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■ COURT OF APPEALS DISMISSES AN APPEAL OF MEASURE 37 WAIVER AS MOOT UNDER MEASURE 49

Cyrus v. Board of County Commissioners of Deschutes County, 226 Or. App. 1, 202 P.3d 274 (2009), arose out of a challenge to a Deschutes County order waiving certain land use regulations that applied to Central Electric Cooperative's (CEC) utility easements. After the circuit court affirmed the board's order, petitioners (including private property owners and the Trail Crossing Trust) appealed the circuit court judgment. While the appeal was pending, the voters passed Ballot Measure 49, which altered claims and remedies available to landowners whose property values were adversely affected by land use regulations. CEC subsequently filed a motion to dismiss the appeal on the ground that Measure 49, as construed in *Corey v. DLCD*, 344 Or. 457, 184 P.3d 1109 (2008), rendered the appeal moot.

Petitioners argued there was a dispute whether CEC had acquired "vested rights" under subsection 5(3) of Measure 49. That provision entitles a Measure 37 claimant to just compensation as provided in a waiver issued under Measure 37 to the extent the claimant has a vested right to complete the use described in the waiver. Petitioners argued that CEC could only have a common-law vested right if the development was accomplished under a valid waiver. The court of appeals held the case was not justiciable and explained that, although the issue before the court arose under Measure 37, CEC's entitlement to "just compensation," if any, now depends entirely on Measure 49. Because CEC's development rights no longer derive from Measure 37 but, rather, from Measure 49, a decision regarding the validity of the Measure 37 waiver in this case will have no practical effect on the rights and obligations of the parties; rather, those rights and obligations must be adjudicated under a different statute in a separate proceeding. 226 Or. App. at 13. The court noted it was not determining any of CEC's rights under Measures 37 or 49 but only holding that any right to just compensation under Measure 49, including issues related to Measure 37 waivers, must be decided under Measure 49.

Petitioners argued that because CEC had partially completed construction of a transmission line—the use described in the Measure 37 waiver—the case was distinguishable from *Corey*, in which there was no claim of partial completion of a use under a waiver. The court recognized the distinction but clearly relied on the supreme court's holding in *Corey* that Measure 49 was intended "to extinguish and replace the benefits and procedures that Measure 37 granted to landowners." *Id.* at 8 (quoting *Corey*, 344 Or. at 465).

In this decision, the court explained that Measure 49 deprives Measure 37 waivers and all orders disposing of Measure 37 claims of any continuing viability except for waivers subject to the vested rights provision of Measure 49. The court noted the opportunity to litigate those rights in another forum and explained that, although Measure 49 does not clearly identify the forum in which a "vested rights" determination would take place, the parties would have "the ability to seek declaratory or injunctive relief concerning CEC's rights under Measure 49." *Id.* at 10 (citing the statutory remedies available under ORS 28.010 to 28.160 and ORS 285.185(1)).

Finally, the concurring opinion explored petitioners' argument that the development was not accomplished under a valid waiver and described the common-law aspects of non-conforming use. Those aspects include the "good faith" and "reliance" of the landowner in proceeding with development prior to receiving a final valid approval, whether in a multi-step land use determination or another process. Relying on *Clackamas Co. v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973), and subsequent decisions of Oregon appellate courts, as well as ORS 215.190, Judge Sercombe noted that "CEC's Measure 37 waiver operated as a variance or exception to otherwise applicable law that makes the transmission line use unlawful . . . . A decision on an 'area variance' is entitled to the 'presumption of regularity,' while a 'use variance' is not presumptively valid." *Id.* at 16-17 (internal citations omitted). The judge found CEC proceeded with development before the waiver was valid, thus preventing its rights under the waiver from vesting.

For those who practice land use law, this case is useful for understanding how the supreme court's analysis of Measure 49 in *Corey* applies to an issue originally arising under a Measure 37 waiver and ultimately whether a case is justiciable if there is no practical effect on the parties. Judge Sercombe's concurrence is also instructive as a primer on the common law theory of "vested rights" to a use, the factors of "good faith" and "reliance" of the landowner, and the distinction between "use" and "area" variances.

UPDATE: CEC attorneys had a hearing for a "vested rights" determination under Measure 49 before the Deschutes County hearings officer on June 2. Final rebuttal is due July 17. The hearings officer has thirty days from the close of the record to submit a final decision.

Joan Kelsey

Cyrus v. Bd. of County Comm'rs of Deschutes County, 226 Or. App. 1, 202 P.3d 274 (2009)

■ *MONEY JUDGMENT FOR MEASURE 37 CLAIM NOT MOOTED BY MEASURE 49*

Measure 49 does not render moot litigation regarding a money judgment that resulted from a Measure 37 claim. After a Measure 37 claim is reduced to a judgment for compensation, the government does not have discretion to "waive" land use regulations in lieu of just compensation. These are the primary holdings of *State ex rel. English v. Multnomah County*, 227 Or. App. 419, 206 P.3d 224 (2009).

Measure 37 claimant Dorothy English obtained a judgment against Multnomah County for just compensation in the amount of $1.15 million dollars. The county initially appealed the compensation judgment but then successfully moved to dismiss the appeal. Months later, Multnomah County issued a fourth and final order regarding English's Measure 37 claim. According to English, the fourth order still did not waive all property value-reducing regulations.

English sought satisfaction of the money award in the compensation judgment, but the county refused to pay. English filed for a writ of mandamus to compel payment. In opposition, the county argued that it could avoid paying the judgment pursuant to the "pay or waive" provisions of Measure 37. The trial court apparently agreed with the county and dismissed the mandamus action, concluding that a judgment entered pursuant to Measure 37 is payable only at the discretion of the government. In other words, the trial court found that even after the county failed to "pay [just compensation] or waive [restrictive land use regulations]," *and* after the claim for compensation was reduced to a final judgment, the county could *still* avoid payment by waiving restrictive land use regulations.

English appealed the dismissal of her mandamus action. The county argued that the appeal was moot—that Measure 49 deprived the compensation judgment of legal effect in the same way that Measure 49 deprived all Measure 37 waivers of legal effect (except for vested rights). The court of appeals disagreed. Applying the rule that "once a claim is reduced to a judgment, the claim is extinguished because it is 'merged' into the judgment and rights upon the judgment are substituted for the former claim," the court distinguished the case from other Measure 37 litigation rendered moot by Measure 49. 227 Or. App. at 428 (quoting *Matter of Barrett and Barrett*, 320 Or. 372, 378, 886 P.2d 1 (1994)).

The court further found that claim preclusion prevented the county from asserting various Measure 37-based defenses to enforcement of the final compensation judgment.

Finally, the court held that any discretion that the county may have had under Measure 37 to "pay or waive" a claim for compensation was not applicable to a final judgment for compensation. *Id.* at 433.

Isa Anne Taylor

State ex rel. English v. Multnomah County, 227 Or. App. 419, 206 P.3d 224 (2009)

■ *MEASURE 49 TRUMPS MEASURE 37 WAIVERS AND THE GOAL-POST STATUTE*

The facts in this case, *Pete's Mountain Homeowners Association v. Clackamas County*, 227 Or. App. 140, 204 P.3d 802 (2009), are not disputed. A claimant acquired a sixty-nine-acre property in 1969 when it could have been divided into one-acre lots. In 1979 the county rezoned the property to create an eighty-acre minimum lot size. The claimant alleged that the rezoning caused a diminution in value exceeding $12 million. Rather than pay compensation, the Department of Land Conservation and Development (DLCD) and the county decided "not to apply" (i.e., waived) the regulations in question pursuant to Ballot Measure 37 (ORS 197.352(1) and (8) (2005)).

In January 2007, waivers in hand, the claimant filed what the county concluded was a complete application to divide the property into forty-one lots. A county hearings officer approved the application in June 2007, which was followed by an appeal to LUBA. LUBA remanded on grounds not relevant to the case before the court of appeals.

Before the county adopted a final order in response to the LUBA remand, the voters enacted Ballot Measure 49, which took effect in December 2007 (Or. Laws 2007, ch. 424, § 5). Following that, opponents of the subdivision argued that Measure 49 superseded and nullified the waivers granted under Measure 37.

The claimants argued that, once they filed the application, the standards and criteria that applied to it—including Measure 37 waivers—could not be changed, based on ORS 215.427(3)(a), commonly known as the "goal-post statute." That statute says, in relevant part, that "approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

On remand from LUBA, the county agreed with the claimants and adopted an amended final order approving the application. LUBA reversed, concluding that Measure 37 and waivers derived therefrom are not "standards" or "criteria;" therefore they are not protected by the goal-post statute. The claimant appealed to LUBA. The issue in this case was whether, given the goal-post statute, Measure 37 waivers survive enactment of Measure 49.

The court of appeals concluded that LUBA's construction of the goal-post statute was wrong, but that the error did not alter the outcome of the case because Measure 49 supersedes Measure 37 and replaces the remedies the latter formerly provided. 227 Or. App. at 151. This holding

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expanded on the court's reasoning in *DLCD v. Jefferson County*, 220 Or. App. 518, 188 P.3d 313, *review denied*, 345 Or. 417, 198 P.3d 941 (2008), where the court held that the goal-post statute did not apply to a change in circumstances unrelated to the applicable standards and criteria for an application—in that case, the death of the claimant. However, the court expressly limited the holding to the facts of the case. Therefore it considered the issue here as one of first impression.

In resolving that issue, the court revisited the Supreme Court's characterization of a Measure 37 waiver in *MacPherson v. Department of Administrative Services* as an "amendment of the land use regulations." 340 Or. 117, 132-133, 130 P.3d 308 (2006). Characterized as such, the court found no alternative but to conclude that the waivers "are themselves standards and criteria within the meaning of the goal-post statute." *Pete's Mountain*, 227 Or. App. at 148. That is, they effectively amended the land use regulations that otherwise applied to the application. Therefore the goal-post statute applies to an application subject to Measure 37 waivers.

Next the court considered whether, notwithstanding the applicability of the goal-post statute, Measure 49 supersedes the Measure 37 waivers. It found the answer to that question largely in *Corey v. DLCD*, wherein the Supreme Court concluded that

> [a]n examination of the text and context of Measure 49 conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners. . . . Measure 49 by its terms deprives Measure 37 waivers—and *all* orders disposing of Measure 37 claims—of any continuing viability, subject to narrow exceptions for common law vested rights. 344 Or. 457, 465-67, 184 P.3d 1109 (2008) (emphasis in original). *See also Cyrus v. Bd. of County Comm'rs*, 226 Or. App. 1, 13, 202 P.3d 274 (2009) (holding that, under *Corey*, the enactment of Measure 49 renders pending challenges to Measure 37 waivers moot).

As if to hammer a final nail into the coffin of Measure 37 waivers that do not involve assertions of common law vested rights, the court relied on *Powers v. Quigley*, 345 Or. 432, 198 P.3d 919 (2008), and *State ex rel. Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145, *cert. denied*, 522 U.S. 994, 118 S.Ct. 557, 139 L. Ed. 2d 399 (1997), for rules of statutory construction to conclude that where two statutes conflict, as in this case the goal-post statute and Measure 49 do, the more recently adopted and more broadly applicable statute—Measure 49—supersedes the goal-post statute and Measure 37 waivers.

Larry Epstein

Pete's Mountain Homeowners Ass'n v. Clackamas County, 227 Or. App. 140, 204 P.3d 802 (2009)

■ COURT REITERATES AGENCY LATITUDE

In *Thompson v. Land Conservation and Development Commission*, 227 Or. App. 120, 204 P.3d 808 (2009), the Court of Appeals reiterated the breadth of agency discretion in interpreting its own rules. The case proceeded on judicial review of LCDC's approval of a Umatilla County ordinance. The ordinance (commonly called a "go-below" amendment) reduced the minimum parcel size for farmland in a discrete portion of the county from 160 acres to a mix of twenty and forty acres. LCDC approved the ordinance on the condition that the county eliminate the twenty-acre minimum because a forty-acre minimum was most consistent with the applicable rules.

A go-below amendment is allowed in order to maintain an area's "existing commercial agricultural enterprise." OAR 660-033-0100(2) (2009). Relevant facts undergirding this amendment included designation of the affected 1,682-acre property as part of the Walla Walla Valley American Viticultural Area and the applicant's stated desire to establish vineyards and wineries there.

Opponents contended that the term "existing commercial agricultural enterprise" necessarily referred to the area's dominant enterprise, which was dryland wheat farming. Surrounding farm parcels ranged in size from ten acres to significantly larger than forty acres and included small orchards and vineyards in addition to parcels farmed for wheat. The court disagreed, relying entirely on *Don't Waste Oregon v. Energy Facilities Siting Council*, 320 Or. 132, 881 P.2d 119 (1994), and the deferential standard of review articulated there. ("Where, as here, the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis on which this court can assert that the rule has been interpreted 'erroneously.'" *Don't Waste Oregon*, 320 Or. at 142.) The court concluded that nothing in the text of the phrase "existing commercial agricultural enterprise" suggests that LCDC must focus on only the predominant agricultural enterprise in the area. Thus, LCDC did not misconstrue the statute by considering the range of commercial agricultural activities in the

area and concluding the county's "go-below" amendment is consistent with the applicable administrative rule—at least as to the forty-acre parcel size LCDC upheld.

The court also rejected the petitioners' procedural claim that LCDC erred by approving the county's ordinance but delaying the DLCD director's signature on the order until the county adopted an ordinance that reflected the forty-acre parcel size that LCDC approved. In the court's view, LCDC essentially approved the county's ordinance with conditions and, in doing so, acted within the range of discretion granted it by applicable statutes and rules. Petitioners failed to prove otherwise.

The courts have applied the principle stated in *Don't Waste Oregon* many times as to many agencies. The primary limitation to this deference relates to administrative rules that "merely reiterate the text of the relevant statutes." *Friends of Bill Bradbury v. Dep't of Justice*, 219 Or. App. 395, 409, 182 P.3d 303 (2008). That limitation would undoubtedly apply to many issues before LCDC, but it did not apply in this case.

Ty K. Wyman

Thompson v. Land Conservation and Dev. Comm'n, 227 Or. App. 120, 204 P.3d 808 (2009)

■ *COUNTY APPROVAL OF A SUBDIVISION APPLICATION UNDER MEASURE 49 IS INAPPROPRIATE WHEN BASED UPON AN UNVESTED MEASURE 37 WAIVER*

In *Welch v. Yamhill County*, 228 Or. App. 124, 206 P.3d 1213 (2009), the Court of Appeals was asked to decide two issues: (1) Whether LUBA's reversal under Measure 49 of the county's approval of a subdivision predicated on a Measure 37 waiver was in error due to a lack of subject matter jurisdiction; and (2) whether LUBA erred in its application of ORS 215.427(3)(a), commonly known as the "goal-post statute." The court held that LUBA did have subject matter jurisdiction and, because petitioner failed to raise application of the goal-post statute before LUBA, that issue was not properly before the court. 228 Or. App. at 133.

Petitioner Kroo, a developer, had property zoned Agriculture/Forestry (AF-20). As the court explained, "The county's AF-20 zone requires that newly-divided parcels include at least 20 acres and does not allow residential subdivisions." 228 Or. App. at 127 (quoting *Welch v. Yamhill County,* LUBA No. 2008-129 (Dec. 15, 2008)).

Kroo applied for and was granted a Measure 37 waiver from both the county and the state. Based on that waiver, the county approved the subdivision application. Respondents appealed the approval to LUBA. While the appeal was pending, Measure 49 became effective, and LUBA remanded the county's decision "to address certain County land use standards." *Id.* at 127.

Following remand, two things occurred: (1) Kroo sought a determination from a county hearings officer that he was entitled to just compensation as provided in his Measure 37 waivers because he had a vested right under subsection 5(3) of Measure 49; and (2) the Supreme Court issued its decision in *Corey v. DLCD*, which held that, subject to a single exception (referred to as the "vested rights" exception under subsection 5(3)), Measure 49 deprives Measure 37 waivers "of any continuing viability." 344 Or. 457, 466-67, 184 P.3d 1109 (2008).

While attempting to obtain a determination from the hearings officer about the vested rights of the Measure 37 waivers, the county's remand proceedings regarding the subdivision application were underway. After the county's final public hearing and before the issuance of its decision concerning the subdivision application, the hearings officer determined that Kroo did not have a vested right under Section 5(3) of Ballot Measure 49. The county ultimately approved the application again.

Respondents appealed the approval and LUBA reversed, finding that Measure 49 rendered Kroo's Measure 37 waivers legally ineffective as a basis for county approval of the disputed subdivision. But LUBA also decided that Kroo could continue to seek ultimate resolution of his vested rights claim before the Yamhill County Circuit Court and hearings officer. Kroo appealed LUBA's order, raising six assignments of error. The court affirmed four and only addressed the second, that LUBA lacked subject matter jurisdiction, and the fifth, concerning LUBA's application of the goal-post statute.

Kroo's main arguments were that (1) LUBA made a determination that, under subsection 5(3) of Measure 49, he was not entitled to just compensation as provided in his Measure 37 waivers; and (2) LUBA lacked jurisdiction to make such a determination because it was not a land use decision.

More specifically, Kroo argued that Measure 49 governs whether he was entitled to just compensation as provided in his Measure 37 waivers according to section 5 of Measure 49. That section states in part:

> A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of

the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in: . . . (3) A waiver issued before the effective date of this 2007 Act 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 this 2007 Act to complete and continue the use described in the waiver.

Or. Laws 2007, ch. 424, § 5. Also, according to 195.305(7) a determination under subsection 5(3) of Measure 49 concerning whether a claimant is entitled to just compensation as provided in a Measure 37 waiver is not a land use decision. Therefore LUBA did not have subject matter jurisdiction over the issue of whether the waivers were valid.

The court agreed with Kroo's reasoning on this point but, in affirming LUBA's remand, pointed out that the land use decision on review was the county's approval of Kroo's subdivision application. LUBA reversed the county's decision because its approval had been based on Kroo's Measure 37 waivers. LUBA acknowledged that the issue of whether petitioner was entitled to just compensation as provided in his Measure 37 waivers was pending, but it found that, "[u]nless and until [petitioner] receives such a vested rights determination, a county decision to grant preliminary subdivision approval must stand on its own." 228 Or. App. at 131.

As to the second assignment of error, the court found that Kroo had failed to preserve the issue for appeal.

Noah W. Winchester

Welch v. Yamhill County, 228 Or. App. 124, 206 P.3d 1213 (2009)

Appellate Cases – Ninth Circuit

■ UPDATE

On June 8, 2009, the United States Supreme Court denied the petition for writ of certiorari in *McClung v. Sumner*, 545 F.3d 803 (2008), previously reported in the February 2009 issue of the Digest (Vol. 31, No. 1). In *McClung*, the Ninth Circuit upheld the district court's determinations that (1) the ad-hoc standards of *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), governed analysis of whether Sumner's ordinance establishing a legislative, generally applicable requirement for storm pipe installation as a condition of development effected a taking; and (2) Sumner did not take petitioners' property because the McClungs voluntarily agreed to install a larger storm pipe than required by the city's ordinance in exchange for a waiver of permit fees.

Kathryn S. Beaumont

Oregon Cases – Federal and State Trial Courts

■ COURTS DIFFER OVER MEASURE 49'S IMPACT ON MEASURE 37 WAIVERS

Did governmental waivers of land use restrictions granted under Measure 37 create contractual rights that must be honored, despite the subsequent passage of Measure 49? And does Measure 49 violate the separation of powers doctrine by overruling these waivers? At the moment, it depends on which court you ask.

Measure 37, passed in 2004 by the people of Oregon, required governments to choose between compensating landowners for reductions in property values caused by land use restrictions and waiving the restrictions. In the wake of Measure 37, government entities across the state issued thousands of waivers.

Measure 49, passed three years later, substantially modified Measure 37. Under Measure 49, property owners whose Measure 37 claims had vested under common law by the effective date of Measure 49 may proceed with the claims. But for pending, unvested claims, Measure 49 modified and limited these claims to no more than either three or ten dwellings, depending on the nature and location of the property.

In *Citizens for Constitutional Fairness v. Jackson County*, No. 08-3015-PA, 2008 WL 4890585 (D. Or. Nov. 12, 2008), the plaintiffs argued that Jackson County must honor the Measure 37 waivers it had granted them, even though the claims had not vested. The plaintiffs offered two theories as to why their waivers must be honored, both of which prevailed.

First, the plaintiffs argued that their Measure 37 waivers were binding contracts between themselves and the county, and that these contracts were protected under the Contract Clause of the United States Constitution, which provides

that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1.

To resolve Contract Clause claims, courts apply a three-step test. The first step is whether the state law substantially impairs a contractual relationship. The court found such a contractual relationship here. According to the court, the Measure 37 waivers were "in effect settlement agreements between Jackson County and each plaintiff, because the waivers allow the parties to avoid potentially costly and protracted litigation." *Citizens for Constitutional Fairness*, 2008 WL 4890585, at *3. The court held that the county received consideration because the plaintiffs agreed "to drop their claims for monetary compensation." *Id.* The plaintiffs also received consideration because they were granted waivers of otherwise applicable land use requirements.

The court also held that when Jackson County declined to honor its Measure 37 waivers after the passage of Measure 49, the impact on the plaintiffs was substantial. Thus, the plaintiffs' contractual rights had been substantially impaired.

The second step of the Contract Clause analysis is whether there is a significant and legitimate public purpose behind the state law. The court assumed, without analysis, that there was such a purpose behind Measure 49.

If there is a legitimate public purpose behind the law, the third and final step is whether any modifications of rights and responsibilities affected by the law are based on reasonable conditions and are appropriate to the underlying public purpose. In a confusing passage, the court declined to evaluate the measure under this third step. Instead, it focused on the county's "interpretation" of the measure, which the court held would "eliminate" the plaintiff's contractual rights. *Id.* Without evaluating whether Measure 49 could be interpreted in any other way, the court declared that "Measure 49 does not apply to plaintiffs' Measure 37 waivers." *Id.* The court stated that its ruling does not mean "that Measure 49 is unconstitutional, but rather that Jackson County may not rely on Measure 49 as an excuse to avoid its obligations under plaintiffs' Measure 37 waivers." *Id.*

The court also accepted the plaintiffs' argument that Measure 49 violates the separation of powers doctrine. The court first held that county decisions whether to grant or deny Measure 37 waivers are quasi-judicial orders. *Id.* at *4. The court then concluded that under the principle of separation of powers, Measure 49, a legislative act, cannot be permitted to overrule Jackson County's quasi-judicial decisions to grant Measure 37 waivers. *Id.*

Four months later, in an unrelated case, a state circuit court addressed the same arguments about contractual rights and separation of powers and rejected both. *Rood v. Coos County*, No. 08CV-0537 (Coos Co. Cir. Ct. Mar. 18, 2009).

In *Rood*, the plaintiffs offered two alternative contractual rights theories. Their first theory was that Measure 37 itself made an offer to the plaintiffs to apply for just compensation and that the plaintiffs had accepted that offer by filing a claim. Their second theory was that the plaintiffs' claim under Measure 37 was an offer and the county's decision to waive land use restrictions on the plaintiffs' property was an acceptance. In support of their arguments, the plaintiffs cited *Citizens for Constitutional Fairness* and other cases.

The state court in *Rood* expressly repudiated the holding in *Citizens* that Measure 37 waivers created contractual rights, and specifically the idea that the waivers were settlement agreements under which the plaintiffs had dropped their claims for monetary compensation:

> The problem with the federal court[']s reasoning is that the plaintiffs dropped nothing. It was not up to the plaintiffs to choose between monetary compensation or waiver for any valid claim. The plaintiffs under Measure 37 were either going to receive money or a waiver. They gave up nothing because Measure 37 directed the governmental body in question to do one or the other. Following that dictate is not a settlement.

Rood, slip op. at 6.

The *Rood* court distinguished the other cases cited by the plaintiffs, noting that in all of them traditional areas of commerce were involved where the state's role was as an employer or insurer, the legislature had expressed its intent to enter into contracts, and there was real consideration. None of those factors were present in this case.

The court also cited the following passage from *McPherson v. Department of Administrative Services*, a case that upheld the constitutionality of Measure 37:

> Oregon's legislative bodies have not divested themselves of the right to enact new land use regulations in the future. Nothing in Measure 37 forbids the Legislative Assembly or the people from enacting new land use statutes, from repealing all land use statutes, or *from amending or repealing Measure 37 itself*.

Id., slip op. at 7 (emphasis in original) (quoting 340 Or. 117, 128, 130 P.3d 308 (2006)). The *Rood* court held that

"[i]f the legislature or the people can amend or repeal Measure 37, it cannot have created a contract." *Id.*

The *Rood* court also rejected the plaintiffs' argument that Measure 49 violated the principle of separation of powers—an argument that had prevailed in *Citizens.* The *Rood* court first accepted the notion that waivers granted under Measure 37 were quasi-judicial decisions. However, the court also noted that quasi-judicial decisions are not the same thing as judicial judgments. The court concluded that, while judgments cannot be overruled by legislative acts, the same protection does not extend to quasi-judicial decisions made by counties and executive department agencies.

Although the state and federal courts in these two cases reached opposite conclusions on these issues, it is important to note that neither case sets statewide precedent, and it appears that the appellate courts will ultimately decide which lower court got it right. In *Citizens*, both sides have appealed the federal district court's decision to the Ninth Circuit, and in January the district court stayed its judgment pending the outcome on appeal. Likewise, *Rood* has been appealed to the Oregon Court of Appeals.

Nathan Baker

Citizens for Constitutional Fairness v. Jackson County, No. 08-3015-PA, 2008 WL 4890585 (D. Or. Nov. 12, 2008)

Rood v. Coos County, No. 08CV-0537 (Coos Co. Cir. Ct. Mar. 18, 2009)

Cases From Other Jurisdictions

■ DEVELOPER CAN CHALLENGE MORATORIUM EXTENSION, SAYS CALIFORNIA APPELLATE COURT

Arcadia Dev. Co. v. City of Morgan Hill, 169 Cal. App. 4th 253, 86 Cal. Rptr. 3rd 598 (2008), involved a 1977 growth moratorium extended by a 1990 referendum until 2010. In 2004 the city's voters approved a ballot measure extending the moratorium again to 2020 without changing the density limits. Plaintiff developer (Arcadia) challenged the extension under the 5th and 14th amendments to the federal Constitution. The trial court construed a ninety-day statute of limitations under state law to have run in 1990, thus barring a challenge to the extension. Arcadia noted that its property was the only one that had been annexed into the City and affected by the extension.

On appeal, the first issue was the statute of limitations, which the court saw as a question of law. The purpose of a ninety-day statute of limitations is to bring finality to land use enactments. In this case the court applied the statute of limitations to the second moratorium extension and not the first one, viewing the second extension as a very different enactment in different circumstances that triggered new federal constitutional claims. The court reasoned as follows:

> It is true that extending the Density Restriction for 10 additional years increased the burden upon Arcadia such that one could argue that the action affected only Arcadia's damages. But since the 1990 restriction was intended to be temporary, extending it for 10 additional years was also a *new* burden. Indeed, if Arcadia were precluded from challenging any extension of the Density Restriction, City could annex more property and allow development around and beyond Arcadia's property while continuing to restrict development on Arcadia's property. City could turn a temporary restriction into a permanent restriction, singling out one landowner to bear the entire burden, and the landowner, who was willing to accept a temporary restriction, would be forced to endure a permanent restriction and would have no remedy.

169 Cal. App. 4th at 266. Thus, the court determined that the 2004 extension of the moratorium and density restriction constituted the basis for new claims that could be pursued under the facts of this case. The trial court dismissal was reversed.

This case shows that the extension of a moratorium does not necessarily relate back to the original moratorium, but may be the basis of independent claims.

Edward J. Sullivan

Arcadia Dev. Co. v. City of Morgan Hill, 169 Cal. App. 4th 253, 86 Cal. Rptr. 3rd 598 (2008)

■ UTAH FEDERAL TRIAL COURT DENIES PUBLIC AGENCY MOTION TO DISMISS TAKINGS CASE

In *Merrill v. Summit County*, No. 2:08CV723DAK, 2009 WL 530569 (D. Utah 2009), Merrill, a developer, alleged that he was a partner in an entity that owned the subject site and that he had applied on behalf of the partnership for economically viable uses for 17 years without success. Merrill now claimed a taking. His predecessor in interest

submitted an application for commercial development on the site, but before acting upon it the county rezoned the property so that it could not be used for at least ten years. The county then denied Merrill the administrative relief he sought to secure an economically viable use. The county denied a plan amendment and vested rights determinations as well. Merrill further alleged that a seemingly never-ending, circuitous process for study of the site occurred during this time and that his efforts to resolve the problems through the use of a statutory property rights ombudsmen process were also unsuccessful. He filed this takings and equal protection action under the United States and Utah Constitutions. The county removed the case to federal court and filed a motion to dismiss the federal claim for lack of ripeness and finality and moved to dismiss the state claim without prejudice.

The court said at the outset that it was not the taking, but the denial of just compensation for the taking that would violate the Fifth Amendment. It also noted the county's contentions that, in addition, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining such compensation." 2009 WL 530569, at *2 (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)).

However, the court explained that *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), which dealt with simultaneous takings claims under the federal and state constitutions, allows a state court to hear both such claims—i.e., to determine the state claim first and then move directly to the federal claim to avoid piecemeal litigation. Merrill had filed his state and federal claims in state court and the county had removed to federal court , a scenario the court found to be permitted under *San Remo* and not prohibited by *Williamson County*. The motion to dismiss was denied and the case proceeded.

This case shows that local governments facing a taking claim and seeking to avoid the Fifth Amendment claim are better off dealing with the issue in state courts rather than removing the action to federal courts, which allow both state and federal claims to proceed.

Edward J. Sullivan

Merrill v. Summit County, No. 2:08CV723DAK, 2009 WL 530569 (D. Utah 2009)

Land Use Board of Appeals

■ LOTS AND PARCELS

The question presented in *Thomas v. Wasco County,* LUBA No. 2008-206 (Mar. 3, 2009), was whether the county ran afoul of ORS 92.017 when it deemed lots or parcels described together in a single deed as consolidated for development purposes. The statute states that "[a] lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law." The county's ordinance specified that certain contiguous legal lots and parcels that are nonconforming in size and are "consolidated onto a single deed at any time" must be treated as "consolidated for development purposes" with limited exceptions. In *Kishpaugh v. Clackamas County*, 24 Or. LUBA 164 (1992), and *Campbell v. Multnomah County*, 25 Or. LUBA 479 (1993), LUBA upheld county regulations that required lots under the same ownership to be combined for development purposes. The petitioner in *Thomas* urged LUBA to overrule both cases, which LUBA declined to do. Although LUBA disagreed with the petitioner that the county's ordinance violated ORS 92.017, petitioner's argument and LUBA's inquiry did not stop there.

LUBA noted that its ruling in *Kishpaugh* and *Campbell* presumed that the disputed county ordinances had a valid planning purpose for requiring lots to be combined in order to be developed. One exception to the consolidation language in the Wasco County ordinance focused on the specific language of the deeds for particular properties: if all of the deeds identified each property by a heading—such as parcel 1, parcel 2—and included a metes-and-bounds description of each property, the properties could be developed separately. If, however, the deeds contained just a metes-and-bounds description, but no headings, the ordinance required consolidation of the properties for development. In petitioner's view, "it is impermissible to declare that a lot or parcel has lost all integral development rights based solely on the presence or absence of headings in a deed, or a presumption regarding the grantor's intent." *Thomas*, LUBA No. 2008-206, slip op. at 5.

LUBA agreed with the petitioner that the county ordinance used an "arbitrary and illegitimate means" to advance a likely legitimate planning reason to require consolidation of contiguous properties for development purposes. *Id.* In particular, LUBA identified several problems with the language used in the deed and with the

county's inquiry into whether particular properties were transferred at *any* time in a single deed. First, many deed transfers likely occurred at a time when neither grantors nor grantees could have foreseen that the presence or absence of headings describing the transferred properties would determine whether they could be developed separately or in combination. The county articulated no planning reason why two identical deeds—one with headings for each lot or parcel transferred and one without—should have different development consequences. Even if the county assumed a deed identifying each property with headings indicated the grantor's intent that the properties should be separately developable, LUBA found no relationship between the grantor's intent and a legitimate county planning objective. Finally, LUBA observed that intent is a factual question that only a court can decide. If the county wishes to prevent development of substandard properties, LUBA identified several alternative methods available to the county, including adopting an ordinance containing an explicit prohibition with appropriate exceptions as long as they "do not hinge on arbitrary differences in the wording or form of deeds." *Id.* at 7.

■ *LUBA PROCEDURE*

LUBA's order resolving record objections in *Home Builders Association of Lane County v. City of Eugene*, LUBA Nos. 2008-148 and 2008-149 (June 1, 2009), addresses a recurring question in appeals of local legislative land use decisions: when does the legislative proceeding begin for purposes of compiling the record in a LUBA appeal? Petitioners in this appeal challenged Eugene's adoption of a package of minor zoning code amendments. The issues and code sections targeted for amendment were derived from a 2007 public outreach and prioritizing process conducted by the city's planning commission. The city sent notice of the proposed amendments to DLCD in April 2008. Following the city council's adoption of the amendments, petitioners appealed to LUBA. The record of local proceedings the city sent to LUBA began with the April 2008 DLCD notice.

Petitioners objected to the record, arguing that it improperly omitted materials generated during the public outreach process that began in May 2007. Petitioners argued that LUBA should interpret ORS 197.830(10)(a) by adopting a "bucket rule" stating that all material relevant to a legislative proceeding should be included in the record transmittal to LUBA. That statutory provision requires a local government to transmit to LUBA "the entire record of the proceeding under review." Agreeing with petitioners that the statutory language is simple, LUBA also concluded it is unambiguous and declined petitioners' invitation to broaden the scope of local record transmittals beyond the parameters identified in its administrative rules. LUBA reasoned:

> OAR 661-010-0025(1) is LUBA's attempt to establish minimum standards for what must be included in a record that is filed with LUBA. . . . We do not agree that OAR 661-010-0025(1) is inconsistent with ORS 197.830(10)(a) or that the rule exceeds LUBA's rulemaking authority. Under OAR 661-010-0025(1), documents must be included in the record if they have been placed before the decision maker, either physically or through operation of local law, or the documents were specifically incorporated into the record. OAR 661-010-0025(1) is not a bucket rule.
>
> Similarly, while local governments must comply with OAR 661-010-0025(1), they retain some authority under that rule to control when city legislative land use proceedings begin, for purposes of compiling the record that must be filed with LUBA. That authority is not without bounds, but the city's decision here is clearly within any implied limits imposed by ORS 197.830(10)(a) or OAR 661-010-0025(1) in deciding when city legislative land use proceedings begin. In this case, all the city has done is decide that the local proceeding began, for purposes of the official record that must be filed with LUBA, on the date the city provided notice of the planning commission's hearing on the proposal. We believe the city is entitled to make that determination. . . .

Order at 10-11 (internal citations omitted).

LUBA also rejected the petitioners' reliance on the city's notice provisions as a basis for including in the record materials generated during the planning commission's public outreach process. Eugene's zoning code requires notice of the city council hearing on the code amendment package to be given to persons who testified orally or in writing before the planning commission or who requested notice of the planning commission's decision. Petitioners argued this notice requirement expressed a legislative intent to treat the planning commission and city council hearings as a unified proceeding. LUBA disagreed, noting that petitioners' argument ignored the fact that the council was the final decision maker and none of the planning commission materials were placed before the council.

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