Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 31, No. 1
February 2009

Also available online

Highlights

Appellate Cases – Land Use

■ UPDATE: APPELLATE COURT UPHOLDS LUBA'S INTERPRETATION OF GOALS 2 AND 10

In the December issue of the *Digest*, we reported on LUBA's decision rejecting arguments that the City of Madras violated Statewide Planning Goals 2 and 10 by failing to amend its urban growth boundary at the time it adopted an updated housing needs analysis, which showed a projected need for residential land over a 20 to 50 year planning horizon. *GMK Developments LLC v. City of Madras,* LUBA No. 2008-003 (July 22, 2008); *RELU Digest*, Vol. 30, No. 5, December 2008. On review, the Oregon Court of Appeals affirmed LUBA's decision in *GMK Developments, LLC v. City of Madras*, 225 Or. App. 1, 199 P.3d 882 (2008). The court agreed with LUBA that nothing in the language of Goal 10 or the implementing statutes and administrative rules required the city to expand its UGB or take other actions contemporaneously with adopting the report identifying a long-term need for residential land. While ORS 197.296 contains such a requirement for local governments with a population greater than 25,000, the city's population is only 7,000 and the statute does not apply. Similarly, the court concurred with LUBA's reasoning that Goal 2 did not require the city to amend any conflicting data contained in its comprehensive plan immediately upon adopting the housing needs analysis. To the extent any conflict existed, the court noted that the analysis clearly stated that the new information superseded any inconsistent data in the comprehensive plan.

Kathryn S. Beaumont

GMK Devs., LLC v. City of Madras, 225 Or. App. 1, 199 P.3d 882 (2008)

Appellate Cases – Landlord-Tenant

■ NOT ALL DISPUTES BETWEEN RESIDENTIAL LANDLORDS AND TENANTS ARE SUBJECT TO ONE-YEAR STATUTE OF LIMITATIONS

In *Waldner v. Stephens*, 345 Or. 526, ___ P.3d ___ (2008), the Oregon Supreme Court held that tenants could bring suit against their landlord for a claim based in common-law negligence and avoid the one-year statute of limitations for actions arising under a rental agreement or the Oregon Residential Landlord Tenant Act (RLTA), ORS Chapter 90.

For the purpose of reviewing the plaintiff tenants' claims, the court accepted as true the following facts: The tenants rented a residence from the defendant landlord. Under their rental agreement, the landlord maintained control over the exterior areas of the building, including the roof, and was responsible for all repairs to them. During the tenancy, water intruded into the residence through the roof and walls. The tenants notified the landlord that water was coming

into their unit and, after inspecting it, the landlord promised to make repairs. Based on the landlord's promise, the tenants remained in the residence and continued to pay rent. Ultimately mold, fungi, bacteria, and related toxins developed from the water intrusion and contaminated the residence and the tenants' personal property.

The tenants brought suit against the landlord after the one-year statute of limitations under ORS 12.125 had passed but before the expiration of the two-year statute of limitations under ORS 12.110(1). The tenants asserted that the landlord had a duty to maintain the premises and to complete the repairs that were in addition to any duties under the RLTA and alleged that the tenants suffered serious personal injuries from the contamination. Although the language of the tenants' allegations often cribbed the language of the RLTA, the complaint pled common-law negligence and argued that ORS 12.110(1) controlled. That statutory provision adopts a two-year statute of limitations for "injury to the person or rights of another, not arising on contract and not especially enumerated in [ORS Chapter 12]." The landlord claimed the applicable statute was ORS 12.125, not ORS 12.110(1). ORS 12.125 provides that "[a]n action arising under a rental agreement or [the RLTA] shall be commenced within one year." The trial court reviewed the tenants' allegations and concluded that the core relationship from which the claim arose was that of landlord and tenant. The trial court dismissed the tenants' complaint, holding that they failed to state a claim in common-law negligence and that the tenants' claim was barred under ORS 12.125. The Court of Appeals agreed, 213 Or. App. 610, 162 P.3d 342 (2007), but the Oregon Supreme Court reversed and remanded.

The court's decision first addressed whether a landlord has duties to tenants beyond those contained in the RLTA. The court pointed to the landlord's common law duty to maintain its property in a reasonably safe condition. Under the common law, a landlord could be liable to invitees and tenants for injuries caused by unsafe conditions if the landlord knew or should have known about such conditions and could have made them safe. The court acknowledged that its decisions concerning a landlord's common law duties had not been consistent but cited several cases, including *Pritchard v. Terrill*, 189 Or. 662, 222 P.2d 652 (1950) (tenant sued landlord for injuries stemming from an unsafe stairway under landlord's control), where a landlord's liability stemmed from a common law duty to all others, including tenants.

The court then looked to *Jones v. Bierek*, 306 Or. 42, 755 P.2d 698 (1988), and *Vollertsen v. Lamb*, 302 Or. 489, 732 P.2d 486 (1987), to determine which statute of limitations applied. In *Jones*, the court recognized that a landlord's duties to its tenants could stem from the lease, the RLTA (the obligation to keep the premises in working order), and from common law (the failure to comply with city ordinances and common law negligence). 306 Or. at 44. Because the tenant in *Jones* alleged that the landlord would have been responsible to all who entered the property to provide adequate lighting, the tenant's claim was legitimately founded on the landlord's common law duty, and ORS 12.110(1) applied. *Id.* at 45. The court refused to apply the one year statute of limitations under ORS 12.125 to all instances involving a landlord and tenant, reasoning that the intent of the legislation could not be to bar a tenant's claim after one year but to allow a non-tenant to bring the same claim within two. *Id.* at 45-46.

The *Waldner* court also reviewed the history of ORS 12.125 outlined in *Vollertsen*. That case involved a claim by a landlord, brought under ORS 105.805, for waste of leased residential property. The court noted that the claim was not based on the obligations of the tenant to care for the premises under the lease. *Vollertsen*, 302 Or. at 491-92. The *Vollertsen* court determined that the term "rental agreement" as used in ORS 12.125 meant a rental agreement under the RLTA and that ORS 12.125 was meant to apply only to claims arising directly out of the residential rental agreement and the RLTA, not to claims arising from the common law that happened to involve parties in a landlord-tenant relationship. 302 Or. at 495, 509.

The *Waldner* court held that the one-year statute of limitations in ORS 12.125 applied only to "claims that seek damages or injunctive relief *as provided in the [RLTA]* for a violation of either the rental agreement or some requirement imposed on landlords or tenants only by a provision of the [RLTA]." 345 Or. at 542 (emphasis in original). Where a claim is based on a common law duty or invokes a right found outside the limits of the lease or the RLTA, the court will not impose a one-year statute of limitations on an injured party simply because the injured party is a landlord or tenant.

Kathleen S. Sieler

Waldner v. Stephens, 345 Or. 526, ___ P.3d ___ (2008)

Appellate Cases – Ninth Circuit

■ *NINTH CIRCUIT USES* PENN CENTRAL, *NOT* DOLAN, *ANALYSIS TO WEIGH IMPROVEMENT REQUIREMENTS*

McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008), involved a development which included an inadequate storm drain pipe. The city required plaintiff McClung to install a 24-inch pipe (the normal requirement was for 12 inches) but proposed to waive certain other permit and facility fees if McClung did so. McClung revised its plans and installed the pipe but later brought this takings claim in federal court.

The issue before the court was which takings standard applied to the requirements for the installation of improvements. The court noted this was not a case involving acquisition of real property. McClung asserted that the *Nollan/Dolan* standard for a physical exaction was applicable, while the city asserted that the three-factor *Penn Central* test was to be used. The court opted for the latter in affirming the trial court and concluded that McClung had voluntarily contracted to install the pipe in exchange for the fee waivers.

The city adopted the 12-inch storm drain standard in response to previous flooding experience. When McClung sought to redevelop its property into a Subway sandwich shop, the city found a short stretch of existing 12-inch pipe under the property attached to a much longer stretch of 6-inch pipe. The city told McClung that if it agreed to replace the entire length with 24-inch pipe it would waive certain fees. The city staff performed a cost analysis of the differential between a 12-inch standard pipe and the 24-inch pipe it desired and found that the fee waivers would be roughly proportional. After raising no objection and installing the pipe, McClung brought this suit in state court. The city removed the action to federal court, and, on cross motions for summary judgment, the trial court found McClung had contracted to install the entire 24-inch pipe voluntarily in exchange for the fee waivers.

On appeal, the Ninth Circuit reviewed the matter *de novo* and assumed the matter was ripe for purposes of the appeal. As to the standard of review, the court wrote:

> The Ninth Circuit has yet to address whether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be addressed under the

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.
Subscription Price: free to Real Estate and Land Use Section Members, $24.50 per year for others.
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Penn Central or *Nollan/Dolan* framework. Other courts addressing this general issue have come to different conclusions. . . .

McClung v. City of Sumner, 548 F.3d 1219, 1225 (9th Cir. 2008). The court concluded that the *Penn Central* three-factor test applied.

The court noted that *Nollan* and *Dolan* involved adjudicative decisions in which *ad hoc* conditions were imposed to appropriate real property. In *Lingle*, the United States Supreme Court noted that it had not extended the *Nollan/Dolan* analysis beyond land dedications. The court concluded that the *Penn Central* analysis was the one to be applied in this situation. Establishing a 12-inch standard for storm pipes does not affect the use of property, but is normally a generally applicable development standard. That the city had required McClung to construct the pipes, as opposed to prohibiting the development, did not change the analysis. Additionally, there was no evidence that McClung was singled out for the 12-inch pipe requirement and there was no *ad hoc* adjudicative decision in this case. To require a *Nollan/Dolan* analysis would subject any development regulation to higher scrutiny and raise concerns over judicial interference with local government powers, concerns better addressed by the usual restraints of the democratic political process.

The court also specifically rejected application of *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003), which related to interest on lawyer trust accounts (IOLTA) and an alleged uncompensated *per se* taking not subject to *Penn Central*. This case, however, did not involve the exchange of money for permits but rather applied an "across-the-board" and generally applicable set of development requirements. Moreover, the court said that, while the uniqueness of real property under *Nollan* and *Dolan* is acknowledged, money is fungible and thus not subject to a *Nollan* and *Dolan* analysis.

With regard to the upsizing of the pipe to 24 inches, this may have been an adjudicative decision; however, it was not subject to *Nollan* and *Dolan* because the court determined that McClung entered into a voluntary contract that was performed by installing the pipe. The evidence was that the city estimated the cost differential between a 12- and 24-inch pipe and offered to waive an equivalent amount of fees. McClung revised the plans accordingly and installed the larger pipe. Under an "objective manifestation theory of contracts," the intent of the parties was manifestly clear. The trial court rejected plaintiff's state law claims on this basis and thus negated the takings claim as well. The trial court decision was thus upheld. *McClung v. City of Sumner*, 548 F.3d 1219, 1230 (9th Cir. 2008).

This case demonstrates that the Ninth Circuit construes *Nollan/Dolan* to apply only in an adjudicative setting and that one may waive a *Nollan/Dolan* claim through actions such as an agreement for improvements voluntarily entered into in exchange for consideration.

Edward J. Sullivan

McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008)

Appellate Cases – Washington

■ WASHINGTON ENERGY FACILITIES SITING PROCEDURES PREEMPT GMA

In this consolidated petition, the Washington Supreme Court reviewed a challenge to the decision making procedures governing the siting of a wind energy project in Kittitas County. *Residents Opposed to Kittitas Turbines v. EFSEC*, 197 P.3d 1153 (Wash. 2008). The court rejected each of the petitioners' challenges, including an alleged violation of the appearance of fairness doctrine and the sufficiency of environmental review under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. What is notable, however, is the court's confirmation that the energy facilities siting process preempts local planning under the Growth Management Act (GMA), chapter 36.70A RCW.

Energy facilities siting in Washington is governed by the Energy Facilities Site Locations Act (EFSLA), chapter 80.50 RCW. Under EFSLA, the legislature created a process for reviewing the location, construction, and operation of energy facilities. The process is administered by the Energy Facilities Site Evaluation Council (EFSEC), a state agency comprised of representatives from several agencies (including one representative from the affected local jurisdiction). EFSEC processes applications for site certification, presides over public hearings, considers conditions of approval to protect the public, and makes recommendations to the governor on the application. The governor makes the final decision to approve or reject the certification for a proposed energy facility.

In both the statutory authority and regulations in effect

at the time this application was processed, the relationship between EFSEC's authority and local land use authority was debatable. Yet the legislation specifically provided that "[t]he state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of . . . energy facilities . . . ." RCW § 80.50.110(2). Conflict between EFSEC decisions and local land use regulations was foreseen and, as such, EFSEC's regulations addressed potential conflicts with an eye on resolution. In the event of inconsistency between an application and local land use laws (as determined by EFSEC), EFSEC could stay the proceedings while the applicant made all reasonable efforts to resolve the noncompliance with the local government. If efforts proved futile, the applicant could then petition EFSEC to preempt the local authority.

In this case, Horizon Wind Energy, LLC submitted a site certification application for the Kittitas Valley wind power project (up to 121 generators). At an initial hearing before EFSEC in 2003, it was agreed by all parties that the project was inconsistent with the county's Wind Farm Resource Overlay Zone, which required (among other things) coordination between the project, applicable zoning, and the comprehensive plan as a prerequisite to site plan approvals. For approximately two years, Horizon attempted to negotiate the divide between the county's land use regulations and the project with the state. Horizon modified its project, reduced the number of turbines to 64, and agreed to a 1,000 foot setback. The county nonetheless rejected the application in 2006, and Horizon successfully petitioned EFSEC for preemption of the county's regulations.

Petitioners argued that EFSLA was not intended to preempt land use regulations adopted pursuant to the GMA. The GMA, enacted some twenty years *after* EFSLA, provides that "[s]tate agencies shall comply with the local comprehensive plans and development regulations thereto adopted pursuant to this chapter . . . ." RCW § 36.70A.103. The court recognized that a "state agency cannot both preempt local laws and comply with such laws at the same time," 197 P.3d at 1170, and inquired into the intention of the state's growth management scheme. Relying on the canon that the more specific statutory scheme ought to control, and that EFSLA's siting focus is more specific than GMA's broad planning purpose, the court noted that the GMA itself contains no express language repealing the preemption provision in EFSLA. On this basis, the court turned to regulations adopted by the Department of Community, Trade, and Economic Development (CTED), the state agency assigned to study and report on implementation of the GMA. Although in the past the court has given inconsistent treatment of CTED due to some confusion over the authority and expertise of the agency, in this case the court found that CTED's regulations expressly recognized that the GMA did not trump other statutory schemes, and that CTED specifically identified EFSLA as one of those schemes. Ultimately, the court held that the GMA was not intended to preempt EFSLA, and that EFLSA clearly authorized preemption of local land use laws for purposes of energy facilities siting. 197 P.3d at 1170-71.

Keith Hirokawa

Residents Opposed to Kittitas Turbines v. EFSEC, 197 P.3d 1153 (Wash. 2008)

Cases From Other Jurisdictions

THE SECOND CIRCUIT WEIGHS IN ON RLUIPA'S EQUAL TERMS PROVISION

In *Third Church of Christ, Scientist, of New York City v. City of New York*, No. 07 Civ. 10962, 2008 WL 5102466 (S.D.N.Y. Dec. 2, 2008), the Southern District Court of New York was asked to consider whether revocation of a pre-consideration approval of private use of a church building as "accessory" to the primary church activity violated the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000cc(b)(1) (2000) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

The Rose Group Park Avenue LLC (the Rose Group) entered into a long term lease and obtained city approval to provide catered social events in a church building and, in return, agreed to complete building improvement and maintenance necessary to enable the church's small congregation to continue use of its deteriorated building for religious purposes. Once the capital improvements began, a group of high-profile neighbors filed a series of complaints arguing that the extent and frequency of the catering activities, in comparison to the use of the building by the church, made the use primarily commercial rather than merely accessory to the church's use. Although not necessarily a result of the complaints, the city revoked the

land use approval. The church sought to enjoin the city from enforcing its decision.

The church argued that the revocation violated both the substantial burden (42 U.S.C. § 2000cc(a)(1)) and equal terms provisions of RLUIPA. The court quickly determined that the city had not violated the statute's substantial burden provision, finding that, "[u]nder the law of the Circuit, a burden on a church's ability to hold catered social events is not a burden on 'religious exercise' as contemplated by RLUIPA." 2008 WL 5102466, at *7. The city did not fare as well with respect to the equal terms provision. The church argued that the city was knowingly permitting non-religious institutions in the same neighborhood to conduct revenue generating social events but was prohibiting the church from doing the same. (The court assumed the equal terms provision could apply without discussing the lease relationship between the church and the Rose Group.)

Applying the equal terms provision of RLUIPA in the Second Circuit was a case of first impression. The court explained the rule in the Eleventh Circuit, which "requires only a showing that the non-religious comparator is an 'assembly' or 'institution' as those terms are commonly understood." *Id.* (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004)). Where both the religious and non-religious groups are understood as assemblies or institutions, then the classic strict scrutiny analysis is applied. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).

The Third Circuit holds that "a religious plaintiff . . . must identify a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation," *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 (3rd Cir. 2007), finding that this analysis is more consistent with congressional intent to codify existing Free Exercise Clause jurisprudence. This is because, "[u]nder Free Exercise cases, the decision whether a regulation violates a plaintiff's constitutional rights hinges on a comparison of how it treats entities or behavior that have the same objectives." *Id.* at 265.

Finally, the *Third Church of Christ* court noted the Seventh Circuit's holding that, to find an equal terms violation, "a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects." *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006). In *Vision Church*, that circuit found that schools were "not a valid comparator [for churches] because the rezoning process is an entirely different form of relief from obtaining a variance." *Id.*

In this case, the court held that it did not need to establish any particular interpretation of the equal terms provision, finding that, "under any reading, the City has treated the [church] on less than equal terms with other non-religious comparators." 2008 WL 5102466, at *9. It was clear that the court had many concerns about the city's approach. First, the court objected to the lack of clearly articulated standards used to determine whether a particular use is an "accessory use." Second, the court believed that the city's decision to withdraw pre-consideration approval relied heavily on the city's perceived level of religious activity at the church—suggesting that small religious groups could be treated less favorably under the zoning resolution. This, said the court, was exactly what RLUIPA was designed to address. Another concern was raised by evidence showing that others in the neighborhood had been conducting food service and catering businesses in violation of city zoning resolution and none of them had had permits revoked. Because of this fact, the court said it did not need to determine whether the church's use of the building was indeed an accessory use.

Carrie A. Richter

Third Church of Christ, Scientist, of New York City v. City of New York, No. 07 Civ. 10962, 2008 WL 5102466 (S.D.N.Y. Dec. 2, 2008)

■ *TENTH CIRCUIT OVERTURNS CELL TOWER DENIAL*

T-Mobile Central, LLC v. Unified Government of Wyandotte County, Kansas City, Kansas, 546 F.3d 1299 (10th Cir. 2008), involved a trial court reversal of a cell tower application denial on grounds of violation of the Federal Telecommunications Act (FTA) of 1996. The trial court found there was no substantial evidence for that denial and that it had had the effect of prohibiting personal wireless services in violation of the FTA.

Defendant Unified Government's land use system allowed cell towers as special (conditional) uses and imposed a number of discretionary standards on them, including a preference for commercial over residential zones. The site at issue was zoned residential but was used for a church and there were other commercial uses in the area. Plaintiff T-Mobile rejected other alternatives for the tower site because they provided less coverage. Staff recommended denial as it found the use incom-

patible with other uses in the neighborhood. T-Mobile provided evidence of a significant gap in phone coverage but staff disagreed with those conclusions. The Unified Government's governing body denied the application, finding that T-Mobile failed to prove the denial would prohibit the provision of personal wireless services, that the proposed tower was not the least intrusive alternative to any gap that might exist, and that the situation failed to satisfy the "*Golden* factors" (described below). T-Mobile then brought this suit in federal court, which granted T-Mobile's summary judgment motion and ruled Unified Government's denial violated the FTA because it was unsupported by substantial evidence and had the effect of prohibiting the provision of personal wireless services. On appeal, the Tenth Circuit affirmed the trial court solely on the substantial evidence ground.

The Tenth Circuit began its analysis with the FTA, which it said preserved local control over telecommunications facilities but restricted local authority in several ways, including: requiring a written decision on all applications for wireless facilities, and further requiring decisions on such applications to be supported by substantial evidence. The substantial evidence standard, according to the court, looks to that evidence addressing applicable state and local standards.

The court then reviewed the three reasons Unified Government gave for the denial, beginning with T-Mobile's failure to show that denial of its application would result in an effective prohibition of personal wireless services. The court found that the local code did not contain this criterion and it could not be used as a basis for denial.

As to the issue of a service gap, the Unified Government had found "zero or limited" dropped calls in denying the application, apparently based upon the planning director's interpretation of a "drive test" conducted by T-Mobile. However, that test, as explained by T-Mobile in the record, had not measured dropped calls but the level of existing network coverage. The uncontroverted evidence in the record showed that the number of dropped calls in the area exceeded the industry average. Thus, this portion of the decision was not supported by substantial evidence.

The court then considered whether the 120-foot cell tower was the "least intrusive" means of resolving any coverage gap. Again, the court found that this was not a state or local criterion and was thus irrelevant to the decision. The court rejected the preference for a commercial over a residential site as the basis for the decision because the evidence showed that, although the site at issue was zoned residential, the uses in the surrounding area were generally commercial and the master plan had designated the site for commercial use. A decision that relied solely on the zoning designation in isolation from these other factors was not based on substantial evidence.

The court next analyzed Unified Government's determination that the tower was incompatible with other surrounding uses. Unified Government based this determination on the lack of any direct relationship between the tower and the existing use of the site for a church. However, the Tenth Circuit concluded the proper inquiry was whether the tower and the church use were incompatible. Aesthetic reasons could be a basis for determining the tower was incompatible as long as those reasons were based on specific evidence rather than generalized concerns. In this case, while there were simulated photos of the tower on the site, there were neither specific objections nor opposition from neighboring property owners and the simulated photos themselves were generalized and insufficient evidence on which to base a denial.

Finally, the court considered the factors regulating the use of discretion in treating special use permits, as established by *Golden v. City of Overland Park*, 584 P.2d 130, 135-137 (Kan. 1978). The Unified Government used three of those factors in its denial decision, but each was dealt with elsewhere in the Tenth Circuit's opinion. Each was found to lack supporting substantial evidence, so this ground provided no independent basis for the decision. The trial court decision was thus affirmed. *T-Mobile Central, LLC v. Unified Government of Wyandotte County, Kansas City, Kansas*, 546 F.3d 1299, 1313 (10th Cir. 2008).

This case deals with the FTA requirement of substantial evidence and cautions against the use of criteria not found in state or local regulations. Moreover, it shows that while substantial evidence most often supports a land use decision, there actually must be some evidence in the record to meet this standard.

Edward J. Sullivan

T-Mobile Central, LLC v. Unified Government of Wyandotte County, Kansas City, Kansas, 546 F.3d 1299 (10th Cir. 2008)

■ GOAL 3

Among the issues presented in *Wetherell v. Douglas County*, LUBA No. 2008-071 (Dec. 31, 2008), was what costs may be considered in determining whether land is profitable for farm use and protected under Statewide Planning Goal 3. Petitioners in *Wetherell* appealed the county's approval of comprehensive plan and zoning map amendments from Agriculture to Rural Residential-5 Acre for a 259-acre parcel in order to divide it into 5-acre residential lots. To render an approval, the county had to determine that the parcel was not agricultural land protected by Goal 3. The goal defines agricultural land in part as lands within certain U.S. Natural Resources Conservation Service (NRCS) soil types and

> [l]and in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices . . . .

OAR 660-033-0020(1)(a)(A)-(B). "Farm use" is statutorily defined as "the current employment of land for the primary purpose of obtaining a profit in money . . ." by undertaking specified activities. ORS 215.203(2)(a). In *Wetherell v. Douglas County*, 342 Or. 666, 160 P.3d 614 (2007), the Oregon Supreme Court had held that profitability—that is, gross income and net income—may be considered as an element in evaluating a property's suitability for farm use. Based on testimony from the intervenor-applicant, the county concluded that the 259-acre parcel was not suitable for farm use because the owner's annual property taxes, insurance, and debt-service payments for acquiring the property exceeded his gross revenue. The county did not consider the testimony of several area ranchers that suggested a higher lease value for the property.

On appeal, petitioners argued that the county erred in its determination of profitability by considering only certain ineligible costs. LUBA agreed that the county inappropriately focused on the lessor landowner, rather than the lessee farmer, in determining profitability. As a result, the owner's annual debt-service payments on the property could not be considered part of the cost of generating farm income and could not be considered in determining profitability for farm use. The particular motivations and financial circumstances of the owner-applicant were likewise immaterial. Also irrelevant was the scale or size of the intended profit. LUBA phrased the appropriate test as "whether, given those considerations [in OAR 660-033-0020(1)(a)(B)], a reasonable farmer would be motivated to attempt to farm the subject property for the primary purpose of making a profit in money." LUBA No. 2008-071, slip op. at 11-12. This determination may include consideration of land costs (the lessee farmer's lease or mortgage payments), seed costs, labor costs, and "other costs of farming that a reasonably motivated farmer would encounter in attempting to profitably farm the 259 acres." *Id.* at 12.

Here, the county incorrectly reasoned that the property could not be profitably farmed because it could not be leased for an amount that would offset the owner's expenses, including debt service, and leave a net profit. In LUBA's view,

> the relevant question is whether a reasonable farmer could lease or purchase the property for a lease or mortgage payment that reflects the property's farm value and, with the other expenses that would be required to farm the property added to that lease or mortgage payment, generate farm income that would be sufficient to make a profit.

Id. at 14. LUBA made clear that consideration of debt-service payments is not categorically prohibited as long as the payments are consistent with the fair market value price a reasonable farmer would pay to buy the property for farm use.

Because the county's determination of profitability was based on inappropriate cost factors, LUBA remanded the county's decision.

■ LUBA JURISDICTION

The jurisdictional question presented in *7th Street Station LLC v. City of Corvallis*, LUBA No. 2008-069 (Dec. 31, 2008), is whether a city council decision to close a street to vehicular traffic, but not to bicyclists and pedestrians, is a statutory land use decision within the meaning of ORS 197.015(10)(a)(A). Applying an exception to the statutory definition for decisions addressing engineering or "preservation of a transportation facility" authorized by and consistent with a comprehensive plan and zoning regulations, LUBA concluded it lacked jurisdiction to review the city's decision.

The city relied on *Leathers v. Washington County*, 31 Or. LUBA 43 (1996), in which LUBA held that a county

decision to remove gates restricting access to a public right of way was exempt from review under ORS 197.015(10)(b)(D) as a decision concerning design, construction, and road operations. If removing gates is not a land use decision under this exemption, the city contended that restricting public access by adding barricades is also exempt. LUBA agreed, ruling that the city's decision to close the street to vehicular traffic effectively determined the "operation" of a transportation facility within the meaning of the statutory exemption.

LUBA also rejected the petitioner's argument that the exemption's language ("a decision . . . [t]hat determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations . . .") means that the specific engineering activities must be authorized and consistent with the city's comprehensive plan and zoning regulations, and that erecting barricades across the street was not. Resorting to rules of statutory construction, LUBA concluded that it is the transportation facility that must be authorized in the comprehensive plan and zoning regulations. In this case, the street (D street) was identified in the city's transportation system plan.

Since the city's decision was exempt from the definition of a statutory land use decision, LUBA concluded it lacked jurisdiction to review the decision and to consider whether it might have been a "significant impacts" land use decision. Accordingly, LUBA dismissed the appeal.

■ *MEASURE 49*

In *Welch v. Yamhill County*, LUBA No. 2008-129 (Dec. 15, 2008), LUBA concluded the county committed reversible error by approving a subdivision pursuant to previously granted Measure 37 waivers *after* Measure 49 became effective absent any finding of a common law vested right to complete the subdivision. This land use appeal had a long history, beginning with the county's approval of intervenor-respondent John Kroo's claim for Measure 37 waivers of the county's AF-20 zone (Agriculture/Forestry, 20-acre minimum lot size) in 2006 and approval in May 2007 of Kroo's application for a 10-lot subdivision under the waivers. An appeal of the initial subdivision approval to LUBA resulted in a remand to the county in *Welch v. Yamhill County*, LUBA No. 2007-111 (Feb. 2, 2008) (dubbed "*Kroo I*").

While *Kroo I* was pending before LUBA, the voters passed Measure 49, which became effective on December 6, 2007, and the Oregon Court of Appeals decided *Frank v. DLCD*, 217 Or. App. 498, 176 P.3d 411 (2008) (owner's appeal of a LCDC Measure 37 waiver rendered moot by Measure 49). On remand, Kroo pursued two tracks, asking the county to determine that he had a vested right to the subdivision and to respond to LUBA's remand in *Kroo I*. Three events followed in quick succession: the Oregon Supreme Court decided *Corey v. DLCD*, 344 Or. 457, 184 P.3d 1109 (2008), in May 2008; the county hearings officer denied Kroo's vested rights claim in July 2008; and, two days later, the county again approved Kroo's subdivision application. This appeal concerned the county's second subdivision approval and is referred to as *Kroo II*. While *Kroo II* was pending, LUBA issued its decision in *Pete's Mountain Homeowners Association v. Clackamas County*, LUBA No. 2008-065 (Sept. 25, 2008), and held that Measure 49 rendered previously approved Measure 37 waivers ineffective.

In *Kroo II*, petitioners relied on the *Frank*, *Corey* and *Pete's Mountain Homeowners Association* decisions to argue that Kroo's Measure 37 waivers were legally ineffective and the county could not approve Kroo's subdivision application because it violated the now applicable AF-20 zoning standards. Kroo argued that petitioners could have raised this issue in *Kroo I*, failed to do so, and were precluded from arguing this issue by *Beck v. City of* Tillamook, 313 Or. 148, 831 P.2d 678 (1992) (applying issue preclusion to successive LUBA appeals of a land use decision).

In LUBA's view, petitioners essentially argued two points: (1) Once Measure 49 became effective, Kroo's Measure 37 waivers were legally ineffective absent a Measure 49 vested rights determination; and (2) since the Measure 37 waivers were ineffective, the county erred in failing to apply the AF-20 standards to Kroo's subdivision application. After reviewing the arguments and briefs in *Kroo I*, LUBA agreed that petitioners raised their first argument—presciently as it turned out—in *Kroo I*. As a result, they could not raise that issue in this appeal, although intervening appellate decisions have confirmed that petitioners' argument was correct. However, LUBA concluded petitioners did not raise the second argument in *Kroo I* and could not have because the decision before LUBA was the county's initial subdivision approval, which predated passage of Measure 49. LUBA characterized Kroo's waiver argument as requiring "a level of clairvoyance that we do not believe is demanded by *Beck*," *Kroo II*, slip op. at 10, and concluded that it was not foreseeable at the time *Kroo I* was decided how Measure 49 would apply to a subdivision previously approved pursuant to Measure 37 waivers.

Kroo raised several secondary arguments at LUBA, the most significant of which was his assertion that Measure

49 preserved his Measure 37 waivers to the extent he had a common law vested right to the subdivision. LUBA rejected this argument and concluded it had to evaluate the appealed decision as it stood. The county's subdivision approval was based on a Measure 37 waiver, not a vested rights determination, and could not stand because the waiver was legally ineffective at the time the county granted its second subdivision approval. Additionally, a Measure 49 vested right had to exist as of December 6, 2007. LUBA noted that

> even if the county could rely on [Kroo's] Ballot Measure 37 waiver to grant the disputed July 9, 2008 subdivision approval, it is difficult to see how that decision could have any bearing on whether [Kroo] had a vested right over eight months earlier, on December 6, 2007, to continue with development of the disputed subdivision.

Kroo II, slip op. at 14. Absent any legally effective Measure 37 waiver of the AF-20 zoning regulations, LUBA held the county violated its regulations by approving the subdivision and reversed the county's decision.

■ *RLUIPA*

Applying the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2000), LUBA concluded Jackson County erred in applying an administrative rule to deny an application for a church on exclusive farm use-zoned (EFU) land located within 2.2 miles of the City of Ashland's urban growth boundary. *Young v. Jackson County*, LUBA No. 2008-076 (Dec. 23, 2008). The petitioners, two individuals, previously received county approval to build an 11,000-square-foot house on the property, which they used as their residence and as a religious retreat. Petitioners subsequently applied unsuccessfully to use their residence as a church or religious retreat center. In *Young v. Jackson County*, 49 Or. LUBA 327 (2005), LUBA upheld the county's denial because petitioners had not exhausted their administrative remedies by seeking an exception pursuant to ORS 197.732 to the administrative rule prohibiting churches within three miles of a UGB (OAR 660-033-00130(2)).

In the current appeal, petitioners challenged the county's denial of their application for a "reasons" exception. The county found that petitioners failed to show that areas not requiring an exception—land more than three miles from the UGB—could not reasonably accommodate the church use. With respect to RLUIPA, the county concluded that denial of the church did not place a substantial burden on petitioners' religious exercise and, if it did, the three-mile rule furthered a compelling governmental interest and was the least restrictive means of advancing that interest.

On appeal to LUBA, petitioners asserted the county's decision violated both the "general rule" and the "equal terms" provisions of RLUIPA. Under the general rule, a local government may not apply a land use regulation in a way that imposes a substantial burden on the religious exercise of a person or institution unless the government shows that the burden is justified by a compelling governmental interest and is the least restrictive means of advancing that interest. 42 U.S.C. § 2000cc(a). The equal terms provision prohibits a local government from imposing or implementing a land use regulation in a way that treats a religious institution "on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). LUBA agreed with the petitioners that the county's decision applying the three-mile rule treated church uses more restrictively than similar non-religious uses and, therefore, violated the equal terms provision of RLUIPA.

The starting point for LUBA's analysis was ORS 215.283(1)(b), which permits churches in any EFU-zoned area, and OAR 660-033-0120, which implements Statewide Planning Goal 3 and further prescribes where churches may be located in EFU zones. Under the administrative rule, churches and other specified non-farm uses may not be established on land with high-value farm soils. Table 1 in the rule prohibits churches and schools from locating on land within three miles of a UGB unless an exception to Goal 3 is taken pursuant to ORS 197.732, but it allows other non-farm uses to be established within the three-mile limit, including public and private parks and playgrounds, community centers serving rural areas, golf courses, and living history museums. In *1000 Friends of Oregon v. Clackamas County*, 46 Or. LUBA 375 (2004), *appeal dismissed*, 194 Or. App. 212, 94 P.3d 160 (2004), LUBA rejected a challenge to the rule and Table 1 under the equal terms provision of RLUIPA by a church under factually distinguishable circumstances, but hinted strongly that denial of a church serving a rural congregation on a site where a community center serving a rural population is allowed would lead LUBA to conclude the rule violates RLUIPA. In this appeal, LUBA made that clear.

LUBA phrased the question as "whether the rule permits non-religious uses within the three mile boundary that can fairly be characterized as 'assemblies or institutions,' and if so whether those non-religious assemblies or institutions . . . cause 'no lesser harm to the interests

the regulation seeks to advance.'" *Young v. Jackson County*, LUBA No. 2008-076, slip op. at 11 (Dec. 23, 2008) (citing *Lighthouse Institute for Evangelism v. City of Long Branch*, 520 F.3d 253, 270 (3rd Cir. 2007), *cert. denied*, 128 S. Ct. 2503, 171 L. Ed. 2d 787 (2008)). Petitioners argued the legislative history of RLUIPA indicated that Congress intended the phrase "non-religious assembly or institution" to be broadly inclusive and courts in other jurisdictions have determined that golf courses, parks, playgrounds, and similar recreational facilities can be non-religious assemblies or institutions. Absent any argument to the contrary by the county, LUBA agreed with petitioners that these uses are "assemblies" for purposes of applying RLUIPA's equal terms provision because "they are places or facilities where groups or individuals gather to pursue common social or recreational interests." *Id.*, slip op. at 16.

In LUBA's view, the rule and Table 1 run afoul of RLUIPA because they permit non-religious assemblies with potentially the same impacts as religious assemblies within three miles of a UGB but prohibit churches. As a result, churches are not treated on the same terms as non-religious assemblies and, applying the "strict liability" standard adopted by the Third Circuit in *Lighthouse*, the county erred by applying the rule to deny petitioners' application. Even assuming the state has a compelling interest in preserving agricultural land and protecting UGBs, LUBA concluded there is no compelling interest in restricting churches and religious institutions from locating within three miles of a UGB but allowing non-religious uses with similar impacts within that three-mile area. LUBA remanded the county's decision, rather than reversing it, because it was unclear whether the county had any basis for denying petitioners' application aside from the reasons exception.

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