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Highlights

Appellate Cases -- Real Estate

■ *COURT OF APPEALS UPHOLDS DISMISSAL OF CONDEMNATION CASE*

In May, the Oregon Court of Appeals issued a decision touching on important aspects of both substantive condemnation law and eminent domain procedure. *State, ex rel. Department of Transportation v. Pilothouse 60, LLC*, 220 Or. App. 203, 185 P.3d 487 (2008), involved a road widening project in Medford. The Oregon Department of Transportation (ODOT) was acquiring frontage strips along several adjacent parcels. One of the parcels was owned by Pilothouse 60, a limited liability company. Another was owned by a couple named Jensen, who also owned Pilothouse 60. The former was occupied by a vacant restaurant and the latter was used by an operating motel.

The Pilothouse 60 parcel had two "curb cut" driveways and the Jensen parcel had one. The two businesses shared a parking lot and a total of three access points. As a result of the project, the Jensens' individual parcel would lose its sole access point. During the early phase of ODOT's efforts to acquire the necessary strip of property, Pilothouse 60 owned both parcels. After rejecting ODOT's initial offer to purchase a strip along both parcels, Pilothouse 60 transferred ownership of one parcel to the Jensens. Thereafter, ODOT treated the parcels as one in its pre-filing negotiations rather than sending separate offers to Pilothouse 60 and the Jensens for the individual takings. After ODOT filed its condemnation case against both, the defendants moved for summary judgment arguing that ODOT had failed to present them with individual pre-filing offers under ORS 35.346(1) and that, as a result, ODOT lacked the statutory authority to proceed. The trial court dismissed the case on that basis and the Court of Appeals affirmed.

In doing so, the Court of Appeals first addressed the predicate issue of substantive condemnation law: were the parcels to be treated as one or two? *City of Salem v. H.S.B.*, 302 Or. 648, 733 P.2d 890 (1987), generally requires proof of both "unity of use *and* unity of ownership," *id.* at 210 (emphasis added), to treat two physically distinct parcels (even when they are contiguous) as one. Like the trial court, the Court of Appeals in *Pilothouse 60* found that the two parcels were under separate ownership despite their common owners. The court relied on *City of Salem* in refusing to disregard entity form in making this determination.

The equally important procedural ruling flowed directly from the substantive one. ORS 35.346(1) requires public agencies to serve the owners of property being acquired with an offer at least forty days before filing a condemnation complaint. The Court of Appeals, like the trial court, found that the defendants had not received separate offers on their individual parcels. It also agreed that service of an offer was a condition precedent to the exercise of the power of eminent domain—at least when the owner insisted on strict compliance.

The Court of Appeals affirmed the dismissal. *Pilothouse 60*, 220 Or. App. at 215. Although the dismissal was without prejudice to filing a new case, dismissed condemnation actions have been construed as "abandoned" under ORS 35.335 and entitle the owner to recover attorney and expert fees. *Pilothouse 60*, therefore, also serves as a reminder to agencies of the practical importance of strictly adhering to the procedural requirements of the condemnation code.

Mark J. Fucile

State, ex rel. Dept. of Transp. v. Pilothouse 60, LLC, 220 Or. App. 203, 185 P.3d 487 (2008)

■ OREGON COURT OF APPEALS AFFIRMS COUNTIES' AUTHORITY TO LEGALIZE ROADS WHEN DOUBT EXISTS AS TO THEIR ESTABLISHMENT

In *Strome v. Lane County*, 219 Or. App. 519, 183 P.3d 237 (2008), the Court of Appeals considered an appeal from a landowner regarding Lane County's authority to establish a road running through her property as a county road. The County believed that Hulbert Lake Road was originally laid out in 1855 as County Road Number 160. Plaintiff asserted that Hulbert Lake Road and County Road 160 were not the same road.

The County undertook the statutory legalization process required by ORS 368.201 through 368.221 in order to eliminate doubts as to the establishment and location of the road. After plaintiff filed a declaratory judgment action asserting her ownership to the road, the circuit court issued a temporary restraining order (TRO) prohibiting the county from continuing with the legalization process. A different judge, when determining whether the TRO should be continued, concluded that the court did not have jurisdiction and dissolved the TRO and dismissed the case. The plaintiff appealed that dismissal.

The Court of Appeals held that Lane County had the statutory authority to proceed with the process of establishing the road as a county road, notwithstanding doubts about whether the road was a "county road" under ORS 368.001(1). 219 Or. App. at 525. In affirming the dismissal, the court held that the trial court had no authority to enjoin the process on that basis. *Id.* Writing for a unanimous panel, Judge Schuman reiterated the court's explanation from *Shotgun Creek Ranch, LLC v. Crook County,* 219 Or. App. 375, 182 P.3d 312 (2008), that the purpose of legalization is to

> remove doubt about establishment due to omissions or defects in the establishment process; to set a location when, due to alterations, defective surveys, or lost surveys, the original "location of the road cannot be accurately determined"; and to conform a road as traveled for 10 years or more to the road as described in county records.
>
> *Strome*, 219 Or. App. at 524-25 (citing ORS 368.201).

Each party had doubts as to the legal establishment or location of Hulbert Lake Road, which triggered the county's decision to legalize the road. The Court of Appeals concluded that "those doubts *themselves* are sufficient to confer statutory authority on the county" to initiate and, if appropriate, complete the legalization process. *Id*. at 525 (emphasis added).

David F. Doughman

Strome v. Lane County, 219 Or. App. 519, 183 P.3d 237 (2008)

Appellate Cases -- Land Use

■ BALLOT MEASURE 49 RENDERS PENDING CHALLENGES TO BALLOT MEASURE 37 MOOT

The Oregon Supreme Court and the Oregon Court of Appeals have weighed in on how Measure 49 affects pending challenges pursued under Measure 37. In *Corey v. Department of Land Conservation and Development*, 344 Or. 457, 184 P.3d 1109 (2008), the Department of Land Conservation and Development (DLCD) sought review of a Court of Appeals holding that a contested case hearing is required to determine the scope of compensation or waiver whenever a public agency accepts a Measure 37 claim as valid. In *Olson v. Department of Land Conservation and Development*, 220 Or. App. 77, 184 P.3d 1220 (2008), DLCD appealed a trial court decision reversing its denial of a Measure 37 claim on the ground that the plaintiff did not qualify as an "owner" entitled to relief.

In November 2007, the voters adopted Ballot Measure 49, which amended Measure 37 by adding provisions that altered the claims process, standards, and remedies for both new claims and claims that were pending before the election. Based on these new remedies, DLCD filed motions in both of the cases to notify the courts that Measure 49 made them moot. In *Corey,* the motion sought to vacate the Court of Appeals decision as well. Given that Measure 49 extinguishes all claims and orders under Measure 37 and directs Measure 37 claimants to proceed instead under Measure 49, DLCD argued that any controversy regarding the correctness of a Measure 37 order, including questions as to the proper forum or the scope of the term "owner," would have no practical effect on the parties. The courts agreed, finding a clear intent in Measure 49 to extinguish and replace the benefits and procedures that Measure 37 granted to landowners, thus making both cases moot.

The plaintiffs in *Corey* argued that subsection 5(3) of Measure 49 entitled claimants to "'just compensation' *as provided in a waiver issued before Measure 49 became effective*," 344 Or. at 466, and that as soon as DLCD concluded that the land use regulations reduced the fair market value, the claimants had a vested right to waiver that could not be taken away without just compensation. The Supreme Court noted that a valid waiver requires a "common law vested right . . . to complete and continue the use described in the waiver." *Id.* (quoting Measure 49, Or. Laws 2007, ch. 424, § 5(3)). Refusing to weigh in on the vested right issue under Measure 49, the court limited its review to the Measure 37 challenge before it.

The *Corey* plaintiffs argued that ORS 14.175 made their case justiciable. That statute authorizes a challenge to the constitutionality of an act even though the act may no lon-

ger have a practical effect on a party if the act is nevertheless capable of repetition and likely to evade judicial review. The court rejected this argument, noting that the plaintiffs were free to pursue their claim pursuant to the procedures set out in Measure 49.

Finally, the court in *Corey* declined DLCD's request to vacate the Court of Appeals holding. That outcome, the court decided, is limited to decisions made under Measure 37 and does not apply to Measure 49. The court implicitly suggested that the *Corey* decision, even though not vacated, does *not* apply to all state agency decisions where a person qualifies for a benefit, thereby triggering a contested case proceeding to determine the extent of that benefit.

Carrie A. Richter

Corey v. Dep't of Land Conservation and Dev., 344 Or. 457, 184 P.3d 1109 (2008) and *Olson v. Dep't of Land Conservation and Dev.*, 220 Or. App. 77, 184 P.3d 1220 (2008)

■ *THE "FIXED GOAL-POST RULE" DOES NOT GIVE LANDOWNER A VESTED RIGHT UNDER MEASURE 37*

In *Department of Land Conservation and Development v. Jefferson County*, 220 Or. App. 518, 188 P.3d 313 (2008), the personal representative of property owner Burk's estate sought review of a Land Use Board of Appeals (LUBA) decision reversing the county's approval of a development permit pursuant to a Measure 37 waiver granted to Burk. Although Burk died while the application was pending before the county, the petitioner argued that ORS 215.427(3)(a), the "fixed goal-post" statute, created a vested right in the applicability of existing approval and denial criteria, including Measure 37 waivers. Thus, when Burk submitted his development application to the county, it "vested" the right to have the application decided under the criteria in place at that time. LUBA held that the limits to transferability contained in Measure 37 were inconsistent with the goal-post statute, which creates vested rights that are transferable. However, given the greater specificity in Measure 37 and that it was the later-enacted provision, the limits to transferability must control.

On appeal, the Department of Land Conservation and Development (DLCD) agreed that LUBA correctly reversed the county's decision but argued that Measure 37 and ORS 215.427(3)(a) do not conflict as LUBA concluded. Rather, DLCD argued that ORS 215.427(3)(a) applies to changes in the applicable law that occur after a development application is filed. Since the change relates to the facts, rather than the law, the fixed goal-post rule has no application. The court agreed, focusing on the language of ORS 215.427(3)(a), which provides that, "once an application has been completed in a timely fashion, state and local governments may not enact new legislation that alters the criteria by which the

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application may be approved or denied." 220 Or. App. at 523.

Instead, in this case the *facts* changed, causing the existing law to have a different effect. The court agreed that, since the personal representative was not the owner who "acquired the property," ORS 197.352(8), that person could not pursue development approval pursuant to Measure 37 waivers. The court found no authority in the language of the fixed goal-post rule or anywhere else to support an argument that ORS 215.427(3)(a) "vested" Burk's Measure 37 waivers.

Carrie A. Richter

Dep't of Land Conservation and Dev. v. Jefferson County, 220 Or. App. 518, 188 P.3d 313 (2008)

■ ONLY INVENTORIED GOAL 5 RESOURCES PROTECTED IN PAPA PROCESS

In *Johnson v. Jefferson County*, 221 Or. App. 156, 189 P.3d 30 (2008), the Court of Appeals held that the county need not apply Goal 5 protection to the groundwater that feeds the springs at the headwaters of the Metolius River because the groundwater resource was expressly excluded from the acknowledged Goal 5 inventory. *Id.* at 165.

Jefferson County adopted a number of changes to its comprehensive plan and zoning ordinance through the Post Acknowledgment Plan Amendment (PAPA) process in order to provide for the siting of destination resorts. Petitioners appealed, arguing, *inter alia*, that the county failed to go through the new Goal 5 process or conduct an environmental, social, economic, and energy (ESEE) impact analysis where the new use would conflict with a Goal 5 resource: an aquifer that feeds springs at the headwaters of the Metolius River.

While the County did *recognize* the aquifer as a potential Goal 5 resource, it had expressly excluded groundwater from its formal Goal 5 inventory because "the county [did] not have sufficient information about groundwater to perform an ESEE analysis or develop a county program to protect groundwater." *Id.* at 160 (quoting *Johnson v. Jefferson County*, 2008 WL 611615, *29 (Or. LUBA 2008)).

> The Oregon Administrative Rules (OAR) provide, in relevant part:
>
> Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource *only* if: . . .
>
> > (b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an *acknowledged resource list*.

OR. ADMIN. R. 660-023-0250(3) (2008) (emphasis added). Because the groundwater was specifically excluded from the county's Goal 5 program, it was not on an "acknowledged resource list." Accordingly, the Court of Appeals found that OAR 660-023-0250 was dispositive on the issue of whether this identified, but un-inventoried, groundwater resource was subject to Goal 5 review in the PAPA process. *Johnson*, 221 Or. App. at 163.

Relying on *Friends of the Columbia Gorge v. LCDC*, 85 Or. App. 249, 736 P.2d 575 (1987), petitioners argued that because the Metolius River and its headwaters are Goal 5 resources, the groundwater that feeds the springs at its headwaters must also be protected. 221 Or. App. at 162-63. However, the court distinguished *Friends of the Columbia Gorge* because the adequacy of the inventory there (identifying bird habitat) was raised in a challenge to LCDC's acknowledgment of the City of Hood River's comprehensive plan—not in a post-acknowledgment proceeding. Here, the county specifically considered and affirmatively *excluded* groundwater from its acknowledged Goal 5 inventory. Therefore, the court found the inventory could not implicitly include the very same groundwater that the plan explicitly excluded. *Id.*

Petitioners contended that the aquifer should be subject to Goal 5 in the PAPA review and urged reconsideration of the decision in *Urquhart v. Lane Council of Governments*, 80 Or. App. 176, 721 P.2d 870 (1986). In *Urquhart,* the court held that a county was not required to update its Goal 5 inventory when adopting PAPAs. *Id.* at 181-82. Petitioners here argued that, because periodic review is less frequent now than it was when *Urquhart* was decided, the Goal 5 inventory should be updated when adopting PAPAs. The Court of Appeals rejected this argument, finding that *Urquhart* had been codified in OAR 660-023-0250 and that that rule was dispositive in this case. *Id.* at 163.

Johnson vs. Jefferson County clarifies the need to include significant Goal 5 resources on a local government's "acknowledged resource list" before a decision maker will be required to apply Goal 5 in consideration of a PAPA. Accordingly, the groundwater that feeds the springs at the headwaters of the Metolius will not be afforded Goal 5 protection until it is formally included on the county's acknowledged Goal 5 inventory.

Peggy Hennessy

Johnson vs. Jefferson County, 221 Or. App. 156, 189 P.3d 30 (2008)

■ STATUTORY DEVELOPMENT AGREEMENTS ARE NOT EXCLUSIVE

In *Povey v. City of Mosier*, 220 Or. App. 552, 188 P.3d 321 (2008), property owners filed an action in circuit court for declaratory relief seeking to invalidate a development agreement between the prior property owner and the City of Mosier. The agreement allowed the prior owner to divide the property into parcels on the condition that when the

property is developed in the future, the then-owner would dedicate and construct a road to serve the parcels. Plaintiffs, the successor owners, wished to develop the property without dedicating the road and filed a declaratory judgment action arguing the prior agreement was void because it did not comply with the statutory requirements governing development agreements.

In 1993 the legislature adopted House Bill 3045, which established the provisions governing development agreements, and codified them at ORS 94.504 through 94.528. The statutes expressly provide that

> [a] city or county *may* enter into a development agreement as provided in ORS 94.504 to 94.528 with any person having a legal or equitable interest in real property for the development of that property.

ORS 94.504(1) (emphasis added). That statutory section further provides a list of items that must be included in the contents of the agreement. ORS 94.504(2). The property owners argued that, although entering into a development agreement is not mandatory, once the parties choose that vehicle it must include the items on that list.

The City argued that statutory development agreements are just one tool local governments can use. In the City's view, the agreement at issue in this case was not a statutory development agreement and was, therefore, not subject to the exclusive list of contents set out under the statute.

This is the first case by the Court of Appeals addressing the statutory provisions governing development agreements. The court found that both interpretations were plausible and that the statute was therefore ambiguous.

After reviewing the legislative history, the court agreed with the City. The summary of House Bill 3045 described development agreements as "optional and voluntary." *Povey*, 220 Or. App. at 556 (quoting the legislative history). The proponents of the bill "believed that statutory development agreements were necessary in order to reassure skittish city attorneys and developers." *Id*. at 556-57. Thus, the legislative history of the bill indicates that statutory development agreements were intended to create a "safe harbor" for government attorneys and developers who were concerned about a future council attempting to undo the agreement.

Although not directly cited or discussed, the Land Use Board of Appeals reached the same conclusion in *ZRZ Realty Company v. City of Portland*, 49 Or. LUBA 309 (2004). See also *Dorall v. Coos County*, 53 Or. LUBA 32 (2006). *Povey* makes clear what was decided in *ZRZ Realty*—statutory development agreements are not the exclusive avenue for entering into development agreements.

Christopher A. Gilmore

Povey v. City of Mosier, 220 Or. App. 552, 188 P.3d 321 (2008)

■ *TROUBLE IN PARADISE: THE ANCHOR TAVERN CONTROVERSY REACHES THE OREGON COURT OF APPEALS*

In *Vanspeybroeck v. Tillamook County*, 221 Or. App. 677, 191 P.3d 712 (2008), the Oregon Court of Appeals affirmed a decision by LUBA that upheld Tillamook County's approval of the Anchor Tavern's proposal to renovate and expand its building in Oceanside. The court also affirmed LUBA's decision to remand the proposed first-story tavern renovation for nonconforming use review.

The building that houses the Anchor Tavern (the Tavern) was moved to its present Oceanside location in 1940. The original two-story building had a tavern on the first floor and a dwelling unit on the second floor. In 1981, Tillamook County zoned the property as a Neighborhood Commercial Zoning District, which permits taverns and accessory dwelling units outright, while motels and hotels containing not more than 35 units are subject to conditional use review. Commercial and residential uses in the district must have off-street parking.

Because the Anchor Tavern does not have off-street parking, the tavern and residence have been nonconforming uses since 1981. In 2004, the Tavern sought to expand the second story into a 10-unit motel, which included a proposed third-story addition. The expansion plans also called for renovation of the first story and additional off-site parking to bring the Tavern into compliance with the zoning ordinance.

The Tavern's expansion proposal met resistance from Oceanside residents. This opposition eventually led to a compromise agreement between the Tavern and the planning commission in which the Tavern reduced its proposed motel development from ten to five units and agreed to withdraw the parking lot proposal. In return, the commission approved the Tavern's conditional use permit without requiring additional off-street parking. The commission approved the tavern renovation as necessary to comply with federal law, which requires access to people with disabilities. The tavern renovation was not subject to nonconforming use review.

Later in 2004, the Tavern obtained a building permit for the proposed motel units and first-floor renovation. The opponents of the expansion plans appealed the building permit to the planning commission. The commission upheld the permit, but found that nonconforming use review would be required for the second-story motel proposal. The opponents then appealed the planning commission's decision to the board of county commissioners. The board upheld the commission's decision, remanded the issue of nonconforming review, and directed the planning commission to determine whether minor or major nonconforming review would be necessary.

On remand, the planning commission decided that minor nonconforming use review was required under the

ordinance despite the opponents' demand for major nonconforming use review. The commission's decision allowed for an appeal to the board of county commissioners, but the opponents did not appeal.

The Tavern then applied for minor nonconforming use review of the residence. The commission reviewed and approved the second-floor residential use as a continuing nonconforming use. The opponents appealed to the board of county commissioners, which affirmed the commission's decision in May 2007. During the proceedings before commission and board, the opponents objected to the use of minor nonconforming use review and argued that the proposal should be subject to major nonconforming use review. The board of county commissioners required no further review of the proposed motel and tavern expansion, citing the earlier approval of the conditional use permit. The opponents then appealed to the Land Use Board of Appeals (LUBA).

On appeal, LUBA required the county to conduct a nonconforming use review of the proposed first-floor expansion but upheld all other aspects of the county's decision. The opponents appealed, making three assignments of error. First, they argued that LUBA erred in upholding the county's finding that the Tavern had not abandoned the residential use. Second, they challenged the process that the county adopted to approve the tavern expansion and proposed new motel units. Third, they argued that LUBA erred in affirming the county's findings of fact on the minor nonconforming use criteria.

On the first assignment of error, the opponents contended that the residential use had been abandoned because the nature of the occupancy changed over time from an owner-occupied residence to a rental tenancy and then back to an owner-occupied residence. LUBA had rejected that argument, deferring instead to the county's interpretation that allowed a change in the type of occupancy without breaking the continuity of the nonconforming use. The court found no error in LUBA's deference to the county and noted that the county's decision was consistent with the county's land use ordinance and state law. Specifically, the court pointed out that ORS 215.130(5) allows nonconforming uses to continue despite changes in ownership.

Next, the court moved to petitioners' second assignment of error, which asserted that the county's decision to apply minor nonconforming use review without holding a hearing and without providing notice that a decision would be made was flawed. LUBA found that petitioners had not preserved their challenge to the county's decision because the petitioners failed to exhaust their administrative remedies. LUBA based its determination on the fact that the county gave petitioners notice of the decision and allowed the petitioners to appeal. LUBA sided with the county's assertion that the nonconforming use criteria decision was final because it was not appealed, and the court of appeals agreed.

The court then moved to petitioners' final assignment of error, which asserted that LUBA erred by approving the county's findings regarding the minor nonconforming use review criteria. LUBA agreed that substantial evidence supported the county's finding that the expansion and changes in the second-floor residential use would not alter the character and intensity of the residential use. The court observed that the county made extensive findings on this issue. Moreover, the court explained that it would only reverse LUBA's decision where either no evidence supported LUBA's findings or where LUBA erred in applying the substantial evidence standard. Based on this limited scope of review, the court found that LUBA was correct in sustaining the county's findings.

Finally, the court addressed the Tavern's cross-petition challenging LUBA's decision to remand the Tavern's first-floor tavern renovation proposal for nonconforming use review. The court opined that the Tavern's final site plan differed significantly from the site plan that the county approved under its conditional use permit decision, and that the 2004 conditional use review decision only applied to the second and third floor construction. Consequently, the court affirmed LUBA's decision. 221 Or. App. at 694.

The court's decision follows at least four years of controversy surrounding the Anchor Tavern's planned expansion, a controversy that pitted neighbor against neighbor and featured a sustained boycott of the Tavern by many Oceanside residents. The controversy eventually earned mention in *The Oregonian* and other media outlets and culminated in a retaliatory proposal by the Tavern to provide adult entertainment in the form of all-nude exotic dancers, much to the chagrin of neighborhood activists who seek to preserve the historic and overwhelmingly non-commercial character of Oceanside.

Glenn Fullilove

Vanspeybroeck v. Tillamook County, 221 Or. App. 677, 191 P.3d 712 (2008)

Appellate Cases – Ninth Circuit

■ NINTH CIRCUIT CERTIFIES TAKINGS QUESTIONS TO OREGON SUPREME COURT

West Linn Corporate Park, LLC v. City of West Linn, 534 F.3d 1091 (9th Cir. 2008), involved appeals from the determination of United States Magistrate Donald C. Ashmanskas that a taking of plaintiff developer's property did not occur as the result of certain actions by defendant city, that other actions did constitute inverse condemnation, and that defendant violated plaintiff's First Amendment rights by retaliating against plaintiff for its speech. Defendant had removed the case to federal court following a state court action over a maintenance bond requirement. Plaintiff also alleged, *inter alia*, inverse condemnation and retaliation claims.

The Ninth Circuit decided that the inverse condemnation claim was a dominant claim and must be reached first, certifying three questions to the Oregon Supreme Court:

1. Whether under Oregon Law an inverse condemnation plaintiff alleging a physical taking or unconstitutional exaction must first exhaust local remedies before resorting to the courts;
2. Whether construction of off-site improvements imposed as a condition of development approval may constitute an exaction or physical taking; and
3. Whether a street vacation under ORS 271.110 is *ultra vires* if it fails to comply with the landowner consent provisions of Oregon law.

The property at issue is part of the previously platted Willamette Tracts subdivision and was approved for a corporate park with conditions in March, 1998. Later that year, West Linn Corporate Park (WLCP) entered into a public improvement guarantee with the city to assure the completion of certain improvements. Having paid systems development charges (SDCs) for some improvements that exceeded the cost of those improvements, WLCP petitioned the city for reimbursement. Instead of refunding the cash, however, the city awarded WLCP $384,450 in SDC certificates. The court noted the inconsistency of the city's actions, as it had refunded cash to a different developer on another occasion. Furthermore, the certificates could not be redeemed for cash, were only valid for 10 years, and could only be used for half the cost of future SDCs. While the certificates could be sold or transferred, there was a small market for them and WLCP ultimately was only able to sell them for twenty-five percent of their value.

WLCP did not complete its improvements on time but had prospective tenants ready to occupy the park, so it agreed to release certain public improvement claims in return for a temporary occupancy permit. The developer then claimed the city breached that agreement by requiring additional public improvements and refusing to release its transportation improvement performance bond.

WLCP filed suit in state court. Subsequently the matter was removed to federal court, which dismissed certain of WLCP's claims and held a 9-day bench trial on the remaining claims, as well as the city's five counterclaims, in 2005. The magistrate denied the city's counterclaims as well as some of WLCP's claims but granted relief to plaintiff on two inverse condemnation claims and one for unconstitutional retaliation. However, the magistrate also found two other inverse condemnation claims unripe as WLCP had not taken advantage of available relief from the city. Both parties appealed.

Under ORS 28.200, certification is permitted if, *inter alia*, the question of law is unresolved by Oregon case law. Under *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), a takings claim must be ripe—plaintiff must avail itself of all available administrative remedies and use state compensation procedures before resorting to the Fifth Amendment and the federal courts. *Id.* at 194-95. Ripeness is jurisdictional. However, when a physical taking is alleged, the federal magistrate decided, use of local administrative remedies is not required under Oregon case law. *West Linn Corporate Park*, 534 F.3d at 1101 (citing *Nelson v. City of Lake Oswego*, 126 Or. App. 416, 422, 869 P.2d 350 (1994)).

The first question the Ninth Circuit certified to the Oregon Supreme Court concerns whether the filing of an inverse condemnation complaint in this case by itself fulfils ripeness requirements. The Oregon Supreme Court has not addressed this issue and there are two cases, one decided by LUBA (*Reeves v. City of Tualatin,* 31 Or. LUBA 11 (1996)) and the other decided by the Oregon Court of Appeals (*Nelson,* 126 Or. App. 416), that reach different conclusions. In this case, WLCP did not exhaust its administrative remedies and the unresolved question is whether it was required to do so.

Similarly, the Oregon Supreme Court has not weighed in on the question of whether off-site improvements may be the basis of a takings claim. The Oregon Court of Appeals' decisions go both ways. *Compare Clark v. City of Albany,* 137 Or. App. 293, 904 P.2d 185 (1995), *with Dudek v. Umatilla County,* 187 Or. App. 504, 69 P.3d 751 (2003). This question arises because the approval condition at issue does not involve the physical transfer of property as part of a development application. If it is an exaction and does not require exhaustion, it may be examined under the analysis outlined in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). If not, it is unclear whether these requirements involve inverse condemnation.

Finally, the court noted that a street vacation in this case was granted in error, as the landowner consent provisions of ORS 271.080 were not met. The city contended that this

failure on the part of WLCP voided the granting of the vacation. The issue was whether the vacation was *ultra vires* and void so that plaintiff did not acquire the property interest in adjacent land and the takings conclusion of the magistrate was in error. If the vacation was in fact valid, the judgment on this issue must be affirmed.

The court thus certified the above three questions to the Oregon Supreme Court and stayed its own proceedings pending the response of the Oregon Supreme Court.

This case emphasizes the position of most federal courts that takings claims are generally governed by state law, which must be satisfied before the federal questions are reached. It will be interesting to see how this case, now back in state court, plays out.

Edward J. Sullivan

West Linn Corporate Park, LLC v. City of West Linn, 534 F.3d 1091 (9th Cir. 2008)

■ *NINTH CIRCUIT FINDS ELEVENTH AMENDMENT IMMUNITY IN TAKINGS SUITE BROUGHT IN FEDERAL COURT*

Seven Up Pete Venture v. Schweitzer, 523 F.3d 948 (9th Cir. 2008), involved frustration of plaintiffs' mining ambitions by the passage of an initiative banning open-pit mining in Montana. Plaintiffs brought an inverse condemnation action in state and federal courts. After the state court proceedings resulted in dismissal, plaintiffs renewed their reserved federal claims in a federal court action, which had been stayed pending the state case. The federal district court dismissed the federal case on Eleventh Amendment grounds and, alternatively, on claim preclusion grounds. Plaintiffs appealed.

Plaintiffs acquired mineral leases from the state in 1991 for the purpose of mining gold and silver using the cyanide heap leaching process. They discussed proposed mining with state officials for many years thereafter and applied for but never obtained a mining permit. In 1998, Montana voters passed initiative I-137, which prohibited mining for gold and silver using the cyanide heap leaching process. Following passage of I-137, state officials notified plaintiffs that they were discontinuing review of their mining permit application and later allowed the mineral leases to terminate. Plaintiffs claimed the only economically viable use of the site was for mining.

In 2000, plaintiffs filed inverse condemnation actions in both federal and state court, naming the Governor of Montana and the director of the state's Department of Environmental Quality as defendants. When plaintiffs filed their state court proceeding, they "reserved" their federal claims for federal court proceedings. The federal district court initially dismissed plaintiffs' claims as not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The state trial court granted summary judgment for the state on plaintiffs' taking claims and the Montana Supreme Court affirmed, ruling that the "'opportunity' to seek a permit . . . did not constitute a property right" to which the Fifth and Fourteenth Amendments applied. *Seven Up Pete Venture*, 523 F.3d at 952. The United States Supreme Court later denied certiorari.

On motion by the plaintiffs, the federal district court reopened the case and dismissed plaintiffs' taking claim on the ground that the Eleventh Amendment bars suit against state officials in federal court and, alternatively, on the ground that the federal court must grant preclusive effect to the Montana Supreme Court's resolution of plaintiffs' taking claims. On appeal, the Ninth Court affirmed the district court on the basis of the Eleventh Amendment. *Id.* at 956.

The court said the Eleventh Amendment prohibits damage suits against states in federal courts unless the state consents and usually applies to state officials acting in their official capacities. The court cited *Broughton Lumber Co. v. Columbia River Gorge Commission*, 975 F.2d 616, 620 (9th Cir. 1992), where a takings claim was dismissed on Eleventh Amendment grounds in a case which involved an alleged regulatory taking. The court distinguished plaintiff's argument in this case as to whether the "self-executing nature" of the Takings Clause defeated Eleventh Amendment immunity, an issue not reached in *Broughton*. *Id.* at 953.

The court rejected the contention even though the United States Supreme Court has not directly ruled on the issue. That court has said in other areas that state courts could determine federal claims against state governments. All other circuits that have considered the issue have barred inverse condemnation claims against states in federal courts on Eleventh Amendment grounds. The court concluded that the Eleventh Amendment bars suits in federal court against states or state officials acting in their official capacity unless the state has consented.

The court finally considered *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), which allows prospective injunctive relief in federal courts against state officials for constitutional violations. The court said the *Ex parte Young* did not apply because the thrust of the relief was for damages for past action alleged to be unconstitutional. The Eleventh Amendment, the court said, cannot so easily be circumvented by terming a damages claim as "prospective relief." The dismissal of plaintiffs' claims by the trial court was thus affirmed.

This case applies traditional Eleventh Amendment principles to takings claims brought under inverse condemnation proceedings in federal court, leaving them to be decided by state courts as a characteristic of our federal system.

Edward J. Sullivan

Seven Up Pete Venture v. Schweitzer, 523 F.3d 948 (9th Cir. 2008)

TWO YEARS AND YOU'RE OUT UNDER FAIR HOUSING ACT

In consolidated cases plaintiffs, a disabled person (Garcia) and a disabled advocacy group, sued defendants, an apartment builder, architect, managers, and developers, alleging violations of the Fair Housing Act's (FHA) accessibility requirements for multi-family structures. *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008). The United States District Court for the District of Idaho granted summary judgment in favor of defendants. Plaintiffs appealed.

In one case the builder had constructed apartments in 1993 and sold the last unit in 1994. In 2001 the disabled person, Garcia, rented an apartment which did not comply with the design and construction requirements of the FHA. By 2003 Garcia had sued the builder, architect, current owners, and management. In the other case, the advocacy group found discriminatory conditions at an apartment building more than two years after it was constructed by the developers. The district court determined that the claims were not filed within the applicable statute of limitations under 42 U.S.C. §§ 3602(i)(1) and 3613(a)(1)(A) (2000).

The FHA prohibits the design and construction of multi-family dwellings that do not have certain accessibility features. *Id.* § 3604(f)(3)(C). The statute provides three enforcement mechanisms: (1) An administrative complaint may be initiated with the federal Department of Housing and Urban Development (HUD) and remedies include actual damages to the aggrieved person, civil penalties, and injunctive relief. Any person who "claims to have been injured by a discriminatory housing practice," *id.* § 3602(i)(1), must file the complaint "not later than one year after an alleged discriminatory housing practice has occurred or terminated," i*d.* § 3610(a)(1)(A)(i). HUD may also file a complaint on its own. (2) The Attorney General may commence an action alleging a pattern or practice of resistance to the FHA. There is no statute of limitations for such actions. (3) A private civil action may be brought within two years after the occurrence.

In the private civil actions at issue here, the Ninth Circuit found that the statute of limitations was triggered at the conclusion of the design-and-construction phase, which occurred on the date the last certificate of occupancy was issued and well before either plaintiff brought suit. *Garcia*, 526 F.3d at 461. "[T]he statute of limitations for private civil actions," the court wrote, "begins to run when the discriminatory act occurs—not when it's encountered or discovered." *Id.* at 465.

Plaintiffs advanced three theories under which their causes of action would not be time-barred. First, they argued that Congress, in codifying the U.S. Supreme Court's "continuing violation doctrine," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), intended that a design-and-construction violation not "terminate" until the design defect is remedied. The Ninth Circuit rejected this argument: "Here, the practice is 'a failure to design and construct,' which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Garcia*, 526 F.3d at 462. The court's reasoning was based on practical considerations:

> Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct. Here, this occurred long before plaintiffs brought suit. Were we to now hold the contrary, the FHA's statute of limitations would provide little finality for developers, who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers. . . . This is not what Congress provided in erecting a two-year statute of limitations for FHA design-and-construction claims. If Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so explicitly.

Id. at 463.

Plaintiffs' second argument was the "encounter" theory, first advanced by Robert Schwemm in an article about accessibility barriers. *See* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 849-55 (2006). The concept is that the FHA has a remedial structure which sounds in tort and a cause of action cannot arise until a protected class encounters a tortious condition. The court, however, rejected the encounter theory because an encounter-based injury is only useful in establishing the standing of the claimant, not in changing the tolling date. *Id.* at 464. The court relied on the express two-year limitation on private rights of action set forth in the FHA to the express detriment of late-coming plaintiffs.

The court also noted that its previous recognition of "tester" standing under the FHA, when combined with plaintiffs' encounter theory, could result in a series of repeat "exposures" to a violation and constantly recycle the injury so that the statute of limitations on private rights of action would become meaningless. *Id.* at 465 (discussing *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1102 (9th Cir. 2004)). (A "tester" is "someone having no interest in actually buying or renting that poses as buyer or renter to collect evidence of unlawful housing practices." *Id.* at 470 n.1.)

Plaintiffs' third argument was based on the "discovery rule," under which the injury only begins to occur when a party discovers the design and construction defect, and the equitable tolling doctrine. The court rejected the discovery

rule aspect just as it did the encounter theory: "Holding that each individual plaintiff has a claim until two years after he discovers the failure to design and construct would contradict the text of the FHA . . . ." *Id.* at 465. The attempt to apply the equitable tolling doctrine was also turned back, although the court distinguished it from the discovery rule:

> As Judge Posner has explained, "[e]quitable tolling is frequently confused . . . with the discovery rule . . . . It differs from the [discovery rule] in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant.

Id.

Plaintiffs' lawsuits, the court held, could not survive an application of the FHA's statute of limitations provisions, and both cases had been properly dismissed by the lower court. *Id.* at 466. In a strongly worded dissent, Judge Fisher argued the statute of limitations period for a design and construction claim begins to run at the time a disabled person attempts to buy or rent a defective housing unit, moves in, or tests a unit, whichever occurs first. *Id.* at 467.

Practice Tip: In the absence of a certificate of occupancy the final inspection or a HUD "Permission to Occupy" for use in FHA insured mortgages or HUD program buildings will usually suffice to establish the date for tolling the statute of limitations.

Robert S. Simon

Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008)

The RELU Digest is soliciting submissions of articles for the December 2008 issue. If you know of a case or substantive issue that would be of interest to the Digest's readership, please send a 2-4 page (double-spaced) summary to Eric Shaffner at eric.shaffner@erslah.com before November 15.

Appellate Cases – Washington

■ SUBDIVISION CANNOT INCLUDE ADJACENT LOTS TO MEET DENSITY STANDARD

In *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wash. App. 118, 186 P.3d 357 (2008), the Washington Court of Appeals concluded that a developer cannot include adjacent subdivision lots to meet density requirements for a new subdivision application.

Milestone Homes, a real estate developer, filed a preliminary plat application with the City of Bonney Lake for a project known as Orchard Grove II. The developer proposed a 25-lot subdivision on 5.65 acres. The property consisted of 4.03 acres owned by Milestone, to be divided into 20 new lots, as well as five previously developed lots owned by third parties within a neighboring subdivision known as Enchanted Estates II. The property was zoned low-density residential (R-1), which permits 4-5 dwelling units per net acre of land. The plat had a density of 4.95 lots per acre when the lots from Enchanted Estates were included. Without them, the density was 5.8 lots per acre.

Milestone obtained the consent of five Enchanted Estates lot owners to the inclusion of their lots in the Orchard Grove II plat. Under the proposal, no change would be made to the existing parcel lines of those five lots, and the owners would not take part in the Orchard Grove II homeowner's association. Milestone also agreed to purchase an undeveloped tract of land in the Enchanted Estates plat and to grant one of the five Enchanted Estates lot owners an ownership interest in the plat.

The city's hearings examiner recommended the city council approve the application, finding (1) that the Low Density Residential designation encourages residential development to take place in an orderly and cost-efficient manner to best utilize available land and reduce sprawl, and (2) that the applicant's unique proposal to increase density within an Urban Growth Area by adding five lots and an open space tract from an adjoining subdivision satisfied that goal.

The city council denied the application. One of the councilors questioned whether there was "fancy footwork going on." 145 Wash. App. at 122. Another councilor noted that another developer in the future could also approach the owners of the adjacent lots to use them to increase its density calculations, and "[a] person living in the right place could have a pretty lucrative business selling the notion [that] the amount [of] property that he sits on is includable in several different plats." *Id.* at 122-23.

The city council relied on the code's definition of "subdivision" as "a division of land into 10 or more lots or other divisions of land for the purpose of development or of trans-

fer," BONNEY LAKE, WA., MUN. CODE § 17.08.020(T) (2008), and the fact that Milestone was attempting to circumvent the R-1 density requirements by adding lots that would be neither developed nor transferred.

On appeal, Milestone argued that the code does not require an applicant for a land use permit to have a possessory interest in the property at issue, as it states only that "applications shall be signed by the property owner or an authorized representative." *Id.* § 14.90.010. Consequently, according to the developer, the code afforded no basis for the city council's objection to Milestone's lack of possessory interest in the five Enchanted Estates lots. The Court of Appeals was not convinced. 145 Wash. App. at 130.

Jeff Litwak

Milestone Homes, Inc. v. City of Bonney Lake, 145 Wash. App. 118, 186 P.3d 357 (2008)

■ *WASHINGTON APPELLATE COURT FINDS CLEARING RESTRICTIONS SUBJECT TO "TAX, FEE, OR CHARGE" PROHIBITIONS*

In *Citizens' Alliance for Property Rights v. Sims*, 187 P.3d 786 (Wash. App. 2008), the Washington Court of Appeals interpreted the exaction limitations in RCW 82.02.020. The challenged ordinance, codified as KCC 16.82.150, was adopted by King County to satisfy the Growth Management Act (GMA) mandate that local jurisdictions protect critical areas by regulation. KCC 16.82.150 limited clearing on property zoned as rural area residential to a maximum of fifty percent of the lot area, depending on the size of the parcel. The appellate court reversed the trial court's judgment in favor of King County, holding that the county restriction on land clearance qualified as a "tax, fee, or charge" on the development of land. 187 P.3d at 797.

The plaintiffs had argued that the land clearance restriction violated RCW 82.02.020, which provides that "no county . . . shall impose any tax, fee, or charge, either direct or indirect, on . . . the development, subdivision, classification, or reclassification of land." Among other things, the statute exempts GMA-based impact fees for "system improvements." The statute "does not preclude dedication of land or easements within the proposed development or plat which the county . . . can demonstrate are reasonably necessary as a direct result of the proposed development." RCW 82.02.020.

In determining whether the restriction on land clearance was a "tax, fee, or charge," the court relied heavily on *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 49 P.3d 867 (2002), and *Trimen Development Company v. King County*, 124 Wash.2d 261, 877 P.2d 187 (1994), which involved development restrictions similar to those at issue here. In both cases, the Washington Supreme Court held the restrictions were a "tax, fee, or charge" under RCW 82.02.020. Unlike the statutes in *Isla Verde* and *Trimen*, however, KCC 16.82.150 was not a revenue-generating regulation: the ordinance did not allow for payment of a fee in lieu of compliance. Instead, the ordinance offered to the applicants an opportunity to modify clearing restrictions based on site-specific stewardship or management plans. Despite the differences between the *Isla Verde* and *Trimen* statutes and KCC 16.82.150, and without explanation, the appellate court here determined that the provision imposed "an in kind indirect 'tax, fee, or charge' on development . . . ." *Sims*, 187 P.3d at 792.

The court expressly rejected several notable arguments. First the county contended that the plaintiffs' claim was not ripe because the plaintiff failed to challenge the scientific basis for the ordinance before the Growth Management Hearings Board. After the plaintiff indicated it did not intend to challenge the science underlying the county's ordinance, the trial court dismissed the ripeness argument and the Washington Court of Appeals affirmed. Second, King County argued that the regulation was mandated by the GMA and therefore could not be preempted by the statute. Here the court recognized that had the state itself mandated the regulations at issue the plaintiffs would have no relief under RCW 82.02.020. However, the court ruled that the particular form and substance of KCC 16.82.150 was not itself required by the GMA. *Id.* at 793. Third, the county argued that the prohibition in RCW 82.02.020 was inapplicable because another provision of the statute authorized the condition. Relying on the *Isla Verde* decision, the court disagreed with the county's reading of the statute.

The appellate court next considered whether KCC 16.82.150 met the nexus and proportionality requirements of RCW 82.02.020 (which, although only expressly applicable to dedications, were applied here). Based on *Isla Verde* and *Trimen*, the court concluded that all such "tax[es], fee[s], or charge[s]" must be "reasonably necessary as a direct result of *the proposed* development," 187 P.3d at 794; a local government entity cannot uniformly apply conditions against land development without regard for the direct impacts of a *proposed* development. The court rejected the county's argument that the ordinance met the proportionality requirement by varying the applicable restrictions based on the lot size of the development or by allowing modification based on stewardship or management plans. The court reasoned that, while the ordinance provided for some site-specific consideration related to lot size, it essentially imposed a uniform requirement unrelated to the nature and extent of the specific development under consideration. Thus, the appellate court concluded that the land clearance restrictions mandated by KCC 16.82.150 were not proportional to the proposed developments. *Id.* at 796.

In holding that KCC 16.82.150 violated RCW 82.02.020, the court's logic may have gone too far. It is easy to see that a multitude of previously valid land use regulations (*e.g.*,

zoning ordinances, planning regulations, floor area ratio regulations, building codes, etc.) might now be subject to the prohibition in RCW 82.02.02 as a "tax, fee, or charge."

Matthew Schoenberger

Citizens' Alliance for Property Rights v. Sims, 187 P.3d 786 (Wash. App. 2008)

Cases From Other Jurisdictions

CALIFORNIA APPELLATE COURT LIMITS APPLICATION OF VESTED RIGHTS DOCTRINE

Charles A. Pratt Construction Co., Inc. v. California Coastal Commission, 162 Cal. App. 4th 1068 (2008), involved the nature and extent of California's statutory vested rights law which allows such rights to "vest" when a tentative land division map is filed. Plaintiff developer (Pratt) requested administrative mandamus and takings damages from the California Coastal Commission (Commission) for denial of its development application. The trial court denied the first claim and dismissed the second as unripe.

Pratt's tentative map was conditionally approved in 1973, dividing 106 acres into 149 residential lots on 187 parcels. San Luis Obispo County gave Pratt extensions to meet the conditions. The Commission's predecessor body later recognized a vested right to meet off-site improvement conditions but did not recognize the land division itself. In 1985, Pratt revised its map to consist of 25 acres, to be divided into 40 lots, and a single 81-acre parcel that was not proposed for development. The county and the Commission approved the application. In 1990, Pratt applied to develop the 81-acre parcel. The application was approved by the county but denied by the Commission.

Pratt claimed the county's approval vested its rights subject only to the conditions of approval and laws in existence at that time and contended that the Commission's denial was based on post-vesting policy (a point the Commission conceded).

Pratt next contended that the Commission's jurisdiction was limited to coastal access issues which Pratt claimed were not at issue in its development application. The court, however, found that the Commission had jurisdiction over the matter. Pratt had relied on California Government Code section 66498.1(b), which provides that, following approval of a tentative map, an applicant has a vested right to proceed in "substantial compliance" with local policies and regulations. However, another subsection of that same statute, (6)(b), says that the vesting prohibition does not remove the requirement of compliance with state and federal laws, regulations, and policies. Pratt argued that the local coastal plan had been approved by the county but the court responded that, by statute, it was the Commission that had ultimate responsibility to adopt and implement coastal policy. The court determined that the Commission's action was not subject to statutory vesting laws for tentative maps if the proposed permit were otherwise inconsistent with state policy, whenever adopted. 162 Cal. App. 4th at 1076.

The court then easily upheld the Commission's actions against an "arbitrary and capricious" claim by finding that the action was supported by substantial evidence. *Id.* at 1080. The Commission had determined that a large portion of the subject site was in an Environmentally Sensitive Habitat Area (ESHA). The court also pointed out that the site, which lay outside the urban services line, would require adequate water and sewer facilities. For the Commission to have approved the application would have contravened an existing policy giving priority to urbanized lands inside that line. There were other grounds for the denial, any of which, according to the court, were adequately supported by the record. *Id.* at 1080.

Pratt also contended that, if the denial were valid, there was no use to which the site could have been placed and that its claim was therefore "ripe" for adjudication. However, the court stated that unless a takings claim was "*per se*" (i.e., involving physical invasion of the property or denial of all economic value), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), requires a balancing of three particular factors. In order for a case to be "ripe," a final decision on the uses allowed must be made, all administrative means of relief must be exercised, and the case must be brought in state court. *Id.* at 1080-81 (citing, *inter alia*, *Penn Central* and *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)). Even if 80% or more of the site were undevelopable as an ESHA, the remaining portions were available for development; no *per se* taking had occurred. Pratt must pursue alternative lot configurations and get a final determination from the Commission as to what may be allowable.

Moreover, contrary to Pratt's contention that the Commission refused to find that there was sufficient water for *any* development, the water supply was assessed only for a development with the density proposed. The court concluded:

> Pratt is not entitled to whatever project it desires. Pratt has yet to submit proposals that contemplate a reduction in the size, scope, configuration or density of the project. . . . Pratt claims it has been trying to develop its parcel for 30 years. The claim is demonstrably untrue. This is the only opportunity the Commission has been given to review a development proposal for this parcel. What development plan, if any, the Commission will approve has yet to be determined.

Id. at 1082.

Unlike the nineteen site plans and five denials found to be evidence of a taking in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), there was only one application and one denial in this case. It was not shown that the defendant would not allow any development or that it was futile to present more plans. The Commission's decision was therefore upheld.

It is always difficult to get a remand of a permit denial. However, what is most important about this case is the statutory language on vesting. Oregon cities have no such language, so the only relevant statutes apply to county land uses under ORS 215.130(5)-(9). Although vesting may be limited to preclude use of newly adopted plans or ordinances, it is clear that the legislature can require the implementation of new regulations and policies notwithstanding the fact that those plans or policies were adopted following approval of a discretionary permit but before that permit is acted upon.

Edward J. Sullivan

Charles A. Pratt Constr. Co., Inc. v. Cal. Coastal Comm'n, 162 Cal. App. 4th 1068 (2008)

■ *SIXTH CIRCUIT APPLIES* HAMILTON BANK *RIPENESS ANALYSIS TO FIRST AMENDMENT CLAIM*

Insomnia, Inc. v. City of Memphis, 278 Fed. Appx. 609 (6th Cir. 2008), involved a proposed land division to facilitate construction of a restaurant, nightclub, and billboard. The city land use control board denied the application and required the applicant to resubmit its application for development of the site as a planned development to control better the allowed land uses on the property. On appeal, the city council upheld the review board's decision. Plaintiffs Insomnia, Inc. and two individuals, Cooper and Fergis, went to federal court seeking an injunction, declaratory relief, and damages. The plaintiffs alleged the city denied their application because of Cooper's association with the adult business industry and out of fear the property would be used for an adult business, in violation of the First and Fourteenth Amendments to the federal Constitution. The city moved to dismiss for failure to state a cause of action and the trial court agreed. Insomnia appealed.

The Sixth Circuit said that the dismissal would be upheld if it were clear that no relief could be granted under any set of facts consistent with the allegations in the pleadings. Ultimately, the court found that the sole issue was whether the claim was ripe. The trial court found the claim was not ripe because the city's denial of their single development application was not the final decision as to whether Insomnia could develop its property. Insomnia claimed the seminal ripeness case, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), does not apply to First Amendment claims, thus obviating the need for a final city decision on the permissible use of their property. The city argued that there was no final decision and thus no subject matter jurisdiction.

The Sixth Circuit said ripeness is one of the "principles of justiciability" predicated on the "case or controversy" portion of Article III of the federal Constitution, as well as "prudential reasons for refusing to exercise jurisdiction" to prevent courts from entangling themselves in abstract disagreements. *Insomnia*, 278 Fed. Appx. at 613. The court cited three general factors used in determining ripeness:

1) The likelihood that the harm alleged by the plaintiffs would ever come to pass;

2) whether the record is "sufficiently developed to provide a fair adjudication on the merits", *id.* (quoting *Warshak v. United States*, 490 F.3d 455, 467 (6th Cir. 2007)); and

3) the hardship to the parties if relief were denied.

The Sixth Circuit also explained that *Williamson County* requires a final local decision and use of available state compensation remedies before a Fifth Amendment takings claim may be brought in federal court. The court noted that this doctrine has been extended in some of the circuits to equal protection and other constitutional claims.

The court concluded that Insomnia had not suffered an immediate injury as a result of the denial of the land division and suggested that a revised development plan could be submitted so as to moot the case. *Id.* at 615. If not approved, the denial would outline Insomnia's First Amendment claims of retaliation. Additionally, the court found that the development of a full record and respect for the principles of federalism in a traditional area of local government activity all militated in favor of a finding that the claim was not ripe.

The deferral of a resolution of the First Amendment claim by use of ripeness is somewhat disturbing. One wonders, had the case involved political or religious speech, if it would have been deferred to a later date, with the attendant cost and time involved.

Edward J. Sullivan

Insomnia, Inc. v. City of Memphis, 278 Fed. Appx. 609 (6th Cir. 2008)

■ TRANSPORTATION IMPACTS AND PERMIT DENIALS

In *Williams v. City of Grants Pass*, LUBA No. 2007-210, ___ Or. LUBA ___ (Aug. 22, 2008), LUBA considered the extent of an applicant's obligation to address the transportation impacts of a proposed development that will worsen the performance of an already substandard intersection. Petitioners in *Williams* applied for site plan review to build two industrial buildings on a vacant parcel near State Highway 199 in Grants Pass. The intersection of Mill Street and M Street provides the closest connection to the highway. Mill Street is controlled by a stop sign at the intersection. M Street is not signalized at the intersection and does not have sufficient traffic levels to warrant a signal according to the Oregon Department of Transportation (ODOT).

Petitioners' traffic impact analysis showed that the intersection functions at a level of service (LOS) D, but that the left turn movement from Mill Street to M Street falls to LOS E during the P.M. peak hour. LOS D is the minimum required by the city's transportation plan. The proposed industrial buildings would add eight trips to the left turn movement during the P.M. peak hour. City planning staff policy is to deny development that affects an intersection that functions below LOS D unless the applicant improves the intersection to LOS D. As a result, the planning director denied petitioners' application, as did both the city's urban area planning commission and the city council on appeal. The denial was based on findings that the development would worsen the substandard left turn movement and that petitioner did not propose any mitigation to bring this failing movement to LOS D.

At LUBA, petitioners challenged the city's application of its standard, arguing that it should require a denial only if proposed development will cause a decrease in the intersection's level of service. Since the intersection generally functions at LOS D, with the exception of the left turn movement that is already at LOS E, and the proposed industrial buildings will not result in a change, petitioners argued the city should have approved its application. While acknowledging this is a plausible interpretation of the city's standard, LUBA nevertheless held that the petitioners failed to show the city's interpretation is erroneous.

Interestingly, LUBA went on to address an unchallenged aspect of the city's decision: the city's position that an applicant must restore an already failing intersection to LOS D in order to satisfy the site plan review criteria and the city's transportation standard. In this case, it did not appear there was any improvement other than signalization that the petitioners could provide to the Mill Street/M Street intersection and signalization was not possible because ODOT had concluded it was not justified by the existing and proposed traffic levels. Nevertheless, LUBA questioned "the correctness of the city's apparent view that compliance with the city's plan and code necessarily requires an applicant to restore a failing intersection to the LOS D standard, in circumstances where the proposed development plays only a part in the failure of that intersection." Slip op. at 8. As LUBA pointed out, approving the proposed development on the condition that the applicant build off-site improvements to restore the intersection to LOS D would likely run afoul of the Fifth Amendment's taking clause and the rough proportionality requirement articulated in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). In LUBA's view, "a more plausible interpretation of the applicable plan and land use regulations, and one more consistent with the city's constitutional obligations, is to require the applicant to mitigate the impact of *its* proposed development on the affected intersection, even if that mitigation does not fully restore it to LOS D." Slip op. at 8. Since the petitioners did not specifically challenge the city's policy to deny an application under the circumstances presented here, LUBA affirmed the city's decision.

Kathryn S. Beaumont

Williams v. City of Grants Pass, LUBA No. 2007-210, ___ Or. LUBA ___ (Aug. 22, 2008)

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