendant argued that the plaintiff did not enter sufficient evidence to establish the "hostile" element, and last that the plaintiff and his predecessors did not have an honest belief of ownership.

The court of appeals first addressed the continuous use issue. In holding that the plaintiff had established continuous use, the court noted that the evidence presented tended to show that the periods during which the home was not occupied were relatively short. Additionally, all that the continuous use element required was use that would be made by an owner of similar land. In the court's view, it is common for residential property to be vacant when it is for sale or, if it is used for a rental, for periods of time between tenants.

Second, the court addressed the actual element. In holding for the plaintiff, the court relied on photos that showed that the plaintiff and his predecessors had maintained the strip of land and kept it manicured and had used the driveway, which displayed ownership over the entire strip

The court next addressed the hostile element. The court first pointed out that hostility requires additional evidence of a subjective intent to possess. In again holding for the plaintiff, the court noted that the driveway, the testimony of a previous owner that she maintained the property, and the fact that the defendant believed the strip to be the plaintiff's all provided the additional evidence necessary.

Finally, the court addressed the added element of honest belief. The court held that based on the evidence, the adverse possession claim vested prior to 1990. It was not until 1990 that the honest belief element was added to ORS 105.620. Therefore, it did not apply.

In the end, the court of appeals found the squatter's right because the evidence presented at trial met the burden for an adverse possession claim.

Noah Winchester

Lieberfreund v. Gregory, 206 Or App 484, 136 P3d 1207 (2006).

Appellate Cases – Landlord Tenant

■ *DRUG AND ALCOHOL FREE HOUSING NON-PROFIT DENIED EXEMPTION FROM RESIDENTIAL LANDLORD TENANT ACT*

In *Burke v. Oxford House of Oregon Chapter V*, 341 Or 82, 137 P3d 1278 (2006), the Oregon Supreme Court considered whether a non-profit providing housing for recovering alcoholics and drug addicts may claim an exemption provided in Oregon's Residential Landlord Tenant Act (RLTA) when the non-profit was structured to avoid the requirements of the RLTA. The trial court determined Oxford House could not. The court of appeals reversed. The supreme court reversed the court of appeals and affirmed the trial court's decision.

Oxford House is a local chapter of a larger non-profit, Oxford House, Inc. Local chapters lease a home, then allow several members, who are recovering alcoholics or drug addicts, to share the single home. Each member has a separate bedroom, but shares the other areas of the home. Oxford House collects a monthly membership fee, which primarily pays the rent and also pays the shared expenses of the home.

The structure of Oxford House, Inc.'s lease reflects a formal policy decision. The policy statement for the non-profit explains that Oxford House enters into a direct lease with the landlord to avoid "the application of local landlord-tenant laws." This allows Oxford House to remove an individual who suffers a relapse without the delay that would occur if the eviction procedures under the RLTA were applied. Notably, the RLTA specifically provides expedited procedures for evicting a person who uses drugs or alcohol while living in a drug-and-alcohol-free facility. ORS 90.398 allows the tenancy to be terminated upon 48 hours notice. Additionally, ORS 90.110 lists several living arrangements that are exempt from the RLTA.

The court of appeals found that Oxford House qualified for two separate exemptions under ORS 90.110, the first for residence in an institution incidental to the provision of medical, counseling, or similar services, and the second for residence in a structure operated by a social organization if the resident is a member of the social organization. ORS 90.110(1) & (2). Nonetheless, the Supreme Court found Oxford House could not avail itself of those exemptions because it had structured its housing arrangement for the purpose of avoiding its responsibilities under the RLTA. ORS 90.110 begins: "Unless created to avoid the application of [the RLTA], the following arrangements are not governed by [the RLTA]." In short, wrongdoers can not avail themselves of the exemption. Oxford House's description of its leasing arrangement acknowledged that it was impermissibly attempting to avoid its obligations under the RLTA.

Kathleen Sieler

Burke v. Oxford House of Oregon Chapter V, 341 Or 82, 137 P3d 1278 (2006).

Appellate Cases – Outside Jurisdiction

■ NINTH CIRCUIT FINDS DENIAL OF SECOND ATTEMPT TO SITE A RELIGIOUS USE COUPLED WITH ACCEPTANCE OF ALL CONDITIONS OF APPROVAL SUFFICIENT TO IMPOSE A SUBSTANTIAL BURDEN UNDER RLUIPA

In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), the Ninth Circuit considered whether the county's denial of a conditional use permit to construct a temple on a parcel of land zoned "agricultural" constituted a "substantial burden" under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Of the twenty-two different zoning designations within the county, churches are conditionally permitted to locate within six zones. This was the second time the county had heard this request. First, Guru Nanak sought to locate on residential land, and this request was denied based on resulting traffic and noise concerns. Although the planning commission approved the second request to locate on a larger agricultural parcel with much greater distance between neighboring uses, the Sutter County Board of Supervisors overturned that decision finding (1) the proposed use was too far away from the city and would result in "leap-frog development;" (2) that the property had been farmed in the past and should remain available for farm use; and (3) the development would harm surrounding agricultural uses. The lower court granted summary judgment for Guru Nanak finding that the denial of the land use permit, particularly when coupled with the denial of the previous application, actually inhibited Guru Nanak's religious exercise.

Applying an interpretation that a "significantly great restriction or onus upon religious exercise" is required to create a "substantial burden," the court found that the county's actions exceeded this fairly high threshold. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004). The court noted that the failure to provide a new church with a land use entitlement does not automatically impose a substantial burden. However, two compelling considerations were that (1) the county's broad reasons for denial could apply to all future applications by the Guru Nanak and (2) the Guru Nanak readily agreed to every mitigation measure suggested by the planning division, but without explanation, the county found such cooperation insufficient. It was not appropriate for the county to base its denial on concerns about leap-frog development when churches were conditionally allowed to locate on agricultural lands and many other churches already existed on agricultural lands. Thus, it was inconsistent to impose leap-frog development concerns solely on Guru Nanak.

The court distinguished the facts of this case with its holding in *San Jose Christian*, where it found the plaintiff had not suffered a substantial burden because the city's actions had not lessened the possibility that the college could find a suitable property. Of central importance in *San Jose Christian* was the lack of evidence to suggest that the college could not obtain approval by merely submitting a complete application. By contrast in this case, the county failed to explain why compliance with the suggested additional conditions was inadequate to render the application satisfactory. This coupled with the two denials, the second intended to respond to concerns raised during the first, suggested that the purpose of the denials was to shrink the amount of land available to Guru Nanak under the zoning code and, thus impose a substantial burden on Guru Nanak.

The county did not argue that it had a compelling interest or that the restrictions were narrowly tailored to accomplish such an interest. Thus, the court affirmed the lower court's decision invalidating the county's denial of Guru Nanak's conditional use application.

Carrie Richter

Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).

■ DIVIDED SUPREME COURT SOWS CONFUSION OVER WETLAND REGULATION

Rapanos v. United States, ___ U.S. ___, 126 S.Ct. 2208 (2006), involved four cases concerning the definition of "waters of the United States," a subset of the statutory jurisdictional term "navigable waters" under the Clean Water Act (CWA). The term "waters of the United States" gives the United States Corps of Engineers (Corps) the authority to regulate dredging and filling to prevent pollution in those waters. Three of the cases involved John Rapanos, his family and their entities, and the enforcement of the CWA regarding filling without a Corps' permit. The remaining case involved Keith Carabell, who appealed the denial of a fill permit by the Corps under the CWA. The court produced five opinions aligned in a 4-1-4 pattern, so that there was only a plurality of four, supported by a concurring opinion, to remand the decisions in which both the federal district and the court of appeals judges unanimously upheld the Corps' jurisdiction. As discussed below, it is unclear how the lower courts will react to the remands. None of the opinions dealt with the constitutional question of whether the Corps acted outside of its Commerce Clause powers. Instead, the Court was satisfied to base its decision on statutory construction.

The Plurality and Related Opinions

Drawing upon his nearly inexhaustible supply of sarcasm, Justice Scalia authored the plurality opinion in which Chief Justice Roberts and Justices Alito and Thomas joined. Justice Scalia noted that petitioner Rapanos had undertaken dredging and filling without state, local, or Corps' permits whereas petitioner Carabell brought a case challenging the denial of a Corps' permit. Both actions resulted from the Corps' interpretation of the statutory standard, which allows it to regulate dredging and filling in the "waters of the United States" under the CWA. The Corps has interpreted this standard through administrative regulations. See 33 C.F.R. § 320.4(a) (2004).

Filling without a permit has criminal sanctions, and Justice Scalia said that the process itself is expensive and full of discretion, comparing the Corps to an "enlightened despot." Justice Scalia added that the Corps' interpretation covers an area the size of California in the lower 48 states and virtually all land over which man-made channels and conduits pass.

Justice Scalia noted a CWA policy to "recognize, preserve and protect the primary responsibilities and rights of states" to reduce and eliminate pollution by prohibiting the discharge of a pollutant without a permit. Such discharges include dredging and filling of waters of the United States. Justice Scalia noted that these cases involved discharge materials such as fill, which did not easily wash down stream.

Before the CWA, federal jurisdiction was limited statutorily to "navigable waters." After the CWA, rulemaking, subsequent litigation over rulemaking, and still more rulemaking, federal jurisdiction grew to include interstate navigable waters and wetlands, as well as intrastate waters including wetlands, rivers, streams, sloughs, lakes, and tributaries of such waters, "the use, degradation or destruction of which could affect interstate or foreign commerce."

Two prior United States Supreme Court cases have interpreted the limits of the CWA. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), a wetland adjacent to a body of navigatable water was found to be subject to Corps' jurisdiction because its soil characteristics and wetland vegetation extended from that waterway to the subject site. The court noted that the transition from water to land was not "necessarily or even typically" a bright line distinction. Later in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court struck down the Corps' Migratory Bird Rule, which purported to extend Corps' jurisdiction to include isolated intrastate waters that might be used as migratory bird habitat, as well as "ephemeral streams" and drainage ditches that might be used as tributaries to waters of the United States if they have a perceptible high water line. *SWANCC* involved an abandoned sand and gravel pit that had become a lake that was entirely isolated from any other bodies of water. The Court decided that the *Riverside Bayview test*, which required a "significant nexus" between the waterway and wetlands, had not been met. Following *SWANCC*, the Corps began, but did not complete, rule making to respond to that decision. The Corps took the position that *SWANCC* did not overrule *Riverside Bayview* and that it continued to have jurisdiction.

The Rapanos cases involved wetlands filling near ditches or man-made drains that eventually emptied into navigable waters. The Corps found them to be adjacent to the navigable waters because they were hydrologically connected, and thus constituted adjacent tributaries of navigable waters. The plurality concluded that "waters of the United States" went beyond navigable waters, but held only that the "natural" definition of "waters" could be used. Using a dictionary definition, the plurality held that "the waters" of the United States meant that not all water was regulated and that term was limited to streams and lakes forming geographic features (i.e. oceans, rivers, and lakes) in which such waters flowed. Justice Scalia noted that ephemeral streams, culverts, and storm drains on the other hand, fell outside the statute and went on to find that the Corps had stretched "waters of the United States" "beyond parody." Justice Scalia said that neither *Riverside Bayview* nor *SWANCC* suggested that "waters of the United States" should expand to include anything beyond waters connected with geographically identified water features.

Justice Scalia buttressed the plurality view by using the CWA definition of "point source," which includes dikes, ditches, pipes, and discernable discharges of pollution into navigable waters, holding that point sources and navigable waters could not be one and the same. Point sources could include intermittent as well as continuous discharges. He also suggested that a broader definition of the term would interfere with the rights of the states to control pollution and would give the Corps "a scope of discretion that would befit a local zoning board." The plurality thus concluded that "waters of the United States" includes "only those relatively permanent, standing or continually flowing bodies of water" forming geographic features "that are described in ordinary parlance" as streams, oceans, rivers, and lakes and does not include intermittent or ephemeral channels that provide rainfall drainage. Any other interpretation would not be based on a permissible construction of statute. Accordingly, the court remanded the case under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

For the Carabell property, the Corps asserted jurisdiction over a ditch that on its own may not have constituted a water of the United States, but flowed into those waters and was seen as a tributary. In *Riverside Bayview*, the Court acknowledged the difficulties of determining where land ended and water began, but upheld the Corps because the wetland abutted traditionally navigable waters and there was a "significant nexus" between them. Nexus, according to Justice Scalia, informed the court's reading of the CWA, but did not provide an independent basis for Corps' jurisdiction as the dissent asserted. Justice Scalia said that such a holding would be contrary to *SWANCC* that physically isolated waters were not within Corps' jurisdiction. Justice Scalia concluded that only those wetlands with a continuous surface connection to waters of the United States were subject to CWA jurisdiction and further held that "wetlands, with only an intermittent, physically remote hydrological connection to 'waters of the United States' do not implicate the boundary drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*."

Justice Scalia minimized the effects of the plurality opinion on pollution enforcement and control, saying that the CWA prohibits the unpermitted addition of a pollutant to navigable waters as well as point source discharges. The plurality opinion cited studies used by development oriented amicii that asserted that enforcement could occur if there was a demonstrated hydrological connection. The plurality also stressed the role of the states in pollution control.

The plurality mocked the dissent of Justice Stevens as "long on praise for environmental protection and notably short" on analysis of statutory text, claiming that the dissent was based "exclusively" on an incorrect reading of *Riverside Bayview* and Congressional inaction following the Corps' adoption of regula-

tions in 1977. Justice Scalia stated that *Riverside Bayview* did not include the extension of jurisdiction of the kind now before the Court and, therefore, could not be the basis for any conclusion on the Corps' jurisdiction. The plurality opinion also noted that the statutory definition of jurisdiction was at issue, rather than ecological values or the consequences of not finding jurisdiction. The term "adjacent wetlands" does not appear in the statute, but is contained only in a Corps' regulation. Additionally, the lack of adjacency of the waterways in these cases distinguished them from *Riverside Bayview*. The plurality also rejected 30 years of Corps' administrative interpretation and the statutory purposes of the act as a basis on which to determine jurisdiction.

Finally, the plurality rejected Justice Kennedy's view that the result was contrary to the structure and purpose of the CWA, suggesting that this view was predicated on the "significant nexus" wording from *Riverside Bayview* and pointing out that this term was used to justify the connection of wetlands to waters of the United States. The plurality said the term could not be used to justify inclusion of all possible connections based on ecological significance on a case-by-case basis by stressing the purposes of the CWA. Because it found the Sixth Circuit used the wrong standard to determine whether the subject wetlands were "waters of the United States," the Court remanded the matter for further proceedings.

Chief Justice Roberts concurred, noting that the Corps should have completed rulemaking after *SWANCC* and decried the lack of an agreed-upon result by a court majority.

The Kennedy Opinion

Justice Kennedy concurred in the remand, but stressed the objectives of the CWA to restore the chemical, physical, and biological integrity of the nation's waters. He noted that the phrase "waters of the United States" does not include every moist patch, but must have a sufficient nexus to support wetland regulation. Justice Kennedy also noted that *Rapanos* threatened to allow filling in wetlands against the advice of experts, the Corps, and state wetlands regulators. He contrasted the *Carabell* case where a complete review was had and the adverse order was challenged in U.S. District Court. Justice Kennedy stated his view of the *Chevron* case, under which an agency's interpretation of a statute is entitled to deference if it is reasonable and not in conflict with the express intent of Congress.

Justice Kennedy used the "significant nexus" test of *Riverside Bayview* in reading the CWA and found the Corps' use of the statutory terms generally reasonable. Justice Kennedy did not agree with the use of the dictionary definition of "waters" used by the plurality, nor the requirement of a continuous surface connection to waters of the United States. According to the dictionary definition, the term leaves out flows that are not continuous, but may be significant, citing the Los Angeles River as an example. Justice Kennedy found no significance in the definition of "point source," which does not require a continuous or intermittent flow. The extension of wetlands without a continuous surface connection was also, in his view, inconsistent with the use of "significant nexus" in *Riverside Bayview*.

Justice Kennedy also stressed the CWA prohibition on pollutant discharges into navigable waters and found the plurality's distinction for materials that do not ordinarily wash downstream questionable as an empirical matter. In any event, he found that approach inconsistent with the filtering functions of wetlands in purifying waters before those waters enter into adjacent navigable bodies. He thus found the Corps' definition of adjacency to be reasonable and consistent with the CWA's text, structure, and purpose, all of which seek a protection of natural means to purify waters within a federalist structure. Such an objective does not depend on surface water connections.

Justice Kennedy also noted also that 33 states plus the District of Columbia had filed amicus briefs in support of the Corps' position, which appeared to be inconsistent with the plurality's federalists concerns. Justice Kennedy also decried the dismissal of Corps' concerns over filling in of ditches and intermittent streams, which had their place in dealing with water pollution. He noted that the plurality saw its interpretation as the only permissible one under the CWA.

Justice Kennedy found the "significant nexus" language in *Riverside Bayview* to apply to all hydrological connections and rejected the plurality's limitations to the facts of that case. He also suggested that "navigable waters" are the product, rather than the sole source, of pollution concerns. He did not see the Corps' assertion of jurisdiction, which rested on adjacency of wetlands to navigable waters, to be deficient. His remand rested on the need to deal with other factors to determine whether a "significant nexus" existed, either through the Corps' adoption of regulations or adjudication. Justice Kennedy allowed the Corps' regulations on adjacent, isolated wetlands may test the limits of the Commerce Clause so that further proceedings were necessary to determine a hydrological connection.

The Stevens Opinion

Justice Stevens's dissent was joined by Justices Souter, Breyer, and Ginsburg, and stressed the deliberate conduct of Rapanos in unlawfully filling wetlands despite the cease and desist order of the United States, the testimony of the wetland experts on the surface connections of those wetlands to tributaries of navigable waters, and his conclusion that *Riverside Bayview* controlled these cases. *Riverside Bayview* involved discharges into tributaries, and the dissent found that the Corps' interpretation met the *Chevron* standard as a permissible interpretation made by an agency charged with enforcement of a statute and also consistent with Congressional intent. On this view of the *Chevron* case, Justice Stevens agreed with Justice Kennedy.

The dissent also decried the plurality's "revisionist" reading of *Riverside Bayview* to require a continuous surface water connection between a wetland and a neighboring creek, concluding that not every regulated wetland may be significant. The dissent noted that *SWANCC* was limited to isolated ponds, which had no "significant nexus" to traditionally navigable waters. The dissent also stressed the role of wetlands in achieving pollution control, noting that Congress had not acted in the face of Corps' jurisdictional regulations in 1977 and concluding, "The Corps' exercise of jurisdiction is reasonable even though not every wetland adjacent to a traditionally navigable water or its

tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands." ___ U.S. at ___, 126 S.Ct. at 2258.

While conceding that the Corps' permitting process is expensive, the dissent criticized the plurality for failing to consider the benefits of that process, as well as the support of 33 states, the District of Columbia, and various local governments. These benefits, according to Justice Stevens, should not be weighed by appointed judges. Justice Stevens also decried the two newly-created restrictions on Corps' jurisdiction, neither of which appeared in the briefs of any party. The first one was that there must be a "relatively permanent" flow, so that intermittent or ephemeral streams do not qualify. The second was that there must be a continuous surface connection between the wetland and the adjacent waterway.

Finally, the dissent disagreed with Justice Kennedy that more rulemaking or adjudication is necessary to satisfy the significant nexus test, which was found to be categorically satisfied in this case. The dissent decried the additional work created by the remand in these cases. Justice Stevens concluded:

> As I explained in *SWANCC*, Congress passed the Clean Water Act in response to wide-spread recognition—based on events like the 1969 burning of the Cuyahoga River in Cleveland—that our waters had become appallingly polluted. The Act has largely succeeded in restoring the quality of our Nation's waters. Where the Cuyahoga River was once coated with industrial waste, "[t]oday, that location is lined with restaurants and pleasure boat slips." By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiesce in the Executive's position that we recognized in *Riverside Bayview*, and its own obligations to interpret laws rather than to make them. While Justice Kennedy's approach has far fewer faults, nonetheless it also fails to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.

___ U.S. at ___, 126 S.Ct. at 2265 (internal citations omitted).

The Supreme Court expressed three different views on the meaning of "waters of the United States" in the context of "navigable waters," as those terms are applied to non-navigable wetland features. The four member Stevens' decision would have upheld the longstanding, broad assertion of jurisdiction contained in the regulations of that agency. The plurality would use two new sweeping limitations created *ex nihilo* in its opinion—i.e. that the CWA definition of "waters of the United States" means only permanent standing or constantly flowing bodies of water forming geographical features and adjacent waters having a continuous surface connection to navigable waters. The "bridge" between the two opinions is that of Justice Kennedy, who found the Corps' jurisdiction to be present if there were a "significant nexus" with waters "navigable in fact," even with only an ecological connection.

Conclusion

The Corps may now do some rulemaking to define its jurisdiction, or it might do so in the context of a contested case, both of which are subject to judicial review. Congress, the source of the problem with the statutory ambiguity, is unlikely to address the issue in an election year. The Corps will likely want to deal with the remand before considering rulemaking. The term "navigable waters" is used elsewhere in the CWA, so the problem is not confined to filling and dredging in wetlands. It is indeed regrettable that there was no majority decision in this case. The fractured result leaves open the likelihood of an extended costly and litigious process with no clear result in sight.

Ed Sullivan

Rapanos v. United States, ____ U.S. ___, 126 S.Ct. 2208 (2006).

LUBA CASES

■ LUBA REVIEWS THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

In *Timberline Baptist Church v. Washington County*, ___ Or LUBA ___ , LUBA No. 2006-058 (Aug. 10, 2006), LUBA analyzed what it means for a county land use regulation to impose a "substantial burden" on religious exercise in violation of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). The petitioner in *Timberline* appealed a county hearings officer's decision approving a church and day-care center and denying a private school, both to be located on a seven-acre parcel of rural land outside of the urban growth boundary. The petitioner currently operates out of three separate spaces. It uses a converted single-family dwelling in Sherwood for its offices and small meetings, rents space in a high school and other churches for its mid-week and Sunday services, and operates a school in a separate leased building. The new seven-acre parcel would allow the petitioner to consolidate its operations. Although the applicable zoning for the seven-acre parcel allows schools, churches and day-care centers, it requires that schools outside of the UGB "be scaled to serve the rural population." The county hearings officer found that the proposed school did not satisfy this standard and that the petitioner failed to show that it could not locate a church/school within the UGB or successfully operate a school on a site within the UGB separate from the church.

In 2005, the Oregon Supreme Court ruled that a government regulation imposes a substantial burden on religious exercise "only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain benefits on the one hand, and abandoning one or more of those precepts in order to obtain the benefits on the other." *Corp. of Presiding Bishop v. City of West Linn*, 338 Or 453, 466, 111 P3d 1123 (2005). In this appeal, the issue was whether requiring the petitioner to demonstrate that it was unable to purchase suitable property within the UGB for the proposed church and school imposed

a substantial burden on religious exercise. LUBA affirmed the hearings officer's decision and concluded the petitioner failed to demonstrate that the decision violated RLUIPA.

During the local proceedings on the petitioner's application, the parties presented conflicting evidence concerning the availability of suitable property within the UGB. The petitioner offered evidence that at the time of its application there were no properties for sale within the UGB that were suitable for a combined church and school and that met the petitioner's criteria for location, access, visibility, size, and price. The petitioner presented similar evidence for 2004 and testimony that operating a church and school on the same site was necessary to fulfill its religious mission. County staff submitted evidence that identified properties near the petitioner's seven-acre parcel that are within the UGB, zoned for a church and school, and appeared to satisfy the petitioner's requirements. These properties were not listed for sale.

The county hearings officer did not question whether operating a parochial school is or could be an element of the petitioner's religious exercise. The issue was whether operating a school on the same site as the church was necessary—and not just convenient—to fulfill the petitioner's religious mission. LUBA, like the hearings officer, therefore addressed whether it is a substantial burden on the petitioner's religious exercise to either find land within the UGB for a combined church and school or to operate the school on a separate site within the UGB.

Before LUBA the petitioner argued that the "substantial burden" analysis should focus on the petitioner's inability to operate a school on the specific seven-acre parcel it purchased and not on whether there are alternative properties on which a combined church/school could be built. In effect, the petitioner contended that denying the petitioner the right to build a school on that particular parcel was a per se substantial burden. After reviewing various federal RLUIPA cases, LUBA rejected the church's argument and concluded that evidence of the availability of alternative sites that are zoned to allow the desired religious use may be relevant in determining whether a local government decision has violated RLUIPA. In LUBA's view, "the strongest case under RLUIPA for requiring evidence on alternative sites arises where the land use regulation effectively *prohibits* the proposed use of a specific parcel, particularly an undeveloped parcel, as in the present case." Slip op. at 12–13.

Turning to the evidence in the record, LUBA characterized the petitioner's evidence as consisting of lists of properties generated by a real estate broker for various periods between July 2004 and January 2006 to which the broker had used a filter of a 4-acre lot size and $10 million upper price range. For the most recent list, all of the identified 29 properties were rejected for various reasons, including that they were outside of the UGB, had limited access or limited exposure, were too expensive or were too small. The county staff submitted a list of 16 apparently suitable properties within the UGB; of these there was no market data for 12 properties (reflecting the fact they had not been sold within the last five years) and four properties had listed sales prices of less than $3 million. The staff subsequently identified two additional properties that were for sale within the UGB that appeared to meet the petitioner's requirements. The hearings officer concluded that the petitioner failed to make a "sufficiently diligent" effort to find suitable property within the UGB. In order to show a substantial burden in violation of RLUIPA, the hearings officer concluded that the petitioner would have to make an offer on a property and have it rejected, rather than relying on computer-generated lists of property for sale.

LUBA disagreed with the hearings officer's "sufficiently diligent" test, but agreed that to show a substantial burden under RLUIPA a "petitioner must do more than present a computer-generated list of properties that listed for sale on a certain date or range of dates, and attempt to disqualify that limited list of properties based on ill-defined 'criteria.'" Slip op. at 18. If the petitioner wanted to locate a church and school on the same site, the petitioner must acquire property within the UGB that is appropriately zoned. Even if property within the UGB is more expensive and requires the petitioner to make tradeoffs between desired characteristics, this is the result of the "petitioner's financial circumstances and market forces that affect all land users," not the county's code. *Id*. LUBA noted that county staff identified numerous parcels within the UGB that were appropriately zoned for a church and school and that the petitioner offered no reason to suggest it might not be successful in purchasing one of these properties or a similar property. The burden of doing so was not a substantial burden within the meaning of RLUIPA. LUBA concluded:

> It bears repeating, however, that whatever considerations are used to disqualify alternative properties must be based on religious exercise or property characteristics necessary to support religious exercise, and not mere convenience or desirable but unnecessary features. Importantly, as we understand the above-cited free exercise and RLUIPA cases, petitioner's financial circumstances and its ability or inability to afford otherwise suitable and available properties is not a basis to conclude that denial of a religious use on property not zoned for that use substantially burdens petitioner's free exercise.
>
> Slip op. at 19.

LUBA briefly considered the petitioner's alternative argument that the hearings officer erred in concluding that operating a school on a separate site was not a substantial burden because it would simply continue the petitioner's existing operations. Before the county, the petitioner's pastor explained why it was necessary to the church's religious mission to operate a school on the same site or in close proximity to the church. Given that testimony, LUBA expressed doubt about the hearings officer's conclusion, but concluded it did not need to reach that issue because it had affirmed the hearings officer's alternative finding.

Kathryn S. Beaumont

Timberline Baptist Church v. Washington County, ___ Or LUBA ___ , LUBA No. 2006-058 (Aug. 10, 2006).

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