OREGON STATE BAR 1935

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 29, No. 4
September 2007

Also available online

Highlights

Appellate Cases – Land Use

■ *LOOK BEFORE YOU LEAP: A LANDOWNER CANNOT CLAIM A SUBSTANTIAL BURDEN FROM A LAND USE DENIAL IN THE ABSENSE OF A REASONABLE SEARCH FOR ALTERNATIVE PROPERTIES*

In *Timberline Baptist Church v. Washington County*, 211 Or App 437, 154 P3d 759 (2007), the Oregon Court of Appeals affirmed LUBA's decision to uphold Washington County's denial of a special use approval for a proposed school that coincided with the building of an associated church and daycare.

The petitioner, Timberline Baptist Church, formed in 2001 with an office and small meeting place in a converted family dwelling and rented space at a local high school and other churches for religious services. A majority of the congregation resided within the urban growth boundary (UGB), and some of their children attended a school run by the church in a separate leased facility, starting in 2005. In 2004 the church purchased land outside of the UGB and intended to build a facility to combine a church sanctuary, a day-care facility, and a school. The church applied for a special use permit from Washington County for that combined use facility. The county granted a special use and development permit for the church and the daycare, but denied the requested special use approval for the proposed school.

At issue was whether the Washington County Development Code (CDC) § 430-121.3 imposed a "substantial burden" on the petitioner's religious exercise for the purpose of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–cc-5 (2000). Under the county's interpretation, CDC § 430-121.3 requires that a school be "scaled to serve a rural population"—that is, at least seventy-five percent of the student body must be students residing in rural areas.

RLUIPA prevents governments from imposing or implementing a land use regulation "that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." 42 U.S.C. § 2000cc(a)(1). A government imposes a "substantial burden" when it "makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property." 42 U.S.C. § 2000cc(a)(2)(C).

The petitioner claimed that the county's denial of special use approval for the school imposed a substantial burden on the petitioner's religious practice because the location of the school within the church building was critical to the church's religious mission. Likewise, the county's requirement that the petitioner purchase an alternative property imposed a substantial burden on its religious practice.

The county claimed that locating the school within the church building was merely a matter of convenience and that RLUIPA does not apply where the owner's choice creates the alleged burden (i.e., the petitioner's choice to buy less expensive rural property rather than urban property that would permit a school). Further, the county asserted that the petitioner's seeking out and purchasing other property would not be a substantial burden.

The court of appeals primarily applied the standard outlined by the Oregon Supreme Court in *Corp. of Presiding Bishop v. City of West Linn*, 338 Or 453, 111 P3d 1123 (2005), with some additional guidance from other federal decisions that addressed free exercise rights. In that case, the Oregon Supreme Court determined that a land use regulation imposes a substantial burden on religious exercise for the purpose of RLUIPA "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." *Id*. at 465–66.

In applying the *Corp. of Presiding Bishop* standard to the facts of this case, the court of appeals looked at evidence involving the petitioner's property selection criteria, or lack thereof. Specifically, the petitioner would have to establish that the county's decision to deny the special use approval somehow forced the petitioner to forgo its religious precepts because it could not reasonably locate and acquire an alternative site for its proposed combined uses. The petitioner failed to offer evidence that it had conducted a reasonable search for an alternative site. Meanwhile, the county had offered evidence of other properties that could meet the petitioner's specific needs. Thus, the petitioner was unable to show that there was a substantial burden imposed by the county's denial of the special use approval

in the absence of a reasonable search for alternative properties where the petitioner could build a school and a church.

In a dissenting opinion, Judge Wollheim disagreed with the majority's conclusion that the petitioner failed to demonstrate the county's denial of approval for the school imposed a substantial burden under RLUIPA. Because operation of the church, daycare facility, and school were sufficiently intertwined elements of petitioner's religious exercise, denial of the school satisfied the "substantial burden" requirement. It effectively forced petitioner to choose between building a smaller church and daycare facility on a site within the UGB that could also accommodate the school, or separating the school site from the church and daycare sites. He would have remanded the case for a determination of whether the county's decision advanced a compelling county interest and was the least restrictive way to advance that interest.

Paul Blechmann

Timberline Baptist Church v. Washington County, 211 Or App 437, 154 P3d 759 (2007).

■ OREGON COURT OF APPEALS FINDS A RIGHT TO A DLCD CONTESTED CASE HEARING FOR MEASURE 37 CLAIMANTS

In *Corey v. Department of Land Conservation and Development*, 212 Or App 536, 159 P3d 327 (2007), the Oregon Court of Appeals granted the Department of Land Conservation and Development's (DLCD) motion for reconsideration of the opinion in *Corey v. Department of Land Conservation and Development*, 210 Or App 542, 152 P3d 933 (2007). In the first hearing, the Oregon Court of Appeals held that it, and not the Marion County circuit court, had jurisdiction to hear an appeal from a DLCD Measure 37 waiver determination. On reconsideration of that issue the court of appeals rejected respondent DLCD's arguments and adhered to its previous holding.

Petitioners Virginia Corey and Bergis Road, LLC each own an undivided one-third interest in a parcel of land in Clackamas County. In 2005 petitioners filed a claim under Measure 37 seeking compensation for the loss of value resulting from certain regulations. ORS 197.352(1) (2005). After evaluating the claim, DLCD determined that the subject regulations resulted in a loss of value to petitioners' land. In lieu of paying compensation, DLCD decided to waive the restrictive regulations, but continued to apply those that had been in effect at the date of acquisition. ORS 197.352(8) (2005).

Petitioners disputed DLCD's determination of the regulations to remain in effect and filed suit in the circuit court and sought judicial review of DLCD's decision in the court of appeals. DLCD filed a motion with the court of appeals seeking a summary determination of which court had proper jurisdiction. In its analysis the court of appeals determined that it would have jurisdiction under ORS 183.482 if the DLCD proceeding was a contested case.

The court's analysis of ORS 183.482 focused on the definition of a "contested case" in ORS 183.310(2)(a)(A). In order to qualify as a contested case under section (A), the party must have a vested property interest. Relying on a recent Oregon Supreme Court case, *Koskela v. Willamette Industries, Inc.*, 331 Or 362, 15 P3d 548 (2000), the court determined that petitioners had a vested property interest. In *Koskela*, a disability entitlements applicant was deemed to have a vested property interest entitled to due process prior to rejection of that interest even though the claimant had not fully qualified to receive the benefits. The court reasoned that because the agency had accepted the beneficiary's claim, the property interest was created and the remaining steps to qualify only determined the extent of those benefits. Like the benefits at issue in *Koskela,* here the court of appeals reasoned that once DLCD had accepted petitioners' claim, a vested interest in the Measure 37 waiver was created. Because the petitioners had a vested property interest, DLCD was required to give notice and a hearing regarding the regulations not waived. Therefore petitioners qualified for a contested case under subsection (A) of ORS 183.310(2)(a), and jurisdiction was vested in the court of appeals under ORS 183.482.

In its motion for reconsideration, DLCD advanced two arguments. First, the court misapplied *Koskela*, and second that even if petitioners were due a contested case hearing, the court should have applied the federal analysis from *Mathews v. Eldridge*, 424 US 319 (1976). DLCD argued that had the *Mathews* analysis been properly applied, the court would have determined the process given by DLCD was sufficient.

The court of appeals disagreed with DLCD in regards to the *Koskela* argument and rejected it without discussion.

In rejecting DLCD's second argument and adhering to its previous decision, the court noted that DLCD procedures are governed by the Oregon Administrative Procedure Act (APA), ORS Chapter 183 (2005). While the *Mathews* case determines procedural safeguards that a government agency must provide, Oregon can provide more procedure and has done so under the APA. Therefore, the court affirmed it earlier decision.

Noah Winchester

Corey v. Department of Land Conservation and Development, 210 Or App 542, 152 P3d 933 (2007), *on recons* 212 Or App 536, 159 P3d 327 (2007).

■ "PROFITABILITY" VERSUS "GROSS INCOME"—WHICH ONE MATTERS MORE IN DETERMINING "AGRICULTURAL LAND"

In the most recent saga involving Shelley Wetherell and Douglas County, *Wetherell v. Douglas County,* 342 Or 666, 160 P3d 614 (2007), the Oregon Supreme Court addressed an important question of first impression regarding Oregon's land use statutes and rules. Two separate land use disputes were consolidated for argument and decision, which required the supreme court to determine the validity of an Oregon Administrative Rule that prohibited considering "profitability" and "gross income" in determining whether land is "agricultural land" protected under Goal 3 of Oregon's land use system.

The facts are straightforward and not an uncommon circumstance in rural Oregon. The two properties in question had been zoned "exclusive farm use – grazing" for years. The owners requested a change in the zoning designation to five acre rural residential. The owners contended that the property should no longer be classified as agricultural because the lands were no longer productive and could not profitably be used for farming or grazing.

At the local hearing, the county granted the rezone applications based upon experts who testified that the properties were poorly suited for farm use and could not make a profit. Neighbors, as well as Friends of Douglas County, appealed the county's decision to LUBA. LUBA remanded the county's rezoning determinations and ruled that the county had improperly considered evidence regarding profitability. Specifically, LUBA based its decision on OAR

660-033-0030(5), which reads, "Notwithstanding the definition of 'farm use' in ORS 215.230(2)(a), profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3, 'Agricultural Land,' is applicable."

The owners appealed to the Oregon Court of Appeals. The court of appeals remanded both cases to LUBA and ruled that Douglas County could consider "gross income" in determining whether land was agricultural land. Specifically, the court stated:

> OAR 660-033-0030(5) is invalid as conflicting with Goal 3 insofar as it precludes consideration of either 'profitability *or* gross farm income' in determining whether land is 'agricultural land.' The rule's exclusion of consideration of 'gross income' is directly at odds with our holding in *1000 Friends* that Goal 3's incorporation of ORS 215.203(2)(a)'s 'farm use' definition includes 'profit in money' which means 'gross income.'
>
> 342 Or at 672.

The property owners appealed and argued that the rule was invalid in precluding consideration of "profitability" as well as "gross income." The owners argued that the reference in ORS 215.203(2)(a) to "profit in money" means "net profit"—revenues minus expenses, rather than "gross income." LCDC appeared as *amicus curiae* supporting the administrative rule and pointing out that ORS 215.203(2)(a) focuses on the inherent characteristics of land and arguing that the concepts of profitability can be easily manipulated by an owner.

The Oregon Supreme Court first reviewed Oregon's Agricultural Land Use Policy, observing that Goal 3 protected land that had certain soil types and land that was suitable for farm use. The supreme court then addressed the issue of definition of "profit in money" as defined in ORS 215.203(2)(a). Acknowledging that its role was to give effect to the Oregon Legislature's intent, *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), the court examined the text, the statute and, as it has done in the past, resorted to Webster's Third New International Dictionary to determine the definition of "profit." The court concluded that the statutory definition of "farm use" contained in ORS 215.203(2), as "the current employment of the land for the primary purpose of obtaining a profit in money" by engaging in certain farm or agricultural activities, refers to net operating profit, i.e., consideration of the costs and expenses of engaging in those activities. Therefore, the Oregon Supreme Court held that OAR 660-033-0030(5) was invalid because it prohibited consideration of "profitability." The supreme court held that a fact finder may consider "profitability" in determining whether property meets the definition of "agricultural land" as specified in Goal 3.

The supreme court also agreed with the court of appeals that OAR 660-033-0030(5) was invalid to the extent it prohibited the consideration of "gross farm income." In summary, the court held that LCDC could not preclude a local government from making a land use decision that considered "profitability" or "gross farm income" in determining whether the land was "agricultural land."

However, the court acknowledged that its decision did not address the weight to be given by a local jurisdiction to the consideration of profitability or gross farm income. It only decided that "profitability" or "gross farm income" could be considered by the local government in making its land use decision.

Jack D. Hoffman

Wetherell v. Douglas County, 342 Or 666, 160 P3d 614 (2007).

Editor's Note: On remand from the Supreme Court, LUBA again

Oregon Real Estate and Land Use Digest

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

Editor
Kathryn S. Beaumont

Associate Editors
Alan K. Brickley
Edward J. Sullivan

Assistant Editor
Natasha Ernst

Contributors

Richard S. Bailey
Nathan Baker
Gretchen Barnes
Paul Blechmann
H. Andrew Clark
Lisa Knight Davies
David Doughman
Larry Epstein
Mark J. Fucile
Liz Fancher
Glenn Fullilove
Christopher A. Gilmore
Susan C. Glen
Lisa M. Gramp
Raymond W. Greycloud
Peggy Hennessy
Jack D. Hoffman
Emily N. Jerome
Mary W. Johnson
Michael E. Judd
Gary K. Kahn
Joan Kelsey
Harlan Levy
Jeff Litwak
Peter Livingston
Matthew J. Michel
J. Christopher Minor
Steve Morasch
Tod Northman
David J. Petersen
John Pinkstaff
David Richardson
Carrie Richter
Susan N. Safford
Steven R. Schell
Kathleen S. Sieler
Ruth Spetter
Kimberlee A. Stafford
Andrew Svitek
Isa A. Taylor
Ty K. Wyman
Noah Winchester
A. Richard Vial

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

remanded the county's decision, ruling that the county's findings addressing suitability for farm use (specifically suitability for grazing or a commercial vineyard) were inadequate. In its original decision, *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005) (*Wetherell I*), LUBA held that even if the portion of the administrative rule later invalidated by the supreme court was inapplicable, the county erred in two respects. First, the county improperly determined that the affected property was not suitable for farm use because it could not support a "commercial-scale" farm use, even though a smaller scale operation could be profitable. LUBA reasoned that "the fact that the cattle operation or vineyard and any resulting profit may be relatively small in size is not a sufficient basis to conclude that the subject property is not suitable for farm use under the Goal 3 rule." (Slip Op. at 6) Second, the county ignored the rule's explicit statement that suitability for agricultural use is determined irrespective of property ownership. The county failed to consider or address evidence indicating the property had been and could be used for agricultural purposes in conjunction with adjacent parcels. Since the supreme court's decision did not disturb LUBA's disposition of these issues, LUBA remanded the decision and directed the county to adopt findings consistent with *Wetherell I* and the court's decision. *Wetherell v. Douglas County,* _____ Or LUBA _____, LUBA No. 2005-045 (8/01/2007).

Appellate Cases – Real Estate

■ DEED RESTRICTIONS AND THE CURIOUS CASE OF THE COFFEE CART CONUNDRUM

In *McKay's Market of Coos Bay v. Pickett*, 212 Or App 7, 157 P3d 291 (2007), the Oregon Court of Appeals deliberated upon whether language in a deed restriction prevented the operation of a coffee "cart" in a parking lot. The court upheld the trial court's determination that the defendant's operation of its coffee cart violated the restriction in the deed that required the premises to remain a parking lot.

The McKays, the plaintiff, owned two parcels of commercial property in Florence, Oregon. The family operated McKay's Market on one parcel and sold the adjacent parcel to the Picketts in 1979 as a parking lot for their auto parts store. The parties agreed to a deed restriction disallowing the Picketts, their heirs, and any assigns from building any building in the parking lot, with the possible exception of an extension of the existing auto parts store. The restriction then delineated a specific section of the parking lot that could be allowed for the permitted extension. The remaining portion of the parking lot was specifically to remain as a parking lot.

In 2004, JF'S Investments, the defendant, entered into a lease/purchase agreement of the Picketts' store and the parking lot in question. The defendant purchased a prefabricated 12' x 8' structure, the "cart," from which to sell coffee, subsequently towed it into the parking lot, and began brewing up business. The cart itself occupied two parking spaces, and when in operation between one and four additional spaces were filled with cars waiting in line for service.

The plaintiff soon thereafter sought a declaration that the defendant's coffee cart violated the restrictions in the deed. The trial court concluded the operation of the coffee cart violated the deed restriction in two independent respects. First, the operation of the cart violated the prohibition on building any building. The court reasoned that the wording of this section of the restriction was ambiguous, and therefore turned to extrinsic evidence of the intentions of the McKays and the Picketts in negotiating the deed restriction. After resolving the ambiguity in favor of the plaintiff, the court concluded that the defendant's operation of the coffee cart also ran afoul of the restriction that, with the exception of a limited extension of the auto parts building, "the remaining portion" of the property would "remain as a parking lot."

On appeal, the defendant contended the court erred in considering extrinsic evidence of the parties' intentions and that even if the restriction was ambiguous, the court erred in considering the subjective extrinsic evidence that the plaintiff offered in this case.

As to the trial court's second conclusion, defendant argued that the court erred in ruling that the operation of the coffee cart violated the restriction that the property be used as a parking lot, because the property remained "primarily a parking lot, with parking spaces and travel lanes." According to the defendant, nothing in the wording of the restriction required that the parking lot be used exclusively as a parking lot.

The court, apparently sensing weakness, focused on whether the coffee cart violated the restriction that the property be used as a parking lot. Citing *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997), the court set out to ascertain the meaning of the deed restriction as it was intended by the parties entering into it. The court needed only the first part of the three-part *Yogman* test—examining the text of the disputed provision within the context of the instrument as a whole—to conclude the deed restriction prohibited the defendant's actions at issue. Since the restriction precisely described the dimensions for the proposed exception for the existing building, and stated further that "The remaining portion of said described property will remain as a parking lot," the court concluded that the restriction plainly required that the portion of the property that was not covered by the exception would "remain as a parking lot." 212 Or App at 12–13.

The court also found it clear that the inherent existence and operation of the defendant's coffee cart ensured the remaining property did not "remain as a parking lot." The defendant's only argument to the contrary was that the property remained "primarily" devoted to parking. The court elected to not add this qualification to the original contractual provisions, citing both ORS 42.230 and *Holloway v. Republic Indemnity Co. of America*, 341 Or 642, 651–52, 147 P3d 329 (2006).

Because the defendant needed to prevail in both respects to overturn the decision of the trial court, the court of appeals therefore declined to address the defendant's other claim as to whether the court erred in concluding that operating the cart amounted to building a "building" within the meaning of the deed restriction.

David Richardson

McKay's Market of Coos Bay v. Pickett, 212 Or App 7, 157 P3d 291 (2007).

■ STATUTORY ATTORNEY FEES ARE MORE MANDATORY THAN CONTRACTUAL ATTORNEY FEES

In *Lemargie v. Johnson*, 212 Or App 451, 157 P3d 1284 (2007), the sole issue was whether ORS 105.180(2) requires the court to award attorney fees to the prevailing party in an action for main-

tenance of an easement under ORS 105.175 *et seq.* The defendant in this easement dispute counterclaimed for maintenance of the easement, but lost for failure to prove damages. The trial court designated the plaintiff as the prevailing party, but did not award the plaintiff any attorney fees.

The Oregon Court of Appeals reversed and reasoned that the statute provides that the prevailing party "shall" recover attorney fees, and "shall" by dictionary definition is an unambiguous command. The defendant argued that equity does not necessarily render a denial of mandatory attorney fees an abuse of discretion, but the court disagreed, ruling that "the legislature removed any discretion that a trial court might otherwise have by requiring that a prevailing party shall recover attorney fees." 212 Or App at 455.

Thus, while mandatory attorney fee provisions authorized by contract are enforceable at law and in equity, *Miller v. Fernley*, 280 Or 333, 338 (1977), those authorized by statute are enforceable only at law without discretion.

Mary Johnson

Lemargie v. Johnson, 212 Or App 451, 157 P3d 1284 (2007).

■ *PARTITION UNDER ORS 105.205 REQUIRES STATUTORY TENANCY IN COMMON*

In *Stevens v. Theurer*, 213 Or App 49, 159 P3d 1224 (2007), the Oregon Court of Appeals addressed the requirements for partition of real property under ORS 105.205. The court found no authority for partition by judicial action when the parties did not meet the statutory definition of tenants in common.

The facts of this case were not in dispute. The parties' grandmother owned a 29-acre parcel of undeveloped real property in Benton County. In 1982 she conveyed approximately seven acres of the 29 acres to the defendant's mother, who conveyed that seven-acre parcel to the defendant 15 years later. In 1983, the grandmother conveyed the remaining 22 acres to two other grandchildren, the plaintiff and his sister. The grandmother did not obtain Benton County's approval to partition the 29-acre parcel. The minimum lot size for applicable zoning was larger than either lot, and as a result, none of the parties could build on their lots or sell them.

The plaintiff initiated an action to partition the property and prayed for an order requiring the partition and sale of both properties. The plaintiff argued that even if the parties were not, strictly speaking, tenants in common, the court nevertheless should exercise equitable authority and consider them as such by operation of law. The defendants argued that because the parties were not tenants in common, there was no statutory authority for the requested partition and sale. The trial court rejected the plaintiff's position and granted the defendants' motion for summary judgment.

On appeal the Oregon Court of Appeals first considered whether a party could obtain partition when the parties do not meet the statutory definition of tenants in common. The court rejected the plaintiff's argument that the parties were tenants in common by operation of law. Partition by judicial action is a statutory procedure governed by ORS 105.205 to 105.405. Under ORS 105.205 only a tenant in common can institute a partition action. *Schwab v. Schwab*, 86 Or App 461, 464, 739 P2d 1065, *rev den*, 304 Or 150 (1987). As defined in ORS 93.180, a tenancy in common is created by a conveyance made to two or more persons without the right of survivorship.

However, the court found that there was no single conveyance to two or more persons in this case. Instead, there were two separate conveyances, in two different years, of separate and mutually exclusive portions of the original 29-acre parcel. The court concluded that the parties were not "tenants in common" within the meaning of the statute. Moreover, the court noted that the plaintiff's argument that there was only one lot with two owners was false because the deeds to both lots describe each as separate parcels.

The court also rejected the plaintiff's other argument that even if the parties did not otherwise satisfy the requirements of tenancy in common, the court could, in the exercise of its equitable powers, deem them to be such. The court was not persuaded by the two Oregon Supreme Court cases cited by the plaintiff. In the first, *Holbrook v. Holbrook*, 240 Or 567, 403 P2d 12 (1965), the Oregon Supreme Court refused to expand on the legislatively enacted definitions of tenancies in land. (Joint tenancy provision of property settlement agreement not enforced because joint tenancy abolished by statute.) Likewise, the court in *Erickson v. Erickson*, 167 Or 1, 115 P2d 172 (1941), refused to find a joint tenancy under a conveyance that declared that the grantees took the land as joint tenants when joint tenancy had been abolished by statute. (Joint tenancy declaration created a tenancy with the right of survivorship, but not a "joint tenancy" as such.)

The court concluded that the cases cited by the plaintiff did not say anything about the authority of the courts to recognize a tenancy that does not otherwise exist in statute or at common law. The court affirmed the trial court decision.

Although the court noted that the plaintiff had other remedies under ORS 92.018 and ORS 92.177, the effectiveness of those remedies is debatable. Under ORS 92.018, a buyer of an improper or illegal lot can seek damages or equitable relief from the seller. However, the seller in this case was the plaintiff's grandmother, who died in 1991. And although ORS 92.177 authorizes the plaintiff to seek the county's approval of the de facto partition, the statute does not waive the applicable minimum lot size requirements. Consequently, the plaintiff's effective statutory remedies in this situation are very limited. This case illustrates the need for the legislature to broaden the statutory definition of tenants in common contained in ORS 93.180.

Raymond Greycloud

Stevens v. Theurer, 213 Or App 49, 159 P3d 1224 (2007).

Appellate Cases – Landlord/Tenant

■ *HOW SUMMARY IS TOO SUMMARY? THE COURT OF APPEALS DRAWS A LINE ON SUMMARY FED TRIALS*

In *Warren v. Licon*, 211 Or App 535, 156 P3d 81 (2007), the Oregon Court of Appeals reversed and remanded the trial court's dismissal of the plaintiff's FED action. The court held that the trial court denied the plaintiff an opportunity to call witnesses and present evidence to prove that she was a renter entitled to the protections of the Oregon Residential Landlord and Tenant Act.

The plaintiff brought her *pro se* action to recover personal property that she claimed she left on her mother's property before her

mother sold the property to the defendants. The plaintiff claimed to have evidence and witnesses to prove she was entitled to the protections of ORS 105.112, which allows a tenant to bring an action to recover personal property from a landlord. The defendants responded that they had purchased the property free of all encumbrances.

Despite the unclear record on appeal, the court found the following facts undisputed. The plaintiff lived in a trailer on property owned by her mother. The plaintiff's mother sold the property to the defendants who either disposed of the plaintiff's property or prevented her from recovering it.

At trial, the court did not allow the plaintiff to present her evidence or witnesses. Rather, after the parties' brief opening statements and despite the plaintiff's protests, the court ended the hearing by telling the plaintiff that "this isn't an FED trial" and that the plaintiff had plenty of time to recover her property. 211 Or App at 538. The trial court's judgment for the defendants declared that the plaintiff and the defendants never had a landlord-tenant relationship.

On appeal, the court considered the plaintiff's claim that the trial court erred by not allowing her to present evidence and witnesses. Although the court noted that FED actions are "intended to be limited in scope and that the proceedings are often streamlined," the court agreed that the plaintiff should have been able to present evidence and sworn witness testimony in support of her case. Consequently, the court held that the record was insufficient to determine the correctness of the trial court's determination that the action did not arise out of a landlord-tenant relationship and reversed and remanded the trial court's judgment.

Glenn Fullilove

Warren v. Licon, 211 Or App 535, 156 P3d 81 (2007).

Appellate Cases – Outside Jurisdiction

■ *THIRD CIRCUIT REMANDS UTILITY/ HOMEOWNER TREE DISPUTE FOR TRIAL*

Township of Piscataway v. Duke Energy, 488 F3d 203 (3rd Cir. 2007), involved efforts by the defendant utility companies to remove certain shade trees in easement areas located within rights-of-way adjacent to residential uses. The plaintiff township and homeowners sought to prevent that action; however, the township settled with the utilities, leaving only the homeowners to continue the litigation. The homeowners claimed removal of the trees was not reasonably necessary to maintain the pipeline within the easement and that laches barred the removal under a 1940 grant of an easement for a gas pipeline. The easement prohibited construction over the pipelines, which were buried. The land at issue was ultimately developed for single family residential use and the trees, planted in the 1960s, are now about 75 feet tall. When the utilities announced they would remove the trees for pipeline inspection and maintenance, the township and homeowners initiated a state court proceeding to enjoin that action. The defendant utilities removed the matter to federal court after the state court granted a preliminary injunction. The federal court refused to disturb the injunction.

When the township settled with the utilities and consented to the removal of approximately 55 trees, the federal trial court dismissed the trespass claims. The court allowed the homeowners to pursue breach of easement and nuisance claims, ultimately granting the homeowners summary judgment and finding that the tree removal was not "reasonably necessary" under the easement and that the utilities were also barred by laches. The defendants appealed.

The Third Circuit found that the homeowners had standing to bring this case because according to the complaint they had suffered a concrete and particularized injury to a legally protected interest, there was a causal connection between that alleged injury and the relief sought, and the injury was redressable by court action. The facts that the homeowners were not parties to the original easement grant or owners of the land subject to the easement, which was in a public road, did not detract from their standing in this case. The trees were in front of their properties, and their affidavits testified as to the economic and aesthetic value of those trees. Because of their age and size, the trees were deemed irreplaceable. In addition, the homeowners had a cause of action under New Jersey case law. The easement was conveyed under the specific undertaking that they would not interfere unreasonably with the use of the land.

The court then turned to whether the proposed tree removal was "reasonably necessary" to the inspection and maintenance of the utility pipelines. The utilities claimed the trees interfered with the regular aerial survey of the pipelines, impeded emergency access, and had the potential for root damage to the pipelines. The trial court found defendants provided no evidence to show an interference with surveillance and maintenance, but the Third Circuit found that there was sufficient evidence to raise a triable issue of fact on that issue. The utility said that air surveillance three times a week was a superior method of pipeline inspection because it looks for "distressed vegetation," which would indicate a leak. Similarly, the court found a triable issue of fact with regard to the defendants' contentions that the trees interfered with emergency access to the pipelines and that root growth could interfere with pipeline maintenance. Because there were triable issues of fact, the Third Circuit held the trial court's grant of summary judgment was improper.

Moreover, the court said that the application of the doctrine of laches to defeat the easement was not a subject for summary judgment. The district court found that a 40-year delay in asserting a right to remove the trees was "inexcusable and prejudicial" to plaintiffs. However, under New Jersey law, laches requires a factual determination, particularly in the light of defendant Duke Energy's explanation that it had adopted new landscape standards for areas over which its pipelines were buried in the year 2000, and it had over 18,000 miles of pipeline to review. These were serious concerns in the light of recent incidents of pipeline conflagration. The court concluded:

> We note that the parties also moved for summary judgment on the issue of whether the provision of the easement grant that prohibited Duke and Texas Eastern from interfering with the "cultivation" of the land applied to the removal of trees. In addition, at the invitation of the District Court, Duke filed a Fed. R. Civ. P. 12(b)(6) motion challenging the homeowners' nuisance claim. Because the District Court ruled in favor of the homeowners on the breach of easement claim, it concluded that it did not need to reach the "cultivation" issue or Duke's Rule 12(b)(6) motion. On remand, the District Court may find that it is necessary to rule on these issues before proceeding to trial.

488 F.3d at 216, n. 10.

The Third Circuit vacated the trial court's grant of summary judgment and reversed and remanded the case for further proceedings.

Utility easements are often seen as fairly dull, but as this case demonstrates, they have the power to stir up both the emotions and the intellect.

Ed Sullivan

Township of Piscataway v. Duke Energy, 488 F3d 203 (3rd Cir. 2007).

LUBA Cases

■ LUBA JURISDICTION

Franchise Agreement

Almost 30 years after LUBA's creation, the boundaries of its jurisdiction continue to be refined. In *Kamp v. Washington County*, ___ Or LUBA ___, LUBA No. 2007-116 (8/28/2007), LUBA considered whether a county resolution that adopted a revised franchise agreement between the county and a landfill is a land use decision. The primary purpose of the agreement was to set a new maximum rate the franchisee could charge for disposal of dry waste. The petitioners argued the resolution was a land use decision because it established an annual cap on the amount of waste that can be disposed at the landfill. Petitioners based their argument on a staff memorandum, which stated the cap was based on the facility's impact on the transportation system and the neighborhood, and their assertion that the resolution constituted a "de facto determination of nonconforming use." (Slip Op. at 3)

LUBA agreed with the county that no comprehensive plan or zoning code provision was applied in adopting the resolution and, therefore, the resolution was not a land use decision. Even assuming the county staff considered transportation and neighborhood impacts in establishing the tonnage limitation, the staff's memorandum did not interpret or apply any land use regulations and did not address the nonconforming use provisions of the county's code. Since petitioners failed to establish that the resolution was a land use decision, LUBA dismissed the appeal for lack of jurisdiction.

Fee Resolution and Timeliness of Appeal

Petitioners' attempt to appeal a city fee resolution in *Jacobsen v. City of Winston*, ___ Or LUBA ___, LUBA No. 2006-072 (8/31/2007), ran into rough jurisdictional waters on the issue of timeliness. The appealed resolution raised fees for a variety of city services and included an increase in land use appeal fees from $200 to $250. The city published advance notice of the council hearing on the resolution. Petitioners did not appear at the hearing and later learned of the resolution when they attempted to appeal a land use decision. The city moved to dismiss the appeal on the ground that petitioners did not appear at the local hearing and lacked standing. The petitioners argued the city's published notice of hearing did not reasonably describe the resolution the city adopted and, under ORS 197.830(3), they timely filed their appeal within 21 days of the date they received actual notice of the resolution.

The published notice stated the council would "[d]iscuss resolution to update fees charged for activities, actions, and services." Although LUBA characterized the notice as "less than specific with regards to exactly what activities, actions, and services would be subject to a fee update" and "vague," it disagreed with petitioners that the notice was misleading. (Slip Op. at 3) The notice indicated the city intended to update fees and the challenged resolution does just that. The city was not obligated to list every fee or service for which a fee increase was proposed. As a result, LUBA concluded ORS 197.830(3) did not apply and dismissed petitioners' appeal as untimely.

Parks SDC Ordinance

In *Home Builders Association of Lane County v. City of Eugene*, ___ Or LUBA ___, LUBA No. 2006-099 (8/15/2007), petitioners challenged the city's adoption by resolution of a Parks Recreation and Open Space (PROS) Project and Priority Plan. The PROS Project and Priority Plan was adopted as a companion to, but separately from, the city's PROS Plan. On appeal, LUBA remanded the PROS Plan because it was not adopted as a refinement plan, as required by the Eugene-Springfield Metropolitan Area General Plan (Metro Plan), and was insufficient to fulfill the additional parks and recreation facilities planning required by the Metro Plan. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006) (*Home Builders I*). At the time of LUBA's decision on the PROS Project and Priority Plan, the city had not responded to the remand of the PROS Plan.

The parties' primary dispute focused on LUBA's jurisdiction to review the PROS Project and Priority Plan. Petitioners argued that plan is land use decision because it is a *de facto* refinement plan to implement the Metro Plan and asserted the plan is legally defective. The city argued the PROS Project and Priority Plan is a parks systems development charge (SDC) plan and is exempt from LUBA review under ORS 223.308(1) and 223.314. Under the SDC statutes, a required step in imposing an SDC is adoption of a plan that lists the capital improvements the city intends to fund in whole or in part with SDCs. ORS 223.309. This type of plan is called a "309 Plan" and is exempt from LUBA review under ORS 223.314. The PROS Project and Priority Plan listed the parks, recreation, and open space projects the city intended to fund with SDCs and the estimated cost and timing of each project, consistent with the requirements for a 309 Plan.

LUBA phrased the relevant question as "whether ORS 223.314 applies here to make the city decision to adopt the PROS Project and Priority Plan something other than a land use decision, and therefore outside LUBA"s jurisdiction." (Slip Op. at 11) LUBA turned for guidance to previous decisions in which petitioners in this appeal challenged the city of Springfield's adoption of a 309 Plan and a public facility plan for sewer facilities. There, Springfield conceded the challenged sewer public facility plan was a Metro refinement plan for sewer facilities, was adopted to comply in part with Statewide Planning Goal 11, and was a land use decision. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 134 (2005). However, Springfield asserted that the 309 Plan for sewer and wastewater facilities was exempt from LUBA review and the appeal challenging that plan should be dismissed. LUBA agreed, concluding that Goal 11 and the SDC statutes did not preclude Springfield from separately adopting a regulatory land use framework authorizing the construction of sewer facilities and an SDC plan and ordinance to levy and collect SDCs to fund construction of the identified sewer facilities. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005), *aff'd* 204 Or App 270, 129 P3d 713, *rev den* 341 Or 80 (2006). The principal caution LUBA offered for local jurisdictions using this bifurcated approach was that the Goal 11 public facilities plan for sewers must be adopted and in place before the facilities can be built.

LUBA applied the same reasoning here and concluded it lacked jurisdiction under ORS 223.314 to review the PROS Project and Priority Plan, ruling:

Under our decision in *Home Builders* [50 OR LUBA 109 (2005)], if a local government wishes to adopt a "309" Plan separately from any plan that it adopts to comply with state and local land use laws, it may do so. State land use laws do not prohibit such bifurcation, and ORS 223.309(1) and 223.314 effectively authorize such bifurcation. Provided the local government adopts such separate planning documents for separate purposes, the decision to adopt a plan for the limited purpose of complying with ORS 223.309(1) is not a land use decision and such a decision is not reviewable by LUBA.***As we explain in our decision in *Home Builders* [50 OR LUBA 109 (2005)], a local government decision to adopt those plans separately and on different time schedules may present practical problems if a "309" plan is adopted and implemented before any required land use planning is completed. However, a local government is not required by state land use laws to adopt the plan that is adopted to comply with state land use laws first. (Slip Op. at 15)

Acknowledging the confusion that may be created when a local government adopts separate, but overlapping, fiscal and land use plans for public facilities, LUBA nevertheless concluded that "state land use laws simply do not mandate that the city complete any required additional land use planning *before* it begins taking the steps necessary under ORS Chapter 223 to levy and collect SDCs." (Slip Op. at 16) Petitioners offered extra record evidence that suggested the city might not readopt the PROS Plan and might simply consider the PROS Project and Priority Plan to be the required Metro Plan refinement plan for parks, recreation, and open spaces. Although the extra record evidence did not alter LUBA's holding that it lacked jurisdiction to review the PROS Project and Priority Plan, LUBA effectively cautioned the city that it could not rely on the plan to fulfill its responsibilities under the Metro Plan without first adopting the PROS Project and Priority Plan as a refinement plan.

SUBDIVISIONS AND PARTITIONS

Applying ORS 92.100(7) and its decision in *Severson v. Josephine County*, 51 Or LUBA 569 (2006), LUBA recently dismissed two appeals of final subdivision and partition plat approvals. The legislature amended ORS 92.100 in 2005 to provide that granting or withholding approval of a final subdivision or partition plat by a county surveyor, county assessor, or a city or county governing body or its designee, is not a land use decision or limited land use decision. The purpose of the amendment was to overrule the Oregon Court of Appeals' decision in *Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003) that a final partition plat approval is reviewable by LUBA.

In *Wagon Trail Ranch Property Owners Association v. Klamath County*, ___ Or LUBA ___, LUBA No. 2007-076 (8/1/2007), petitioner association argued LUBA had jurisdiction to review a final subdivision plat approval despite ORS 92.100(7) because the statutory language only applies to nondiscretionary final plat approvals. The association argued the county exercised significant discretion in approving the plat as consistent with the preliminary plan, which was approved in 1975. LUBA rejected the association's interpretation and held that neither the text nor the legislative history of ORS 92.100(7) suggested the legislature intended to limit its application to nondiscretionary plat approvals. Absent jurisdiction to review the appealed subdivision plat approval, LUBA granted the petitioner's motion to transfer the appeal to the circuit court.

The petitioner in *Ehle v. City of Salem*, ___ Or LUBA ___, LUBA No. 2007-089 (8/13/2007) offered a slightly different argument that LUBA had jurisdiction to review his appeal of a final partition plat approval. He contended that ORS 92.100(7) should be narrowly construed to exempt from LUBA review only nondiscretionary plat approvals by county surveyors or county assessors. Again, LUBA found no support for this argument in either the statute's text or legislative history and dismissed the petitioner's appeal.

Kathryn S. Beaumont

Presorted Standard
US Postage
PAID
Portland, OR
Permit #341

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

Recycled/Recyclable