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Appellate Cases – Land Use

■ *THERE'S AN EXCEPTION TO EVERY GOAL*

VinCEP v. Yamhill County, 215 Or App 414, 171 P3d 368 (2007), involves the interpretation and interplay of two Land Conservation and Development Commission (LCDC) administrative rules setting criteria for taking exceptions to Oregon's statewide planning goals.

The applicant requested, and the county approved, a comprehensive plan amendment and zone change from exclusive farm use to recreational commercial to allow a "luxury wine country hotel" on 12 acres of a 65-acre rural parcel. The plan amendment and rezoning required that the county take a "reasons exception" to Goals 3 and 14. Opponents of the project appealed the county's decision to the Land Use Board of Appeals (LUBA). The primary issue on appeal was which LCDC administrative rule, or rules, had to be satisfied to approve the exceptions.

Oregon Administrative Rule (OAR) 660-014-0040 sets out the requirements for a county to take a "reasons exception" to Goal 14. Among other criteria, the urban use (in this case, the planned hotel) must be "necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource." OAR 660-004-0022 sets out the generic standards for a "reasons exception" which apply to most of the Goals, including Goal 3. These are more onerous than the criteria for a Goal 14 exception, including a showing that the use must be located at this particular site. At LUBA, the applicants argued that when a proposed use requires exceptions to both Goals 3 and 14, the Goal 14 administrative rule (OAR 660-014-0040) is applied to judge both. LUBA agreed, relying on rule language which, in its view, made it "reasonably clear" that LCDC intended to require application of only the Goal 14 exception rule in this situation. It remanded the decision, however, for additional justification under the Goal 14 rule.

On review, the Court of Appeals agreed with the opponents, reversing LUBA's interpretation of the administrative rules. Under the court's reading of the text and context, while only OAR 660-014-0040 applies to the exception to Goal 14, OAR 660-004-0022 is the standard for the exception to Goal 3. In this case, therefore, both rules applied, and LUBA erred in holding that compliance with OAR 660-004-0022 "is somehow excused because a Goal 14 exception is taken." Because the county had made alternative findings under OAR 660-004-0022, which LUBA had not analyzed because of its conclusion that they were unnecessary, the court remanded to LUBA for that review.

Michael E. Judd

VinCEP v. Yamhill County, 215 Or App 414, 171 P3d 368 (2007).

Editor's Note: On remand from the Court of Appeals, LUBA again remanded the county's decision, ruling the county failed to address why the proposed hotel requires a location on resource land under OAR 660-004-0020(2) and failed to explain why there is a demonstrated need for the hotel under Goal 9's requirement to provide adequate opportunities for a variety of economic activities. *VinCEP v. Yamhill County*, ____ Or LUBA ____, LUBA No. 2006-157 (12/21/2007).

■ PGE, *"PLAUSIBILITY," AND DEFERENCE TO LOCAL GOVERNMENT INTERPRETATIONS OF LAND USE REGULATIONS*

In *Foland v. Jackson County*, 215 Or App 157, 168 P3d 1238 (2007), the Oregon Court of Appeals took another step away from the "*Clark* jurisprudence" that limited appellate review of local governing bodies' interpretation of their own land use ordinances. As stated in a number of opinions based on *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and ORS 197.829(1), which was adopted in 1993, the court of appeals has held that *Clark* "establishes a principle of review under which LUBA and the courts may not construe local land use legislation independently but, with limited exceptions, are bound by the interpretations that the local government offers in applying the legislation to particular land use decisions." *Cope v. Cannon Beach*, 115 Or App 11, 836 P2d 775 (1992). The court rephrased its interpretation of *Clark* in different but similar ways in many subsequent opinions, such as

Huntzicker v. Washington County, 141 Or App 257, 917 P2d 1051, *rev den* 324 Or 322, 927 P2d 598 (1996) and *Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999).

These cases and their holdings are summarized in *Schwerdt*:

> [i]f the question confronting us were what the local provisions mean, both arguments would be quite tenable. But that is not the question. Rather, it is whether the local interpretation is reversible under the deferential standard of review required by *Clark*. To be reversible under that standard, the local interpretation must be 'clearly wrong.' *Goose Hollow Foothills League v. City of Portland*. In *Huntzicker v. Washington County*, we explained that 'clearly wrong' means that the reviewing tribunal must be able to 'say that no person could reasonably interpret the provision in the manner that the local body did.' We have also described 'clearly wrong' as meaning 'so wrong as to be beyond colorable defense.' *deBardelaben v. Tillamook County*. Further, we have emphasized repeatedly that LUBA's task and ours in reviewing a local interpretation under the *Clark* standard is not to resolve the question of 'what the local legislation in fact means,' nor is it 'to provide an independent interpretation of local land use legislation that might appear preferable to the local government's.' *Zippel v. Josephine County*, *Langford v. City of Eugene*. Rather, the issue is whether the local government's interpretation, taken on its own terms, passes the 'clearly wrong' test. (Citations omitted.)

In *Huntzicker*, the court expressly rejected using the analytical approach taken by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), when reviewing the interpretation of a land use plan or ordinance by a local governing body:

> [t]he rules of statutory construction, as explained in *PGE*, are designed to arrive at a 'right' understanding of the meaning of an enactment. Although it might be abstractly correct that if an interpretation is right, it cannot be clearly wrong, the converse is by no means true: LUBA's and our post-*Clark* cases amply illustrate that there are many points on the continuum between 'right' and 'clearly wrong.' 141 Or App at 261.

After *Schwerdt* the court began to turn away from its "*Clark* jurisprudence." It decided in *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), that while it "continue[d] to believe that [a limited] standard of review is mandated by *Clark*," the "shorthand summary" of the standard of review in certain earlier cases "is not precisely consistent with *Clark*." 187 Or App at 524. The court then stated, "[t]he *Clark* decision and ORS 197.850(9) [ORS 197.829(1)?], which was enacted after *Clark*, are more correctly characterized as consistent with the rules of construction announced in [*PGE*]." *Id.*

The three recent land use cases, including *Church*, that apply the *PGE* analytical approach do not justify a rigid embrace of that approach. None of the cases has been a close call when the principles of statutory construction are applied. In *Church*, the interpretive issue involved an application to construct a dwelling on a substandard lot, which was nevertheless "authorized" by a previous land use approval. The county code specifically provided that the county's minimum area or width requirements did not apply to an "authorized" lot. To avoid the express language of the ordinance, the county argued that the title of the code section ("Non-Conforming Lots or Parcels") implicitly amended the meaning of "authorized lot." The court observed that a statute's caption is of no legal significance and rejected the county's argument, which would have "read into an unambiguous and directly relevant definition of a term in an ordinance a requirement that the ordinance simply does not contain." 187 Or App at 526.

In *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 365, 129 P3d 702 (2006), the court emphasized the importance of deference on review to the local governing body's interpretation of its own ordinances. The court reversed LUBA's holding, based on *Church*, that a city governing body's interpretation of its own code strayed too far from the underlying policy supporting a prohibition on a new application for a similar "proposal" within one year from denial of the initial application. The court gave more deference to the local government's interpretation of "proposal" than LUBA had, stating, "[w]e see no inconsistency in following the steps of statutory interpretation articulated in *PGE* while also giving a local legislative body's interpretation and application of its own enactments some deference as discussed in *Clark* and *Church*." 204 Or App at 365.

In *Foland*, language in the county code established a three-step process for destination resort approval. The code required completion of the third step within three years of the completion of the second step. As explained by LUBA, because of the delays caused by appeals and other matters, the third step was not completed within three years. The question presented was whether the code could be read to allow the three-year period to start after all appeals and the county's action on remand with respect to the second step had been completed. LUBA concluded that this would require rewriting the language rather than interpreting it.

The petitioners argued that because LUBA had not identified any language in the applicable development ordinances with which the county's decision was "inconsistent," LUBA's conclusion was wrong. The court focused on the language of ORS 197.829(1):

> [w]hether a local government's interpretation of its ordinance is 'inconsistent' with the language depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE*. We have previously considered, and rejected, suggestions . . . that the principles of interpretation articulated in *PGE* do not apply to our examination of the plausibility of a local government's interpretation of its own ordinances. *See, e.g.*, *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 364-65, 129 P3d 702, *rev den*, 341 Or 80 (2006).

Thus, the standard on review now appears to be whether the local government interpretation is 'plausible' in light of a *PGE* analysis. *Clark* and ORS 197.829(1) still require "some deference" to the interpretation of the local governing body. *Gage v. City of Portland*, 319 Or 308, 316 17, 877 P2d 1187 (1994). Given the reappearance in *Church*, *Wal-Mart Stores* and *Foland* of the analytical principles of *PGE*, it appears the court has now adopted the analytical approach it scorned in *Huntzicker*: interpret the ordinance using the *PGE* approach and then compare the local governing body's interpretation to determine if it is plausible or if it has strayed beyond the limits allowed by "some deference."

Peter Livingston

Foland v. Jackson County, 215 Or App 157, 168 P3d 1238 (2007).

Appellate Cases – Real Estate

■ AMENDMENTS TO HOA RESTRICTIVE COVENANTS REQUIRE PROPER VOTING AND CERTIFICATION

The plaintiff in *Andrews v. Sandpiper Villagers, Inc.*,215 Or App 656, 170 P3d 1098 was a homeowner living in the Sandpiper Village subdivision located in Lincoln County, Oregon. The Sandpiper Villagers, Inc. ("Association") is a nonprofit homeowners association established to oversee the affairs and operations of the subdivision. Owners in the subdivision purchased their property subject to restrictive covenants ("CC&Rs") that governed the use of their property. The CC&Rs required owners to trim trees and bushes on their property in order to preserve the ocean views of other owners within Sandpiper Village. However, the CC&Rs were amended several times over a period of years. The amendment process created ambiguity and ultimately led to litigation.

In 1993 the Association amended its CC&Rs to prevent owners from blocking the ocean views of other neighbors. The Association's architectural review committee ("ARC") was vested with the authority to determine if there was, in fact, a view impairment, and also the power to require offending owners to remove any view obstruction. The authority granted to the ARC was broad, giving the committee subjective authority to determine what constitutes an "ocean view." The amendment was approved by the owners, properly certified by the Association, and recorded in the county records. A year later, in 1994, an owner (who also served as the Association's lawyer) revised the CC&Rs in an effort to make them more readable, characterizing his edits as "stylistic." The ocean view provision was revised during the process and significantly altered. The new version of the ocean view provision stated that no owner may obstruct a "designated ocean view" lot. The problem with this revision, as the Association soon found out, was that there was no system of designating ocean view lots. The CC&Rs did not contain any such designation, nor did the plat record or any other recorded document. Rather than allowing the ARC to subjectively determine whether an ocean view was impaired, the new amendment purportedly operated to limit the obstruction requirement to "designated" lots – of which there were none. The amendment was recorded and contained a certification that the amendment was properly voted on by the owners, despite the fact that no vote had been taken.

Plaintiff Andrews moved into the neighborhood three years later in 1997. A neighbor complained to the ARC and Andrews that her trees were overgrown and blocked the neighbor's ocean view. The neighbor requested that the ARC require Andrews to trim her trees. Andrews responded that her neighbor did not own a "designated" ocean view lot, and therefore she was under no obligation to accommodate her neighbor. Plaintiff filed an action for a declaratory judgment and to quiet title. The trial court granted summary judgment in favor of the Association and Plaintiff Andrews appealed.

The Court of Appeals found that the terms of the CC&Rs were ambiguous, and therefore, it was able to consider extrinsic evidence to determine the meaning of the ocean view provision. The Court considered affidavits from Board members of the Association, along with letters from the Association's attorney. Based on the evidence, the Court concluded that the 1994 "stylistic" amendment was not

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intended to change the substance of the 1993 language, which the Court stated was designed to protect *all* lots with an ocean view. After lengthy discussion of the extrinsic evidence, summary judgment for the Association was affirmed.

There are two important lessons to be gleaned from this case. First, there is no category of "stylistic" changes to CC&Rs that do not require a vote of the owners. An association may, however, "restate" its CC&Rs by incorporating separate amendments into a single recorded document for convenience purposes. A change in words, a "plain English" revision, and "stylistic changes" are not merely restatements. Rather, they are amendments that require a formal vote by the individuals subject to the CC&Rs. Second, the amendment certification provisions contained in ORS 100.135 (condominiums) and ORS 94.590 (planned communities) are to be taken seriously. Certification requires a notary and signatures of Association officers stating that a vote was taken and the requisite number of votes received to amend the CC&Rs. Unless a proper vote occurred, there can be no valid certification.

Absent the strong extrinsic evidence presented in the case and reviewed by the Court, this case would likely have taken a different turn and left the Association in a precarious position. Nevertheless, it reinforces the tendency of the judiciary to support the efforts of volunteer board members in homeowners associations who act in good faith but occasionally do not strictly follow appropriate procedures.

A. Richard Vial and Kevin V. Harker

Andrews v. Sandpiper Villagers, Inc., 215 Or App 656, 170 P3d 1098 (2007).

Appellate Cases – Takings

■ NINTH CIRCUIT FINDS SUBSTANTIVE DUE PROCESS CLAIMS AREN'T ALWAYS SUBSUMED BY TAKINGS CLAUSE

In 1996, the Ninth Circuit ruled in *Armendariz v. Penman*, 75 F3d 1311 (9th Cir 1996), that substantive due process claims arising from land use permit applications were "subsumed" by the takings clause. The import of *Armendariz* was to effectively preclude substantive due process claims where a land use decision did not effect a taking. In 2005, however, the United States Supreme Court found in *Lingle v. Chevron U.S.A., Inc.*, 544 US 528, 125 S Ct 2074, 161 L Ed2d 876 (2005) that a land owner's challenge that a regulation does not substantially advance legitimate interests invokes due process, not necessarily the takings clause. The Ninth Circuit in *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir 2007), acknowledged that *Lingle* "pulls the rug out from under our rationale [in *Armendariz*] for totally precluding substantive due process claims based on arbitrary or unreasonable conduct."

Crown Point involved a multi-phase development in Sun Valley, Idaho. In the initial approval for the project, Sun Valley required Crown Point to build 39 units overall in an anticipated five phases to meet minimum density requirements. Sun Valley later required Crown Point to reduce the number of units planned for the fourth phase of the project, which, in turn, meant that the fifth and final phase contained more units than originally anticipated to meet the overall 39-unit total. The Sun Valley Planning Commission approved the fifth phase. Following an objection by one of the current residents and the homeowners association to the increased units in the fifth phase, the Sun Valley City Council denied the application for that final phase notwithstanding the fact that Crown Point had simply been doing what Sun Valley had required it to do. Litigation followed, including a federal civil rights claim under 42 USC § 1983. In the federal case, Crown Point alleged a single substantive due process claim based on Sun Valley's shifting positions. The district court dismissed, citing *Armendariz*. Crown Point appealed, citing *Lingle*. The Ninth Circuit, acknowledging the impact of the Supreme Court's intervening decision in *Lingle*, reversed and remanded.

In doing so, the Ninth Circuit traced both the origins of *Armendariz* and *Lingle's* subsequent impact on *Armendariz*. Noting *Lingle* and another post-*Armendariz* Supreme Court decision, *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), the Ninth Circuit found that, as applied to land use regulations, "the Fifth Amendment would preclude a due process challenge only if the alleged conduct is actually covered by the Takings Clause." 506 F.3d at 855. Because the Ninth Circuit had *Crown Point* on appeal from a motion to dismiss (*i.e.*, on the initial pleadings rather than a factually developed summary judgment or trial record), it remanded to the trial court, allowing the case to go forward but expressing no further view on the specific factual merits of the claim alleged.

Mark J. Fucile

Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007).

Cases from Other Jurisdictions

■ IOWA SUPREME COURT AFFIRMS RESTRICTIVE DEFINITION OF "FAMILY"

In *Ames Rental Property Association v. City of Ames*, 736 N.W.2d 255 (Ia 2007) defendant City tried to stem the flow of students into residential areas by limiting the definition of "family" to include not more than three unrelated persons. Plaintiff Association challenged the ordinance on equal protection and takings grounds under the federal and state constitutions and appealed the trial court's grant of summary judgment in the city's favor.

The state supreme court first turned to federal constitutional limits and noted the deferential view of the United States Supreme Court with respect to the definition of "single-family" in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). In that case a zoning ordinance defined the term "family" as any number of related individuals but not more than two unrelated individuals. The court emphasized that *Belle Terre* is still good law and rejected the plaintiff's claim under the Equal Protection Clause of the United States Constitution.

Turning to the Iowa Constitution's equal protection clause, the

court found the regulation singled out unrelated persons but also said the alleged discrimination did not involve a fundamental right or suspect classification, so that the rational basis test applied. The court described this test as "deferential" as it presumed the reasons for the classification were rational and placed the burden on a plaintiff to negate every reasonable basis that might support it. The city might rest on its presumption of validity and had no burden to provide any evidence to justify its classification.

Here the interests advanced to support the classification included promoting a sense of community, supporting residential neighborhoods, limiting congestion and the like. The court concluded these interests are sufficient and satisfied the court under the Iowa constitution as well. The court said that the city is permitted to consider and project the impacts of large concentrations of transient students in formulating its zoning regulations. In this case it acted on those concerns to meet its goal of family-oriented neighborhoods. The court noted that the ordinance was imprecise and may be based on stereotypes, but explained that it was nonetheless a reasonable attempt to meet legitimate local concerns. While the ordinance may do little to achieve its goals, the court said that "it is the city's prerogative to fashion remedies to problems affecting its interests." If the remedies are ineffective, then elected officials may take other actions without the fear of judicial second-guessing. The trial court decision was thus affirmed.

Justice Wiggins authored the dissent, finding that the ordinance violated the Iowa (but not the federal) constitution in that it encompassed extreme degrees of over- and underinclusion. The dissent found that the distinction between related and unrelated persons was not rationally related to the promotion of a sense of community, sanctity of the family, quiet and peaceful neighborhoods, low population, limited motor vehicle capacity, and combating transiency. Nor was there a showing that a limit of three unrelated people would directly target students as the dissent noted:

> [i]n today's modern society families are more mobile, especially in a college community, where professors, visiting professors, graduate students, and administrators are frequently moving to new universities to continue or further their studies and careers. These university families come in and out of Ames, yet under this ordinance their transitory nature is not a factor. . . . The majority dismisses this fact and finds students or other unrelated persons are the only transitory or mobile residents in a university town. 736 N.W. 2d at 265-266.

The dissent found the practical effects of the ordinance were to discriminate against those most likely to live with roommates – the poor and the elderly. They concluded that a land use ordinance should deal with the uses of land accepted or prohibited, rather than the relationship among residents, adding that the more typical nuclear family had changed a great deal since the *Belle Terre* decision. If defendant wishes to regulate property to deal with these goals, it can do so with reference to floor space and facilities (bathrooms and kitchens) parking and nuisance regulations, concluding:

> Ames claims it is promoting a sense of community with this ordinance: But whose community is Ames promoting? Is Ames only interested in promoting traditional families or those who can afford to live in a home without roommates – the wealthy and the upper-middle class? It is irrational for a city to attempt to promote a sense of community by intruding into its citizens' homes and differentiating, classifying, and eventually barring its citizens from the community solely based on the type of relationship a person has to the other persons residing in their home. 736 N.W.2d at 266.

This 4-3 decision reflects the ambiguity of using land use regulations as a means of classifying uses based on personal relationships. The deference of Justice Douglas in *Belle Terre* resonates with the antipathy towards judicial intrusion into matters of social and economic policy. Nevertheless, the allowance of such restrictions is troubling.

Edward J. Sullivan

Ames Rental Property Assn. v. City of Ames, 736 N.W.2d 255 (Ia. 2007).

■ *KELO COMES TO NEW JERSEY – STATE SUPREME COURT VOIDS TAKING WITH COMPENSATION*

Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 924 A.2d 447 (N.J. 2007) arose out of defendant's redevelopment designation prior to the commencement of eminent domain proceedings to acquire plaintiff's property. At issue was the reconciliation of a statute with a constitution: could the state supreme court interpret *N.J.S.A.* 40A:12A-5(e), which allowed taking property by the power of eminent domain if it were "in need of redevelopment," so as to comport with the Blighted Areas Clause of the New Jersey Constitution? Because the property at issue was in an unimproved condition, defendant deemed it "not fully productive" and posited that being "not fully productive" met the statutory criterion of "in need of redevelopment."

Plaintiff owned the property with clear quieted title since 1951. Plaintiff's family had used the property to moor produce-hauling barges as early as 1902. The site, undeveloped and identified as a protected wetland by the New Jersey Department of Environmental Protection, had industrial remnants from prior uses of the site. The site received dredge spoils periodically and had been leased to an environmental cleaning organization for water access, employee parking and storage. In addition, plaintiff harvests a wild reed three times a year. The reed is valuable as cattle feed and can also be planted to neutralize pollutants in soils. Defendant argued that the latter activity was undertaken primarily for tax abatement purposes. Nonetheless, at plaintiff's request, defendant's planning board rezoned the property in 1998 to allow commercial, light industrial, and mixed non-residential uses.

Also in 1998, the Borough adopted a new comprehensive plan, Since then, it had been considering the land use designation of plaintiff's property and the possibility of acquisition by eminent domain, first for recreational use, then as part of an adjacent industrial development. A study prepared for the Borough suggested the site was in need of redevelopment. Most significantly, when the Borough considered the property's designation, it did not purport to do so in support of an industrial development for the public's benefit, but rather because it believed the property was "not fully productive."

Defendant's planner testified at the redesignation hearing that the property was idle and unproductive and could be used for job creation, but did not discuss an access problem identified in previous reports that would preclude use of the subject site along with the adjacent industrial development. Plaintiff's expert, on the other hand, testified about the "need for redevelopment" statutory requirement, noting that no industrial use was proposed for the site and stating that the "need for redevelopment" criteria was associated with lands having title problems and the like. The land was ultimately placed within the redevelopment area and plaintiff brought suit, claiming that the land did not meet the statutory criteria for redesignation. Both the trial and the appellate courts ruled in favor of defendant Borough.

On appeal, plaintiff contended the statute was inconsistent with a constitutional provision authorizing the use of eminent domain for "blight," a term defined by the legislature in the statute used in this case. Defendant equated blight with property being "stagnant" and "not fully productive," two terms used in the statute. The New Jersey Supreme Court said it would first consider whether the statute is constitutional, and, if it is of dubious constitutionality, whether the statute is reasonably susceptible to an alternative, constitutional interpretation.

The court said that the New Jersey Constitution limited eminent domain for public uses while allowing redevelopment of "blighted areas." The court traced the history of the term "blight" and found the word was carefully chosen to allow acquisition due to deficiencies in title, diversity of ownership, or "other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare." Defendant read the statute broadly to allow acquisition if the land were stagnant or not fully productive. Plaintiff countered that the state constitution's definition of "blighted areas" limits the statute such that a property's status as "not fully productive" cannot be the sole basis for the use of eminent domain. The court reviewed this question of law *de novo,* asserting that it is for the courts to determine consistency of the statute with the constitution so as to assure that the powers granted to the legislature are constitutionally exercised.

The court began with the plain language of the constitutional provision and presumed that the statute was constitutional. It reviewed the history of the term "blight" and found that it is used to describe a civic disease where land is characterized by slums, unhealthy conditions and higher than average rates of crime. Hearkening back to the 1947 New Jersey Constitutional Convention, the court noted that the term "blight" was used deliberately in lieu of "slum clearance" to provide for a broader basis to favor civic rehabilitation. The court concluded:

> [a]ccordingly, in adopting the Blighted Areas Clause, the framers were concerned with addressing a particular phenomenon, namely, the deterioration of "certain sections" of "older cities" that were causing an economic domino effect devastating surrounding properties. The Blighted Areas Clause enabled municipalities to intervene, stop further economic degradation, and provide incentives for private investment. 924 A.2d at 458.

The court found an interpretation that allowed for the use of eminent domain if the land had reached a point of stagnation and unproductiveness, concluding that "blight" under the New Jersey constitution meant deterioration or stagnation that also negatively affected surrounding properties. New Jersey, like all other states, territories and U.S. possessions, treats blighted property as an economic and social problem in terms of health and crime. Even for those states in which the term arguably is based solely on an economic evaluation, no state would find property "blighted" if the land were merely "not fully productive" as defendant suggests. The court concluded:

> [u]nder [defendant's] approach, any property that is operated in a less than optimal manner is arguably "blighted." If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment. We need not examine every shade of gray coloring a concept as elusive as "blight" to conclude that the term's meaning cannot extend as far as [defendant] contends. At its core, "blight" includes deterioration or stagnation that has a decadent effect on surrounding property. We therefore conclude that [defendant's] interpretation of *N.J.S.A.* 40A:12A-5(e), which would equate "blighted areas" to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution. 924 A.2d at 460.

To avoid finding the statute unconstitutional, the court said it would interpret it such that the need for redevelopment on "not fully productive" grounds would relate to such things as deficiencies in title or diversity in ownership – not as a singularly sufficient basis for public acquisition. The court found this interpretation harmonious with previous incarnations of both housing authority and redevelopment statutory law since 1949 and limited construction of the statute to these matters. This narrower, more constitutionally sound interpretation of the statute would not allow the redevelopment designation challenged by plaintiff as there were no issues of fragmented title or ownership in relation to the "not fully productive" label placed upon the property by the defendant. The case was thus reversed and remanded for further proceedings.

The court also said that a municipality's decision to acquire land under these statutes is not valid if supported solely by evidence presented by an expert reciting the statutory criteria and finding them met. The court said that such testimony was "too slender a reed" to support such an important decision.

In this case, the New Jersey Supreme Court presented an alternative interpretation of its constitution and laws and there is no further appeal of that decision. One wonders, however, if the court was influenced by all the hype about *Kelo* over the past two years.

Edward J. Sullivan

Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 924 A.2d 447 (N.J. 2007).

■ GEORGIA SUPREME COURT FINDS "TAKING" THROUGH APPLICATION OF SEX OFFENDER STATUTE

Mann v. Georgia Dept. of Corrections, 282 Ga 754, 653 S.E.2d 740 (Ga. 2007) involved state laws that prohibit a convicted sex offender from living or working within 1,000 feet of places where minors congregate. Plaintiff, a convicted sex offender, complied initially with both statutes at his home and business. However, childcare facilities moved within 1,000 feet of both places and his parole officer directed him not to be present at either under penalty of arrest and revocation of probation Plaintiff brought this takings claim under the state and federal constitutions as a result.

Unlike other states, Georgia law does not have an exception for later third-party activities (move-to-the-offender exceptions), but does have a public notice requirement by which others may know the location of a sex offender's residence and work place. The court noted that this creates the potential for others to locate childcare and similar facilities within 1,000 feet of known sex offender residences for the specific purpose of forcing them out of the community.

The court also noted that regulations which did not deprive an owner of viable economic use may nevertheless be a taking under *Penn Central Transportation Co. v. NYC*, 438 U.S. 104 (1978), which uses a three-factor analysis to determine whether the constitution has been violated: 1) the impact of the regulation on plaintiff, 2) whether the regulation violates the reasonable investment-backed expectations, and 3) the character of the regulation.

Plaintiff focused on the economic impact of the regulation. The court found the application of the statute utterly impaired plaintiff's use of property for a home, the purpose for which the property was purchased. Under the law, plaintiff must leave his home and either sell it or maintain two residences for at least ten years after he is released from probation – the minimum period of time plaintiff is required to continue registering as a sex offender. Even if plaintiff is able to rent out his house, such actions involve numerous costs with significant economic impacts and the possibility of being required to move from the new residence if certain facilities are placed within 1,000 feet of it. In addition, the investment-backed expectations in the home are subject to ouster, a burden which these offenders bear alone. The court concluded that "justice requires that the burden of safeguarding minors from encounters with registered sexual offenders must be spread among taxpayers through the payment of compensation" and found the statute to be unconstitutional. 653 S.E.2d at 745. The trial court's declaration to the contrary was reversed.

As to the workplace prohibition for convicted sex offenders, the court found it constitutional as it does not prohibit ownership of a business, merely the offender's physical presence at the business. Plaintiff's half-ownership in a restaurant did not necessarily require him to be present at the business and, in fact, plaintiff testified that he was able to perform work related to the restaurant by computer from a distant location.. Plaintiff failed to show an undue burden on his financial interests or adverse impact on his reasonable investment-backed expectations, and thus did not establish a taking. That portion of the trial court decision was upheld. The Chief Justice, writing for himself and another justice, specially concurred, stating that the employment restriction prohibits an owner from being at the place of his or her business and was thus too broad as well.

This case is interesting in that it invalidates as unconstitutional a statute that provides no alternative for an offender to deal with the location of his home or business and makes no exception for the placement of a subsequent use that threatens to oust the offender from his or her home. The *Penn Central* takings factors are triggered and subsequent cases along these lines should make for interesting reading.

Edward J. Sullivan

Mann v. Georgia Dept. of Corrections, 282 Ga 754, 653 S.E.2d 740 (Ga. 2007).

LUBA Cases

■ Measure 37/Measure 49

Two recent LUBA decisions address transfer of ownership and vesting issues raised by claimants seeking to develop property pursuant to waivers of regulations under Measure 37.

In *Reeves v. Yamhill County*, LUBA No. 2207-122 (12/26/2007), petitioners challenged the county's approval of a 16-lot subdivision and conditional use permit. Samuel and Mildred Eastman filed Measure 37 claims with the county and state in 2005. Following the county's approval of their claim, the Eastmans contracted to sell their property to Coyote Homes, Inc., subject to conditions including final approval of the 16-lot subdivision and vesting of the Eastmans' ability to transfer the property to third parties. After the state issued its order approving their Measure 37 claim in 2006, the Eastmans applied to the county for approval of a 16-lot subdivision and conditional use permit, which the county approved in June, 2007.

On appeal petitioners argued that any right to develop pursuant to a Measure 37 waiver is personal to the claimant such that the right is lost if the claimant transfers the property before the right becomes vested. In county proceedings and before LUBA, petitioners expressed concern that the Eastmans had transferred ownership of their property to Coyote Homes and argued the county erred by failing to inquire about the property's ownership. In response to petitioners' motion to take additional evidence at LUBA, the Eastmans supplied an affidavit from Samuel Eastman that described the nature of their contractual obligation with Coyote Homes and stated that Mr. Eastman signed all of the land use applications as an owner. Nothing in the record indicated that ownership of the property had been transferred to Coyote Homes.

While acknowledging that the Eastmans have a contractual obligation to sell their property to Coyote Homes when the rights to complete development have vested, LUBA agreed with the Eastmans that petitioners offered no basis for remanding the county's decision. LUBA characterized the petitioners' argument as speculation and concluded:

> In our view, where the ORS 197.352 claimant signs the development application as owner or otherwise certifies

> to the local government that he or she is the owner of the property that is the subject of the claim, if an issue regarding continued ownership arises at later stages of the development review the county is entitled to rely on the representations of the claimant or the claimant's representatives that the claimant continues to own the subject property, without conducting any further evidentiary inquiry. (Slip Op. at 11.)

In so ruling, LUBA acknowledged the ambiguities of determining what constitutes a vested right under Measure 37 and Measure 49, but concluded that petitioners' attempt to raise that issue was premature.

The issue in *Department of Land Conservation and Development v. Jefferson County*, LUBA No. 2007-177 (1/24/2008) concerned the relationship between ORS 215.427(3)(a) (the county "goal post" statute) and the right to develop under a Measure 37 waiver granted pursuant to ORS 197.352. William Burk filed a Measure 37 claim with the state and the county. Both waived regulations to allow him to divide his 153-acre property into approximately 50 parcels. He subsequently sought approval from the county for a 100-lot subdivision and either a 100-lot or 60-lot planned unit development. Before the county could act on his application, Mr. Burk died. County planning staff recommended denial of his application because upon Mr. Burk's death ownership of the property transferred to his heirs who had no rights to the Measure 37 waivers. The staff also recommended denial of the subdivision and PUD as inconsistent with the Measure 37 waivers that were approved and with Goals 11 and 14, which had not been waived. Nevertheless, the county board approved the applications and granted to "the estate of William Burk" the right to subdivide the property into 60 lots.

On appeal, DLCD argued that the waivers were personal to Mr. Burk and ceased to have any effect when ownership of the property passed to his heirs after his death. As a result, the county erred in approving the applications because they are inconsistent with applicable regulations. Jerry Burk, an intervenor in the appeal, argued that once a Measure 37 waiver is implemented by filing a land use application, ORS 215.427(3)(a) (the "goal post" statute) vests the waiver of standards as of the filing date and any subsequent owner of the property is entitled to have the application approved and the land developed free of the waived standards.

Phrasing the issue as one of first impression, LUBA concluded Measure 37 (ORS 197.352) and the goal post statute are in conflict and cannot both be given full effect. LUBA turned to principles of statutory construction to resolve the impasse, relying primarily on the rule that the more specific statute prevails over the more general statute. LUBA treated the goal post rule as the more general statute and held that Measure 37 controls. An alternative maxim of statutory construction that yields the same result holds that a later adopted statute prevails over an earlier statute. Since Mr. Burk is no longer the owner of the property and the rights granted under the Measure 37 waiver were personal to him, LUBA held that the county erred in approving the subdivision and PUD applications and reversed the county's decision.

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