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Highlights

Appellate Cases -- Land Use

■ *LOCAL GOVERNMENT ADVICE NO SUBSTITUTE FOR A FINAL LAND USE DECISION*

In *Loosli v. City of Salem*, 345 Or. 303, 193 P.3d 623 (2008), the Oregon Supreme Court made clear that reliance on land use advice from a local government is risky unless you have a land use decision.

The Looslis wanted to open a used car dealership in Salem and leased land to do so. In order to start their business, they needed a "vehicle dealer certificate" from the DMV. In order to get that certificate, the Looslis needed to obtain a certification from the City of Salem that the proposed business complied with local land use ordinances. Mrs. Loosli brought the form to the city, paid the required fee, and an associate city planner signed the certification. The Looslis continued to put time and money into opening the dealership at the leased location. However, the city later notified the Looslis that an overlay zone applied to their leased property and prohibited the sale of cars in that zone. The Looslis moved the business and sued the city for negligence, seeking to recover the money lost in relying on the city's certification. The city moved for summary judgment, arguing that even if the planner was negligent, the city could not be held liable unless it owed the Looslis some duty above and beyond the common law duty to exercise reasonable care. The circuit court agreed and dismissed the case and a divided Court of Appeals affirmed. *Loosli v. City of Salem*, 215 Or. App. 502, 170 P.3d 1084 (2007).

The Looslis appealed to the Supreme Court, which also affirmed. There, the Looslis argued that their relationship with the city imposed a duty on the city to protect their economic interests. The court analyzed the statute requiring the local government certification and concluded that it was not intended to protect an applicant's interest but rather to guide the DMV. 345 Or. at 312. The court looked to Section 552 of the Restatement (Second) of Torts and found that, because the city did not sign the certification "for the guidance of [plaintiffs] in their business transactions," 345 Or. at 312, it did not fit within Section 552. The court acknowledged the Looslis' argument that there were other sources of the city's duty to the plaintiffs, but it indicated that the only relationship identified by the Looslis arose out of the statute and, because the duty to provide information was not intended to benefit them, there was no city liability.

In 2006, the Court of Appeals reached a similar conclusion in *Wild Rose Ranch Enterprises v. Benton County*, 210 Or. App. 166, 149 P.3d 1281 (2006). The lesson to be learned is that one should be very careful about relying on the representations of local governments regarding what is allowed by land use regulations. Most local governments are overworked and understaffed and can make mistakes. Before expending significant amounts of money on development, a developer should ideally get a final land use decision, or at least competent professional advice.

William Kabeiseman

Loosli v. City of Salem, 345 Or. 303, 193 P.3d 623 (2008)

Appellate Cases – Landlord-Tenant

■ SAILBOATS CAN BE FLOATING HOMES UNDER RESIDENTIAL LANDLORD AND TENANT ACT

In *Ramsum v. Woldridge*, 222 Or. App. 109, 192 P.3d 851 (2008), the Oregon Court of Appeals decided what notice was required to terminate without cause a month-to-month rental agreement for boat moorage space. The court held that the tenants were entitled to 180 days' notice of termination instead of thirty days because the sailboats in question were "floating homes" under the Residential Landlord and Tenant Act (RLTA), ORS Chapter 90.

This case involved three different defendant tenants and the same plaintiff landlord. The individual Forcible Entry and Detainer (FED) actions under ORS Chapter 91 were consolidated for purposes of appeal. The relevant facts were not in dispute. Defendants lived on their sailboats at Eagle's Cove Marina, where they rented moorage slips from plaintiff. The marina is advertised as a live-aboard community. All defendants rented slips on a month-to-month basis and lived on their sailboats as their primary residences. Each dock has laundry, shower, and bathroom facilities, and each moorage slip has a storage shed and electricity, water, and sewage hookups for the boats. The sailboats are tied to the docks with ropes and are capable of being sailed with less than an hour of preparation. One defendant sailed his boat approximately fifteen days a year and the other two defendants had not sailed their boats since coming to the marina.

Plaintiff served defendants with thirty-day eviction notices under ORS 91.070. When the defendants refused to vacate their slips, plaintiff filed FED actions under ORS chapter 91 to evict them. At trial, defendants asserted that ORS chapter 91 was inapplicable because their sailboats qualified as "floating homes" under the RLTA. However, the trial court found that defendants' sailboats were boats and not floating homes. The trial court ruled that only a thirty-day notice was required and entered FED judgments in favor of plaintiff. Defendants appealed.

The court first summarily dispensed with plaintiff's assertion that the claims were moot because plaintiff no longer owned the marina. The court concluded that the tenants were still liable for the supplemental judgments for costs and disbursements, and that required a determination on the merits. 222 Or. App. at 114-15.

The main issue on appeal was whether the defendants' sailboats were "floating homes" under the RTLA. If they were, then at least 180 days' notice was required in order to terminate the rental agreement without cause. ORS 90.429. If not, then only thirty days' notice was required pursuant to ORS 91.070. The court began by noting that the RTLA only applies to the rental of a "dwelling unit." ORS 90.115. A dwelling unit includes moorage space for a floating home, as defined by ORS 830.700, but not rented moorage for boats. ORS 90.100(9). "Thus, whether the spaces rented for the moorage of defendants' sailboats are subject to the RLTA depends on whether their sailboats are 'floating homes' within the meaning of ORS 830.700." 222 Or. App. at 115.

The trial court had found that defendants' sailboats were considered boats and not floating homes under ORS 830.700. Subsection (1) of that statute defines a boat as any watercraft "capable of being used as a means of transportation on the water, but does not include . . . floating homes . . . ." ORS 830.700(4) defines a floating home as a "moored structure that is secured to a pier or pilings and is used primarily as a domicile and not as a boat." The trial court had decided that defendants' sailboats were not structures under that definition.

Noting that ORS 830.700 did not define the word "structure," the Court of Appeals gave it its ordinarily understood definition. Applying dictionary definitions, the court concluded that "defendants' sailboats *are* structures because they are 'something constructed or built' and are 'made up of more or less interdependent elements or parts . . . having a definite or fixed pattern of organization.'" 222 Or. App. at 116 (emphasis added). The court also rejected the trial court's determination that a floating home could not be "capable of being used as a means of transportation . . ." because nothing in the statute created such a restriction. *Id.* n.5.

The final issue under ORS 830.700(4) was whether defendants' sailboats were used primarily as domiciles and not as boats. Since the undisputed record indicated none of defendants sailed more than fifteen days a year, the court decided that defendants had established that their sailboats were primarily used as domiciles. As a result, the moorage spaces were "dwelling units" under the RLTA and plaintiff had to comply with the notice requirements for floating homes. "Consequently, defendants are correct when they contend that 30 days' notice was not sufficient to lawfully evict them without cause . . . ." 222 Or. App. at 116.

The fact that the court had to resort to determining whether a sailboat is a "structure" suggests the need for ORS Chapter 90 to indicate clearly the requirements for a boat to be considered a floating home under the Residential Landlord and Tenant Act.

Raymond W. Greycloud

Ramsum v. Woldridge, 222 Or. App.109, 192 P.3d 851 (2008)

■ *NINTH CIRCUIT OVERRULES* CITY OF AUBURN V. QWEST CORP.

Sprint Telephony PCS, L.P., a wireless service provider, sought an injunction against the imposition of the County of San Diego's ordinance regulating wireless communications. Specifically, Sprint argued that the ordinance was in violation of section 253 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18, & 47 (2000)) (the Act). The district court, relying on *City of Auburn v. Qwest Corporation*, 260 F.3d 1160 (9th Cir. 2001), granted the injunction, concluding the ordinance could have the effect of prohibiting service. The Ninth Circuit reversed, expressly overruling the holding in *City of Auburn* and concluding that an ordinance violates the Act only if the regulations either expressly prohibit service or will (as opposed to may) have the actual effect of prohibiting service. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008).

In 2003 the County of San Diego adopted its Wireless Telecommunications Facilities ordinance, which imposes restrictions on the location of wireless facilities. San Diego County, Cal., Ordinance No. 9549, § 1 (Apr. 4, 2003) (codified as SAN DIEGO COUNTY, CAL., ZONING ORD. §§ 6980-6991, 7352). The regulations are comprehensive, including requirements for submitting a complete application, a hearings process, and discretionary criteria governing the location of facilities. For example, the ordinance requires findings

> [t]hat the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings or structures with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
> 2. The availability of public facilities, services and utilities;
> 3. The harmful effect, if any, upon desirable neighborhood character;
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
> 5. The suitability of the site for the type and intensity of the use or development which is proposed; and to
> 6. Any other relevant impact of the proposed use[.]
>
> SAN DIEGO COUNTY, CAL., ZONING ORD. § 7358(a). An application may be denied or approved conditionally at the discretion of the reviewing authority. *Id.* § 7362.

After adoption of the ordinance, Sprint brought suit alleging violation of section 253 of the Telecommunications Act. That section provides: "No State or local statute or regulation,

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or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a) (2000).

In *City of Auburn* the Ninth Circuit had concluded that section 253(a) preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunication services, but also those that 'may . . . have the effect of prohibiting' the provision of such services." 260 F.3d at 1175. From that interpretation the court concluded that local regulations that "create a substantial . . . barrier" to the provision of services are preempted under the Act. *Id*. at 1176. The 'substantial barrier' standard was applied in towns and cities across the nation, including in Portland, Oregon. *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004).

The Ninth Circuit reversed course here and agreed with a recent opinion of the Eighth Circuit in rejecting the holding in *Auburn* and concluding that a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony PCS*, 543 F.3d at 577 (quoting *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)).

The court found this result to be consistent with interpretations of similar language under the Act that precludes regulations that "prohibit or have the effect or prohibiting." 47 U.S.C. § 332(c)(7)(B)(i)(II). The Ninth Circuit in *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005), had concluded that section 332 requires consideration of the "*actual* effects of the city's ordinance, not what effects the ordinance *might possibly* allow." *Sprint Telephony PCS*, 543 F.3d at 578 (citing *MetroPCS*, 400 F.3d at 732-34 (9th Cir. 2005)). Any interpretation of section 253 necessarily should be consistent with the same text used under other sections of the same Act. *Id.* at 579.

The court then applied this new standard and upheld the county's ordinance notwithstanding the significant discretion reserved under the regulations. The court concluded that they are reasonable and responsible conditions for the construction of wireless facilities. *Id.* at 579-80.

Christopher A. Gilmore

Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008)

■ *UPDATE:* SEVEN UP PETE VENTURE V. SCHWEITZER

In the last issue of the *Digest*, we reported on *Seven Up Pete Venture v. Schweitzer,* 523 F.3d 948 (9th Cir. 2008), in which the federal appeals court found a state (and its officials) were immune under the 11th Amendment from inverse condemnation claims in federal courts. In October, the plaintiff threw in the towel, following denial of its petition for writ of certiorari in the U. S. Supreme Court on October 6, 2008, stating it was abandoning its efforts to mine the site at issue. Some cases actually do end.

Edward J. Sullivan

■ *NO HOUSING VIOLATIONS IN DENIAL OF DISCRETIONARY PERMIT FOR CONTINUING CARE COMMUNITY, SAYS NINTH CIRCUIT*

Budnick v. Town of Carefree, Arizona, 518 F.3d 1109 (9th Cir. 2008), involved defendant town's denial of plaintiff developer's application for a special use permit to construct a multi-level continuing care community. Budnick challenged the denial on grounds of inconsistency with the Fair Housing Act, Rehabilitation Act, and Americans with Disabilities Act, as well as the Due Process and Equal Protection Clauses. The trial court upheld the denial.

The application related to properties in multi-family and detached single family zones. The developer proposed a "village-like community" with apartments, casitas, single-family homes, and both assisted care and skilled nursing units. The "healthcare, meal, laundry, and housekeeping" services envisioned for the facility required special use approval in those zones. Additionally, the height of structures in the development, which would have exceeded the underlying zoning limitations, and the use of attached units required special use approval.

As proposed, residents would enter into "life care contracts" which would provide for their needs in one location for life. At both the planning commission and city council proceedings, Budnick asserted that the residents would be "vibrant" community members and that the proposed skilled nursing beds would be for temporary acute needs only. After the town's denial, however, he asserted that the residents of the skilled nursing facilities and assisted living units were "disabled" and that the laundry, kitchen, healthcare, and restaurant facilities were necessary to provide services to the disabled.

The town offered alternatives, including locations on different parcels, moving the community elements to commercial properties, and limiting the facility to disabled residents. Budnick declined and filed the instant lawsuit in federal court. The trial court granted summary judgment to the town on all of the plaintiffs' claims.

On review, the Ninth Circuit noted that the Fair Housing Act prohibits discrimination in the sale or rental of housing (including making housing *unavailable* for sale or rental) because of a disability. Budnick claimed violations of the FHA based on disparate treatment, disparate impact, and a failure to make reasonable accommodation.

As to the disparate treatment claim, the court said a plaintiff must show it is a member of a protected class, that it applied for a special use permit and that it was entitled to receive the same, that the permit was denied despite the plaintiff's qualification, and that the defendant recently approved other such permits to similarly situated persons. If those requirements are met, the burden shifts to the defendant to show a legitimate non-discriminatory reason for the denial. The plaintiff must then show either that the denial reasons were merely pretextual or that a discriminatory reason more likely than not motivated the defendant's decision. Either way, the plaintiff must counter the defendant's explanation with some evidence of discriminatory intent.

In this case, the trial court found Budnick provided no direct or circumstantial evidence of discriminatory intent, nor was he able to rebut the non-discriminatory reasons given by the town for its denial. The Ninth Circuit held that future residents could not currently be considered "disabled" under the FHA simply because they might become disabled in the future. 518 F.3d at 1115. To hold otherwise would posit that all senior citizens are, by that fact, "disabled." "[B]eing old," the court asserted, "is not, *per se*, equivalent to being disabled." *Id.*

Moreover, Budnick never claimed before the planning commission or council that the residents of the proposed development were disabled. Budnick contended before the town that the development would primarily serve "the active and independent discerning senior populace," *id.* at 1112, and that only those capable of independent living would be accepted as residents. The presence of assisted living and skilled care nursing facilities did not change that characterization as those services were said to be reserved for temporary acute needs. Nor had Budnick made a case that others similarly situated had received permits at about the same time. The record showed that other similar uses either predated the town or were located in different zones.

The town said its denial was for the non-discriminatory reasons of achieving its zoning goals and preserving the character of its neighborhoods. Those are legitimate reasons, the court said, and "[e]ven viewing the evidence in the light most favorable to Budnick, it does not support the conclusion that discrimination played a role in Carefree's decision." *Id.* at 1117. Budnick also contended that the town had denied two requests for housing seniors with disabilities. However, in each case the town had steered those developments to other zones (much as it had proposed to do in this case). The court found these actions to be consistent with maintenance of residential neighborhoods. The court thus found no discriminatory intent on this record.

Moreover, during the proceedings before the town there were few comments from neighbors of the proposed development that could have been construed as suggesting unlawful discrimination. Those comments that could have been taken as discriminatory were a small percentage of the total comments received and did not appear to the court to have motivated the decision makers to discriminate. Similarly, the town's legal counsel's advice at the hearing that a supermajority of the council was necessary to overcome the planning commission decision did not appear to be anything but a good faith interpretation of statutory law. Finally, the town's subsequent amendment of the zoning code to require a special use permit for similar developments in residential districts did not amount to discrimination, given the determination that being old is not equivalent to being disabled.

With respect to Budnick's disparate impact claim, the court noted that a plaintiff must show discriminatory effect—an outwardly neutral action by defendant with a disproportionate or adverse impact on the disabled. No discriminatory intent need be shown, but impact must be demonstrated by, for example, statistical evidence. The burden then shifts to the defendant to supply a legitimate non-discriminatory reason for its action. Here, Budnick supplied no evidence of such impact. It might have been true that his company's financial model was necessary to its success in this venture; however, he did not show that the *town's* practices resulted in a disproportionate impact on the disabled as compared to others. The absence of such a showing under the circumstances provides no basis for a discriminatory impact claim.

As to the reasonable accommodation claim, the court explained that, under the FHA, a plaintiff must show that he or she is disabled, that the defendant knew or reasonably should have known of the hardship, that accommodation may be necessary to offer the plaintiff an equal opportunity to use and enjoy a dwelling, and that the defendant refused to make such accommodation. In this case, Budnick had not shown the prospective residents were disabled; he had, in fact, represented otherwise. Moreover, he did not show that, "but for" the accommodation, the disabled would have been able to use or enjoy housing of their choice, especially given that, again, being old is not equivalent to being disabled. The trial court grant of summary judgment to defendant was thus affirmed. *Id.* at 1120.

This case appears to have focused on the FHA as an afterthought basis for challenging the denial of the development in that the disability issue was not raised until after the denial of the special use permit (in addition to the fact that it was not supported by the evidence). Also important is the court's point that even if the disability issue had been raised in a timely way, it would not have supported a Fair Housing Act claim because old age is not cognizable as a disability under the Act.

Edward J. Sullivan

Budnick v. Town of Carefree, Ariz., 518 F.3d 1109 (9th Cir. 2008)

Cases From Other Jurisdictions

■ NEW YORK APPELLATE COURT AFFIRMS ANNULMENT OF DISCRIMINATORY COMPREHENSIVE PLAN

Land Master Montg I, LLC v. Town of Montgomery, 863 N.Y.S.2d 692 (2008), involved an appeal from a trial court judgment annulling defendant town's comprehensive plan on the grounds that it constituted exclusionary zoning and violated the State Environmental Quality Review Act (SEQRA) and directing the town to review development applications under prior law. The court also awarded $463,162.74 in attorneys fees. The trial court reviewed the evidence to determine whether the elimination of the multi-family zoning district (RM-1) constituted exclusionary zoning in violation of the federal Fair Housing Act and a succession of New York cases beginning with *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975), which required local zoning regulations to consider regional needs.

The appellate court upheld the grant of summary judgment to plaintiff developers but did so not on the Fair Housing Act claims but under SEQRA, which required consideration of the environmental impacts of eliminating the RM-1 zone through the preparation of an environmental impact statement (EIS). 863 N.Y.S.2d at 411. The court concluded that such action without an EIS was arbitrary and capricious. The remainder of the claims were dismissed, as was the award of attorney fees.

This case illustrates a trend towards requiring conscious consideration of the effects of exclusionary zoning on the human environment.

Edward J. Sullivan

Land Master Montg I, LLC v. Town of Montgomery,
863 N.Y.S.2d 692 (2008)

■ CALIFORNIA APPELLATE COURT DENIES DEPOSITIONS IN QUASI-LEGISLATIVE DECISION MAKING

San Joaquin Local Agency Formation Commission v. Superior Court, 162 Cal. App. 4th 159 (2008), involved an attempt by a disappointed applicant for a discovery order to take the depositions of the commission members. The commission had denied an application by an irrigation district that had been providing wholesale electricity services to add retail electric service.The district filed suit against the commission and alleged, among other claims, that the commission improperly based its denial on concerns about eminent domain. Shortly thereafter, the district sought permission to depose several of the commissioners about extra-record evidence they considered and additional information they needed in order to approve the project. The commission sought a writ of mandate and a protective order, noting that review of the commission's decision was limited to the record. When the superior court allowed the depositions on a limited basis, the commission applied for this writ to vacate that order and to require the superior court to issue a protective order.

The application by the district was resisted by a publicly owned utility company, Pacific Gas and Electric Company (PG&E). There was much discussion, by both PG&E and other parties, over whether the district's plan to provide retail electricity services through acquisition of PG&E facilities constituted an abuse of eminent domain. The commission was advised that the use of eminent domain was not a criterion for approval, but at the hearing a number of parties, including PG&E, raised the issue. The commission's final order, which denied the application under the statutory criteria, found that the district had not borne its burden of proof. Before the final order was presented, the district brought suit alleging, *inter alia*, that the real reason for the denial related to the use of eminent domain, which was impermissible.

The court noted that discovery orders are ordinarily not reviewable by prerogative writ but also stated that an "unbroken line of cases," 162 Cal. App. 4th at 167 (quoting *Carrancho v. Cal. Air Res. Bd.*, 111 Cal.App.4th 1255, 1269 (2003)), had determined that there were no discovery orders available in these quasi-legislative proceedings, in keeping with the limited scope of review by the appellate courts and separation of powers considerations. Because discovery orders assist in the gathering of admissible evidence, and this evidence was not admissible, the order was wrongfully issued. The court rejected the district's contention that the commission applied an unwritten criterion, noting that the final order stated that the proposal was denied because the district had failed to bear its burden of proof and not because it applied a secret criterion. All of the commissioners had noted that the district had failed to bear its burden of proof, even though others had spoken to eminent domain abuse in their oral statements of decision.

Moreover, the court applied the deliberative process privilege, a limited privilege not to disclose or to be examined concerning the decision maker's mental processes. In addition, the "substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated," i*d.* at 170 (quoting *Regents of Univ. of Cal. v. Superior Court*, 20 Cal. 4th 509, 540 (1999)), was not subject to discovery. Allowing such discovery would undermine an agency's ability to perform its duties by discouraging candid discussion. In review of quasi-legislative decisions, those thought processes are not relevant and the decision is reviewed on its face.

The court also rejected the district's position that the commission's challenge was premature as the trial court had ordered only the discovery of non-privileged material. The appellate court said the trial court had abused its discretion by allowing discovery of evidence not admissible in a challenge to a quasi-legislative decision. Finally, the court found the order violated the deliberative process privilege and it issued a writ of mandate or prohibition to vacate the challenged discovery order and to issue a protective order.

Whether denoted as quasi-legislative or quasi-judicial, deliberations of an administrative body are normally protected from discovery requests and judicial review is limited to the four corners of the order itself.

Edward J. Sullivan

San Joaquin Local Agency Formation Comm'n v. Superior Court, 162 Cal. App. 4th 159 (2008)

■ *SPLIT MARYLAND HIGH COURT MUDDLES PLAN CONFORMITY REQUIREMENT*

Trail v. Terrapin Run, LLC, 943 A.2d 1192 (Md. 2008), involved review of a special exception permit for a planned unit development in rural northwest Maryland. The sole question was the meaning of the statutory requirement that a special exception "conform" to the local comprehensive plan. The 935-acre site at issue was planned ultimately for urban development but was zoned for agriculture, forestry, and mining, as well as for conservation use. The special exception was for 4,300 residential units, an equestrian center, and a 125,000-square-foot shopping center, and was to be developed over twenty years. The county found its plan was merely advisory and that conformity was not required, so the only decision was whether the special exception was "in harmony with the general purpose and intent of the plan." *Terrapin Run*, 943 A.2d at 530. The trial court remanded, finding that Maryland law required a showing of consistency with the local plan. The Maryland Court of Special Appeals reversed, using the "harmony with the plan" standard. 920 A.2d 597 (Md. App. 2007).

The Court of Appeals's majority began its analysis by noting that Maryland statutes did not require either planning or zoning to be undertaken locally. It found the use of the word "conform" in the special exception statute to be ambiguous, requiring an examination of the statute's legislative history. The majority noted that there were various study committee reports and legislative proposals for mandatory planning and plan conformity, many of which were not enacted or were enacted in a weaker form than when first introduced. The majority noted a cacophony of views on the role of the plan and found interpretation of "conform" (which was the term ultimately adopted by the legislature as the standard for special exceptions) colored by these diverse views. The majority found "harmony" to be synonymous with "conformity," which it determined to be a less-than-exacting requirement. The court also noted the failure of efforts to require both planning and plan conformity over the years and concluded that, notwithstanding the use of the word "conform," the Maryland legislature had never intended to require counties to follow their plans. Consideration of the plan in this case was thus optional.

The majority displayed its lack of understanding of the issue by concluding that if conformity to the plan were required for special exceptions, those exceptions could not be "exceptional." Also, if the Maryland statute required the application of statutory "visions" which local plans must meet, they would be real requirements rather than "visions." The majority concluded that because the state legislature failed to enact requirements for mandatory plan conformity across the board, a lesser standard than absolute conformity resulted so that special exceptions need only be "in harmony" with the plan. 943 A.2d at 575.

Three of the court's seven judges dissented, taking the position that "conformity" meant compliance with local plans in review of special exceptions in non-charter counties. They preferred to read the enabling legislation as a whole rather than to select excerpts from legislative history and case law. The dissent gave "conformity" its ordinary meaning and emphasized the priority of the state enabling legislation for non-charter counties, saying that courts must determine these issues of state law without deference to county determinations, particularly if, as here, the text was clear. The dissent found the majority relied on pre-1970 case law (before the word "conformity" was applied to special exceptions) and the "in harmony" language directed at that time to zoning rather than to the plan. The dissent also suggested that the majority incorrectly applied some cases and omitted others, adding that the majority's indifference to statutory language and proper application of case law set the state on a "lubricious path" in failing to reverse the county approval. *Id.* at 587.

These are lengthy opinions which deal with the peculiarities of Maryland statutory and case law. Nevertheless, it appears that the dissent got it right by a consistent application of statutory text and proper review of the cases. This opinion shows just how difficult it is to change long-standing attitudes towards the relationship of planning and zoning, even when the legislature commands it.

Edward J. Sullivan

Trail v. Terrapin Run, LLC, 943 A.2d 1192 (Md. 2008)

■ NEW JERSEY APPELLATE COURT INVALIDATES CONVICTED SEX OFFENDER RESIDENTIAL SPACING ORDINANCE

G.H. v. Township of Galloway, 951 A.2d 221 (N.J. Super. Ct. App. Div. 2008), two consolidated appeals, involved plaintiff convicted sex offenders' (CSO) challenges to defendant townships' ordinances prohibiting the residency of a CSO within a certain distance of schools, parks, playgrounds, and daycares. Plaintiffs argued the local ordinances were preempted by state law and violate certain state constitutional provisions. The court decided the cases solely on preemption grounds.

Under the ordinances a CSO required to register with the state may not reside within 500 feet of the facilities listed above, although those doing so at the time of the passage of the ordinances are considered "grandfathered." The first plaintiff was a twenty-year-old college student who was convicted at age fifteen of fourth-degree sexual contact with a girl of thirteen and given two years probation. The township concluded that he could not live on a college campus. Another case involved CSOs in other jurisdictions. The court noted that approximately 100 local New Jersey governments had adopted ordinances similar to those challenged in this case.

The preemption issue involved the scope of "Megan's Law," N.J. REV. STAT. § 2C:7-1 to -19 (2008) [hereinafter NJSA], which is described as an "all-encompassing" system to "protect society from the risk of re-offense by CSOs and provide for their rehabilitation and reintegration into the community." 951 A.2d at 400. Under this law municipalities have certain responsibilities, including registration of CSOs, community law-enforcement notification of their presence, and, potentially, periodic reporting and notification for the life of the offender. New Jersey case law prevents municipalities from enacting local legislation in the criminal law field. Megan's Law, however, is a part of the state criminal code and the court found a legislative intent to provide for statewide application of Megan's Law without local government interference.

The court reviewed the sweeping terms of the community notification and CSO supervision requirements of Megan's Law. That law also prohibits use of CSO information to deny necessities, including housing and other accommodations, and classifies CSOs in certain tiers, depending upon a risk evaluation. The supervision-for-life provisions subject CSOs to conditions "to protect the public and foster rehabilitation," NJSA § 2C:43-6.4b, which include parole officer approval of a residence.

The court found the challenged ordinances inconsistent with these statutory provisions. The ordinances limit where a CSO may live, not where he or she may work, drive, or sit. Moreover, the community notification provisions do not confer a legislative power on municipalities to regulate residency. Selection of residential venues for CSOs is a function of parole officers, not municipalities. The court again emphasized Megan's Law's prohibition on the use of CSO information for non-law enforcement purposes or for denying housing or accommodations. The court gave dispositive effect to the more specific prohibitions of the law so as to invalidate the challenged ordinances. Finally, the court rejected characterizing the local ordinances as zoning regulations, as the procedures for adopting zoning regulations were not followed in these cases and because the "residency restriction ordinances are plainly not zoning ordinances." 951 A.2d at 411.

Moreover, the ordinances apply to CSOs for life, whereas Megan's Law allows some offenders to leave supervision after fifteen years. The townships' suggestion that a terminated CSO is not subject to the local provisions, the court said, is inconsistent with the text of those ordinances and violates the statutory prohibition against conflict with state substantive criminal law. While Megan's Law generally is not a criminal statute, there are criminal provisions within its scope and the preemptive statute regarding state criminal law implicates conflict with a state "'policy' or 'provision' 'expressed by' the criminal code." *Id.* at 413 (quoting N.J.S.A. 2C:1-5d). Moreover, the court found that Megan's Law was enacted to occupy the field so as to prohibit interference with the rehabilitation and reintegration of CSOs into the community. The court concluded:

> However, if municipalities are permitted to restrict the residency of CSOs to the point where they will have difficulty finding housing in a traditional neighborhood, the entire tier system would become obsolete and the chance of reoffense would increase. The residency restrictions imposed by the ordinances hamper a CSO's ability to be near family and employment, thus hindering reintegration into the community. These restrictions make it difficult for a CSO to find stable housing, which can cause loss of employment and financial distress, factors which inadvertently increase the chance of reoffense. By restricting all CSOs, without regard to tier, the ordinances substantially hinder the integration of CSOs into the community, and conflict with the goal of the Legislature in designing a comprehensive and uniform system for protecting communities throughout the state. . . .

Id. at 417.

The court decried the "patchwork" of residential restrictions by over 100 municipalities in all twenty-one New Jersey counties, making it "impossible for a CSO to know with clarity where he or she may reside in the state, thus defeating the uniformity the Legislature intended." *Id.* While understandings of risk may change, there is nothing unique in protecting children from predators. The mischief resulting from the race to exclude CSOs by sending them elsewhere could lead to their exclusion or near exclusion from all communities.

The specter of "vigilantism and harassment" also militates against separate local regulations. *Id.* at 418. Setting residency requirements near sensitive uses is a matter for the legislature, not local governments. This is because a "comprehensive apparatus" has been put into place to deal with CSOs who have served their sentence or have otherwise been released into the community to deal with the risk of reoffense and the need for rehabilitation and reintegration. *Id.* at 419. The judicial branch assures uniform treatment of CSOs and protection of their constitutional rights. The legislature did not include residential restrictions in its comprehensive approach for CSOs and the court concluded that the challenged local ordinance conflicted with the preemptive statutory scheme. *Id.* at 421. The ordinances were thus struck down.

This case involves the conflict between local regulations and a comprehensive state program for released sex offenders, with the court finding that the latter was both all-encompassing and preemptive.

Edward J. Sullivan

G.H. v. Township of Galloway, 951 A.2d 221
(N.J. Super. Ct. App. Div. 2008)

Land Use Board of Appeals

■ ANNEXATION

In *Verizon Wireless (VAW) LLC v. Jackson County*, LUBA No. 2008-062, ___ Or. LUBA ___ (Sept. 26, 2008), the applicant (Verizon) found itself caught after the City of Medford annexed the site of its proposed cellular communications facility midway through the county's land use review proceedings for the facility. On appeal of the county's administrative decision approving Verizon's request, the county hearings officer ultimately determined annexation of the property deprived the county of jurisdiction over Verizon's application and denied the application. Verizon appealed the county's decision to LUBA and the intervenors, the local appellants, moved to dismiss the appeal as moot.

LUBA agreed with the intervenors that Medford's annexation of the cell tower site rendered the LUBA appeal moot for several reasons. First, LUBA read the *Standard Insurance* cases to mean that city annexation of property during a county land use proceeding involving the property effectively terminates the county proceeding. LUBA No. 2008-062, slip op. at 3-4 (citing *Standard Insurance Co. v. City of Hillsboro*, 97 Or. App. 625, 776 P.2d 1313 (1989) and *Standard Insurance Co. v. Washington County*, 97 Or. App. 687, 776 P.2d 1315 (1989)). While the county zoning regulations may continue to apply to the annexed property until it receives city zoning, the city may not "step into the shoes of the county to complete the county's land use proceedings for the county." *Verizon Wireless (VAW) LLC v. Jackson County*, LUBA No. 2008-062, slip op. at 5. As a result, any decision LUBA might make to remand the county's decision would have no effect because the county no longer has jurisdiction over the property.

Second, LUBA rejected Verizon's argument that the "goal-post statute," ORS 215.427(3)(a), preserved its application and required the county to complete its review of the application under the standards in effect at the time it filed the application with the county. The effect of the goal-post statute on a county land use review that is pending at the time the affected property is annexed was, in LUBA's view, an issue of first impression. LUBA concluded there is nothing in the text of the goal-post statute that suggests the result urged by Verizon. Similarly, LUBA found unpersuasive Verizon's argument that an urbanization policy contained in a city-county intergovernmental agreement that concerned "unincorporated urbanizable area" required the County to retain jurisdiction over its cell tower application despite the annexation. Once Medford annexed the tower site, it was no longer "unincorporated urbanizable" land and the cited policy no longer applied. Concluding that any decision it might make would have no practical effect, LUBA dismissed the appeal as moot.

■ LOCAL PROCEDURE

LUBA's decision in *Freedman v. City of Grants Pass,* LUBA No. 2008-056, ___ Or. LUBA ___ (Sept. 4, 2008), underscores the problems of incorporating multiple documents as part of a local government's decision and of considering evidence submitted after the evidentiary record is closed. As part of its final decision approving a comprehensive plan amendment and zone change from Industrial to Business Park, the city incorporated into its findings a portion of the applicant's final written argument and a letter from the applicant's traffic consultant that was submitted with the argument after the evidentiary record was closed. On appeal to LUBA, petitioners raised numerous arguments concerning the applicability of Statewide Planning Goal 9, the city's reliance on a draft economic opportunity analysis that had not been adopted, and the propriety of accepting the traffic consultant's report without reopening the evidentiary record for rebuttal.

LUBA agreed with the petitioners that incorporating the applicant's written argument and other documents into the city's findings was problematic for several reasons. Many of the documents were not intended to serve as findings and were inadequate to explain the basis for the city's decision. Additionally, some of the documents conflicted with the applicant's written argument, rendering the city's decision internally inconsistent. Finally, to the extent that Goal 9 applied to the decision, it was error for the city to rely on an unadopted, draft economic opportunities analysis, rather

than to address the adopted economic opportunities analysis.

LUBA also agreed that the city erred by accepting the traffic consultant's report after the evidentiary record was closed and by relying on that report in its written decision. The fact that it was attached to the applicant's final written argument did not transform the information in the report from evidence into argument. Under the circumstances, the city had two choices: reopen the record to allow others to address the consultant's report or reject the report. Since the city failed to exercise either option, LUBA concluded the city's action constituted procedural error that warranted remand of the decision.

■ *LUBA JURISDICTION*

An amendment to a non-ORS Chapter 94 development agreement is not a land use decision subject to LUBA's jurisdiction, according to *Workers for a Livable Albany v. City of Albany*, LUBA No. 2007-256, ___ Or. LUBA ___ (July 9, 2008). The city and intervenor SVC Manufacturing Co. entered into a development agreement in 2006 to allow the construction of a bottling plant. Less than a year later, the intervenor indicated it wanted to delay construction of the plant and the city and intervenor amended the agreement to establish a new timetable for construction. Petitioner appealed the city council's resolution approving the amendment to LUBA and the city responded by challenging LUBA's jurisdiction to hear the appeal.

LUBA cited the Court of Appeals' decision in *Povey v. City of Mosier,* 220 Or. App. 552, 188 P.3d 321 (2008), in which the court held that not all development agreements must conform to the requirements of ORS 94.504 through 94.528. Agreeing with the city, LUBA ruled that the amended development agreement at issue in this appeal was not an agreement entered into under ORS 94.504 through 94.528 and, as a result, that statute could not be the source of LUBA's jurisdiction to hear this appeal. Turning to the significant impact test, LUBA easily concluded that the appealed resolution did not approve any land use actions and was not a significant impact land use decision. While projects identified in the amended development agreement may require future land use approvals, the amendment did not grant those approvals. Absent any basis for exercising jurisdiction, LUBA dismissed the appeal.

■ *MEASURE 49*

LUBA's jurisdiction to review a county vested rights determination and the relevance of the "fixed goal-post statute" under Measure 49 were the subjects of a pair of recent cases addressing different aspects of Measure 49.

In *Friends of Yamhill County v. Yamhill County*, LUBA No. 2008-060, ___ Or. LUBA ___ (July 2, 2008), LUBA concluded it lacked jurisdiction to review a county decision determining that the intervenors had a vested right to develop a 36-lot subdivision under a previously approved Measure 37 waiver. Under Measure 49, determinations made "under Sections 5 to 11" of the measure are not land use decisions and are not subject to LUBA's review jurisdiction. Section 5(3) authorizes just compensation to Measure 37 claimants under a waiver issued before Measure 49 became effective "to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right" on the effective date of the measure.

The county asserted its vested rights determination was a decision made "under Sections 5 to 11" of the measure and LUBA lacked jurisdiction to review it. The petitioner argued that Section 5(3) simply authorized relief under a common law vested rights theory, but the actual relief was provided "under" the county's decision, not under Section 5. LUBA sided with the county, concluding that the text of the measure "demonstrates that a local government vested rights determination that development authorized by a Measure 37 waiver may or may not continue is not a land use decision subject to our jurisdiction" and that "just compensation under a vested rights theory is just compensation granted 'under' section 5(3)." LUBA No. 2008-060, slip op. at 6.

In *Pete's Mountain Homeowners Association v. Clackamas County*, LUBA No. 2008-065, ___ Or. LUBA ___ (Sept. 25, 2008), the issue before LUBA was whether the "fixed goal-post statute" in ORS 215.427 protected the intervenor property owners' Measure 37 waivers from invalidation when Measure 49 became effective. The intervenors obtained Measure 37 waivers from the county and the state to allow them to develop a 41-lot subdivision in an Agricultural/Forest zone. They later sought and received subdivision approval from the county based on the waivers. On appeal to LUBA, the subdivision approval was remanded. *Pete's Mountain Homeowners Association v. Clackamas County*, LUBA No. 2007-124, ___ Or. LUBA ___ (Nov. 15, 2007). Shortly after LUBA's remand, Measure 49 was passed by the voters and became effective. The county hearings officer again approved the subdivision in April, 2008 and it was this second subdivision approval that was the subject of LUBA's decision.

The intervenors acknowledged that the Court of Appeals had ruled that Measure 49 effectively replaced the remedies available under Measure 37 and invalidated orders granting Measure 37 waivers, unless the claimant could prove a vested right to complete development under a Measure 37 waiver. *See, Frank v. Department of Land Conservation and Development*, 217 Or. App. 498, 176 P.3d 411 (2008); *Corey v. DLCD*, 344 Or. 457, 184 P.3d 1109 (2008). However, the intervenors asserted that when the county accepted their subdivision application as complete in January 2007, the standards and criteria in effect on that date included their Measure 37 waivers and the fixed goal-post statute effectively insulated their application from Measure 49.

Citing a subsequent Court of Appeals decision, *DLCD v. Jefferson County*, 220 Or. App. 518, 188 P.3d 313 (2008) (*Burk*), LUBA disagreed. In *Burk*, the court held that the standards and criteria that become fixed under the fixed goalpost statute do not include Measure 37 waivers. Accordingly, once Measure 49 became effective, all previously waived land use regulations became applicable to the intervenors' property and the county erred in concluding otherwise. Since the previously waived land use regulations would require denial of the intervenors' application, LUBA reversed the county's decision.

■ STATEWIDE PLANNING GOALS

Goal 10

The issue before LUBA in *GMK Developments, LLC v. City of Madras,* LUBA No. 2008-003, ___ Or. LUBA ___ (July 22, 2008), was whether the city erred by adopting an updated housing needs analysis without contemporaneously amending its urban growth boundary (UGB) to accommodate a projected housing shortfall at the end of the planning period. Under ORS 197.296, certain cities are required to provide enough buildable land within their urban growth boundaries to accommodate a 20-year housing supply. In *DLCD v. City of McMinnville,* 41 Or. LUBA 210 (2001), LUBA held that the statute requires a city that updates its housing needs analysis to simultaneously either expand its UGB or adopt other measures to address any projected housing shortfall. Petitioners in *GMK Developments* asserted that the city's actions were inconsistent with the *McMinnville* decision as well as Statewide Planning Goals 10 and 2.

LUBA rejected all three of the petitioners' arguments for different reasons. First, the *McMinnville* case interpreted the requirements of ORS 197.296 and that statute applies generally to cities with populations greater than 25,000. Since Madras's population is 7,000 people, neither the statute nor the *McMinnville* decision was controlling. Second, neither Goal 10 nor its administrative rules required Madras to take immediate or contemporaneous action when it adopts an updated housing needs analysis.

Finally, LUBA disagreed with the petitioners that Madras violated Goal 2 by adopting the updated analysis without also conforming references in its comprehensive plan to the new analysis. The city's decision contained a provision that explicitly acknowledged the comprehensive plan will be amended in the future to replace outdated information with information from the updated analysis. While the Goal 2 guidelines state that a comprehensive plan should "form a consistent whole at all times," these guidelines are not mandatory approval criteria. Finding Madras's decision did not violate ORS 197.296 or any applicable statewide planning goals, LUBA affirmed the decision.

Goal 5

In *Rogue Aggregates, Inc. and LTM, Inc. v. Jackson County,* LUBA No. 2008-158, ___ Or. LUBA ___ (July 8, 2008), LUBA considered the extent to which a business competitor's threatened opposition to an applicant's expansion of its aggregate use is a "conflicting use" for purposes of Goal 5. At issue was the county's approval of comprehensive plan amendments, zone changes, and permits to expand an existing aggregate mining operation. Petitioners, who conducted a competing aggregate operation approximately one mile downstream from the expansion site, argued that the county's Economic, Social, Environment, and Energy analysis should have treated their mining operation as a "conflicting use" because they opposed and would continue to oppose the proposed expansion. They relied on *Hegele v. Crook County*, 190 Or. App. 376, 78 P.3d 1254 (2003), in which the Court of Appeals held that a local government may consider "social, legal, or other pressures that can result in negative impacts *on* the Goal 5 resource," including legal action by surrounding property owners. 190 Or. App. at 386.

LUBA rejected the petitioners' reading of the *Hegele* case as too broad, stating: "As we understand *Hegele*, the scope of conflicting uses can include impacts *on* the resource extraction site, such as lawsuits and organized social opposition, that derive from the impacts *of* the resource extraction operation on surrounding permitted uses." *Rogue Aggregates, Inc. and LTM, Inc. v. Jackson County,* LUBA No. 2008-158, slip op. at 18-19. Here, the county found the expanded mining operation would have no impact on downstream properties and there was substantial evidence in the record to support this finding. In LUBA's view, the *Hegele* case does not stand for the proposition that a conflicting use analysis must include "mere opposition by a business rival based solely on economic competition." LUBA No. 2008-158, slip op. at 19. Finding no flaw in the county's Goal 5 analysis, LUBA affirmed the county's decision.

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