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. 4
September 2009

Also available online

Highlights

Appellate Cases – Land Use

■ *MEASURE 49 SUPERSEDES APPEALED MEASURE 37 JUDGMENTS*

Bleeg v. Metro, 229 Or. App. 210, 211 P.3d 302 (2009), provides a helpful road map for determining which Measure 37 claims and waivers are superseded (or not superseded) by the passage of Measure 49.

In general, Measure 49 supersedes Measure 37 claims and waivers. However, an exception to this rule occurs if, prior to Measure 49 becoming law, a trial court adjudicated a Measure 37 claim and issued a judgment in favor of a landowner. In such cases, the landowner's claim for compensation is merged into the court judgment and extinguished, and the judgment can be enforced despite the passage of Measure 49.

Bleeg involved an exception to the exception: an *appeal* of a court judgment awarding compensation can keep the judgment from becoming final and can keep the underlying Measure 37 claim in dispute. When that occurs, Measure 49 operates normally and supersedes the Measure 37 claim.

In *Bleeg*, Metro passed an ordinance that brought the plaintiffs' properties into the regional urban growth boundary, designated the properties for industrial or urban residential development, and applied a temporary twenty-acre minimum lot size that would remain in place until comprehensive plan provisions could be adopted by the local governments. The Bleegs filed Measure 37 claims, which Metro denied. The Bleegs then filed Measure 37 actions in circuit court. The day before Measure 49 became law, the circuit court entered a judgment awarding the Bleegs compensation. Metro appealed and assigned multiple errors to the trial court's judgment. Metro also contended that the case was moot.

The court of appeals never reached Metro's assignments of error, and instead agreed with Metro that the case was moot. In reaching this conclusion, the court examined a number of cases involving the interplay between Measures 37 and 49.

In *Corey v. Department of Land Conservation and Development*, 44 Or. 457, 184 P.3d 1109 (2008), the Oregon Supreme Court held that Measure 49 supersedes all Measure 37 claims and waivers. Furthermore, because Measure 49 deprived all Measure 37 waivers of continuing viability, review of the government order involved in *Corey* would have no practical effect on the parties, and the case was moot.

In *Cyrus v. Board of County Comissioners*, 226 Or. App. 1, 202 P.3d 274 (2009), a circuit court issued a judgment awarding compensation under Measure 37, but that judgment was appealed prior to Measure 49 becoming effective. The court of appeals applied *Corey* to determine that Measure 49 superseded the underlying Measure 37 claim, and the case was thus moot.

State ex rel. English v. Multnomah County, 227 Or. App. 419, 206 P.3d 224 (2009), reached a different result: the case was not moot. In *English*, although Multnomah County appealed the circuit court judgment awarding compensation, the county later voluntarily dismissed its own appeal. The landowner's claim for compensation was merged into the circuit court judgment and extin-

guished, and the county's failure to pursue the appeal rendered the judgment final and enforceable.

The procedural posture of the instant case was essentially the same as that in *Cyrus*: although a court had issued a judgment awarding compensation, the judgment was appealed, and that appeal kept the underlying Measure 37 claim from becoming final. Measure 49 superseded the Measure 37 claim.

As in *Cyrus*, this case was no longer justiciable. The court of appeals therefore vacated the lower court's judgment and remanded for entry of new judgments dismissing the Bleegs' claims.

Nathan Baker

Bleeg v. Metro, 229 Or. App. 210, 211 P.3d 302 (2009)

■ *MEASURE 37 FEE AWARD IN* ENGLISH II

The present installment of the *English v. Multnomah County* Measure 37 appellate litigation concerns Multnomah County's appeal of the trial court's award of attorney fees, expert witness fees, costs, and expenses. In *English v. Multnomah County*, 229 Or. App. 15, 209 P.3d 831 (2009) (*English II*), *adh'd to in part on recons.*, 230 Or. App. 125, 213 P.3d 1265 (2009), the court of appeals upheld English's right to an award of fees, costs, and expenses, but remanded to the trial court for a proper calculation of the appropriate amount of attorney fees.

Measure 37 claimant Dorothy English (now deceased) obtained a judgment for $1,150,000 in just compensation pursuant to Measure 37. That judgment was upheld on appeal in *State ex rel. English v. Multnomah County,* 227 Or. App. 419, 206 P.3d 224 (2009) (*English I*). Following the just compensation judgment, English sought and obtained a supplemental judgment for her attorney fees under former ORS 197.352(6) (2005) (amended by Oregon Laws 2007, chapter 424, section 4 and renumbered as ORS 195.305 (2007)). The trial court awarded English a customary contingent fee of approximately $383,000, which represented one-third of the amount of just compensation awarded in the compensation judgment. In its appeal, the county argued that: (1) the appeal had become moot after the passage of Measure 49; (2) English was not entitled to attorney fees under ORS 197.352(6) because she had not yet collected the monetary award from the compensation judgment and ORS 197.352(6) allowed for fees "incurred to collect the compensation"; (3) the trial court erred in awarding a contingent fee or abused its discretion by awarding fees that were unreasonable; and (4) ORS 197.352(6) did not provide for recovery of expert witness fees and, even if it did, those fees were unnecessary to the prosecution of English's Measure 37 claim. *English II*, 229 Or. App. at 23-24.

The court disposed of the county's argument that the appeal was moot for the same reasons it rejected essentially the same arguments in *English I*. The court noted that *English I* was "not an appeal concerning a Measure 37 claim" but rather an attempt, by way of a writ of mandamus, to compel payment of a final compensatory judgment for which the county had exhausted its opportunities for appellate review. *Id.* at 26 (quoting *English I*, 227 Or. App. at 428). Summarizing the foundation of the *English I* holding, the court wrote "[w]hen the dispute involving a predicate Measure 37 claim for just compensation is ongoing (whether in another forum or on appeal), Measure 49 supersedes the Measure 37 claim and requires the parties to proceed under the new standards in Measure 49 to determine their rights." *Id.* In such situations, the appeal will be moot because it will not have a practical effect on the parties' rights. The court continued, "because this appeal does not involve an ongoing dispute concerning English's Measure 37 claim for just compensation, which Measure 49 would otherwise obviate, our resolution of English's entitlement to fees and costs pursuant to ORS 197.352(6) will have a practical effect on the parties. Accordingly, this appeal is not moot." *Id.* at 27.

The court also made short work of the county's second argument that fees were limited to post-judgment enforcement proceedings (ORS 197.352(6) allowed for attorney fees "reasonably incurred to *collect* the compensation" (emphasis added)). Based on the text of the statute and the context provided by the Measure 37 ballot materials, the court interpreted ORS 197.352(6) as allowing for an award of attorney fees to English when she became liable to pay the fees to her attorneys as a result of pursuing her cause of action for just compensation. *Id.* at 29. English was not required to have collected the compensation award; it was enough that her claim had been reduced to a final judgment. *Id.*

The court next turned to the issue of the amount of the fees award by the trial court. Because under ORS 197.352(6) fees were awarded in the amount incurred (i.e., the amount for which English became liable), the court looked to the fee agreement between English and her attorneys as circumscribing her statutory fee entitlement. *Id.* at 30. The fee agreement was hybrid in nature,

including a contingency fee provision and an hourly fee calculation. *Id.* at 18. It appears that the contingency fee calculation was intended to apply in the event that the trial court awarded monetary compensation and the contingency calculation would result in a fee higher than the hourly calculation. *Id*. at 18-19. The hourly calculation would apply in the event that English did not receive monetary compensation. The trial court had awarded fees based on a customary one-third contingency. *Id*. at 21-23, 30. The court of appeals rejected this portion of the supplemental judgment, noting that the fee agreement did not sufficiently specify that English was obligated to pay her attorneys a set percentage of an award. *Id*. at 30. The court found the hourly calculation to be the method by which English's obligation was calculated, stating that

> as of the time that the trial court awarded attorney fees, English had "incurred"—that is, was obligated to pay [her attorneys]—fees based only on the hours her attorneys spent prosecuting this matter multiplied by their hourly billing rates plus interest. Nothing more, nothing less. Consequently, the trial court's award of attorney fees based on a one-third contingency must be reversed because it did not comport with ORS 197.352(6) in that it awarded a fee that English had not incurred under the terms of the fee agreement.

Id. at 30 (footnote omitted).

Finally, the court, concluding that the allowance for "expenses" in ORS 197.352(6) included expert witness fees, therefore affirmed the trial court's granting of those fees. *Id.* at 32-34.

UPDATE: The court in *English II* initially designated Multnomah County as the prevailing party on appeal. English sought reconsideration of that designation. The court allowed reconsideration and adhered to its former opinion and disposition, but concluded that it had erred in designating the county as the prevailing party. The court therefore designated English as the prevailing party on appeal. *English ex rel. Sellers v. Multnomah County*, 230 Or. App. 125, 213 P.3d 1265 (2009).

H. Andrew Clark

English v. Multnomah County, 229 Or. App. 15, 209 P.3d 831 (2009)

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.
To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

Editor
Kathryn S. Beaumont

Assistant Editor
Eric Shaffner

Associate Editors
Alan K. Brickley
Edward J. Sullivan

Contributors

Nathan Baker
Richard S. Bailey
Gretchen S. Barnes
Jennifer M. Bragar
Alan K. Brickley
Robert A. Browning
Craig M. Chisholm
H. Andrew Clark
Lisa Knight Davies
David Doughman
Larry Epstein
Mark J. Fucile
Glenn Fullilove
Christopher A. Gilmore
Susan C. Glen
Lisa M. Gramp
Raymond W. Greycloud
Peggy Hennessy
Keith Hirokawa
Jack D. Hoffman
Mary W. Johnson
William K. Kabeiseman
Gary K. Kahn
Joan S. Kelsey
Harlan E. Levy
Jeff Litwak
Peter Livingston
Marisol R. McAllister
Nicholas P. Merrill
J. Christopher Minor
Steve Morasch
Tod Northman
David J. Petersen
John Pinkstaff
Carrie A. Richter
Susan N. Safford
Steven R. Schell
Kathleen S. Sieler
Robert S. Simon
Ruth Spetter
Kimberlee A. Stafford
Andrew Svitek
Isa A. Taylor
A. Richard Vial
Noah W. Winchester
Ty K. Wyman

The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

■ ONLY LAWFULLY CREATED PARCELS CAN BE COUNTED IN DETERMINING WHETHER FOREST TEMPLATE DWELLING REQUIREMENTS MET

In *Friends of Yamhill County v. Yamhill County*, 229 Or. App. 188, 211 P.3d 297 (2009), the Court of Appeals affirmed LUBA's reversal of the county's forest template dwelling approval under ORS 215.750(1)(c) on a 5.5-acre parcel zoned for commercial forestry in a subdivision that had never received final subdivision approval from the county. Under that statute, a county may approve the construction of a single-family dwelling within a forest zone if, among other things, "[a]ll or part of at least 11 other lots or parcels that existed on January 1, 1993 are within a 160-acre square centered on the center of the subject tract . . . ." Opponents objected on the grounds that the county, in order to meet this requirement, had counted parcels that had not been lawfully created.

LUBA held that the word "parcel" as used in ORS Chapter 215 means a unit of land that was "created in compliance with applicable partitioning laws or created before any partitioning laws were in place." 229 Or. App. at 191. And since the county could not satisfy the statute without counting illegally-created lots, LUBA held that the county erred in approving the forest template dwelling. *Friends of Yamhill County v. Yamhill County*, LUBA No. 2008-196 (Feb. 6, 2009).

The Court of Appeals agreed with LUBA, based upon the principles of statutory construction set out in *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009), and *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993). Under those principles, the court wrote, "we attempt to determine the meaning of the statute most likely intended by the legislature, examining the text in context along with any legislative history offered by the parties and, if necessary, relevant canons of construction." *Friends of Yamhill County*, 229 Or. App. at 192 (citing *Gaines,* 346 Or. at 171-72).

The court first looked at the context of the forest template dwelling statute, ORS 215.700-215.783, and noted that although it does not define "parcel," ORS 215.010(1)(c) does and expressly applies that definition to Chapter 215. The court acknowledged that, because "the statutory definition is phrased in terms of what a 'parcel' *includes*, not what it *means*," it could be asserted that the courts were not foreclosed "from determining that it means units of land without regard to whether they were lawfully created." *Id.* at 193. However, the court rejected this argument under the principle of *ejusdem generis* (in examining whether an open-ended list includes items not expressly listed, a court is limited by the common characteristics of those things listed). As a result, the types of units of land listed in the statute were legally created and units not of the same type are not lawfully created. Moreover, the court said, "if the term includes parcels not lawfully created, then there is no point in the legislature providing that it includes parcels that are lawfully created." *Id.*

Next, the court rejected the argument that the inclusion of the term "lawfully created" in ORS 215.705(1) indicates that no such requirement exists in other statutes where that phrase does not occur. The consequence of such a finding, the court decided, is that the definition in ORS 215.010(1) becomes meaningless. When confronted with a choice between an interpretation that the legislature was redundant or an interpretation that it was simply incorrect, "the courts of this state routinely select the former interpretation." *Id.* at 195.

Finally, the court was not persuaded by the petitioner's reliance on the legislative history of ORS 215.750(1), which included a legislator's statement that the statute was intended to establish an application process that could occur at "at the land use planning counter." *Id.* at 196 (quoting Tape Recording, House Floor Proceedings, H.B. 3661, Aug. 3, 1993, Tape 230, Side A (statement of Rep. Marilyn Dell)). The court said this was merely the statement of one legislator who spoke not to the particulars of the forest template dwelling statute but to the broader purposes of the entire bill of which the statute was a part, and did not mention this specific statute. Furthermore, the court said this legislative history argument was based on "an unproven assumption . . . that lawfulness of the creation of a given parcel is information that would not be readily available 'at the land use planning counter.'" *Id.*

The court concluded that "only parcels lawfully created may be counted in determining whether the requirements of the forest template dwelling statute have been met." *Id.* at 198.

John C. Pinkstaff

Friends of Yamhill County v. Yamhill County, 229 Or. App. 188, 211 P.3d 297 (2009)

■ *A STREAM THAT HAS BEEN CHANNELIZED AND RELOCATED IS STILL A "NATURAL WATERWAY"*

In *Gienger v. Department of State Lands*, 230 Or. App. 178, 214 P.3d 75 (2009), the Oregon Court of Appeals upheld a Department of State Lands order finding the petitioner in violation of ORS 196.810 after he removed material from the bed and banks of Golf Course Creek in Tillamook County without a permit.

The basic facts of the petitioner's action were not in dispute. Mr. Gienger is a dairy farmer. The farm adjoins the Tillamook County Creamery. Golf Course Creek runs through his dairy farm; the fields in that area grow rye grass. The rye grass fields have an underground tile drainage system that drains into Golf Course Creek. Prior to the current action, Mr. Gienger had already constructed a drainage ditch connecting Golf Course Creek with the Wilson River through a new two-foot culvert under Boquist Road. The west end of the creek still ran through the older four-foot culvert in times of high water.

In late 2003, the Tillamook Creamery began discharging effluent into a marsh near the north end of Golf Course Creek. This caused water levels in Golf Course Creek to rise, which caused water to back up onto Mr. Gienger's property. At the same time, the western part of the creek was overgrown with reeds and canary grass and the older culvert was clogged with dirt and debris.

In January 2004, Mr. Gienger used a trackhoe to remove more than fifty cubic yards of dirt and canary grass from the west end of Golf Course Creek. The Department of State Lands (DSL) issued a cease and desist order and held a contested case in December 2004. An administrative law judge (ALJ) issued a proposed order concluding that Golf Course Creek was a "water of the state" under ORS 196.800, but also that it was exempt from the permit requirement pursuant to ORS 196.905(3), (4), and (6). These exemptions allow activities without a permit on converted wetlands, certain activities on land zoned exclusive farm use, and maintenance of structures, such as drainage ditches.

DSL submitted an exception to the proposed order and the ALJ responded to the exception (which the decision does not detail). DSL then adopted the ALJ's findings, adding one historical fact—that the essential character of Golf Course Creek as a natural waterway has persisted in that it has headwaters in the foothills and carries a natural flow into the Wilson River. DSL also concluded that none of the exemptions listed in the ALJ's proposed order applied.

The Court of Appeals upheld the state's addition of the historical fact under ORS 183.650(3) and (4) (allowing an agency to modify a historical fact found by an ALJ, and specifying that the court reviews the modification de novo). The court also upheld the state's conclusion that none of the exemptions applied. Mr. Gienger argued that this conclusion was also a modification of a historical fact. The court disagreed, noting that the state's conclusion that Golf Course Creek was a natural waterway was a legal issue reviewable for error of law.

The court then turned to the question of whether Golf Course Creek was a natural waterway or a drainage ditch. As expected, the court started by determining plain meaning. It noted that *Webster's* defines "structure" as "something constructed or built" and that the then-OAR definition of "structure" was consistent with *Webster's*. The court then reasoned that in order for a waterway to be a "structure," it would have to be something constructed or built and designed to accomplish a specific purpose. The term "natural waterway" as previously defined in the OAR indicates a "waterway created by naturally by geological or hydrological processes, waterways that would be natural but for human caused disturbances . . . ."

The court quickly concluded that, under these definitions, even a channelized stream is a natural stream as opposed to a drainage ditch. Specifically, Golf Course Creek is natural because it originates in the hills and flows to the Wilson River. Underground tiling in surrounding fields and channelizing the stream did not convert it into a drainage ditch. The court also noted that the state's interpretation of its regulations was consistent with the court's interpretation and gave deference to the state's interpretation. Finally, the court concluded that Mr. Gienger removed material from the creek itself, not from his fields, so the converted wetlands exemption did not apply.

In short, this case reminds us to look at the entirety of a stream, not simply the portion that crosses a single ownership.

Jeffrey B. Litwak

Gienger v. Dep't of State Lands, 230 Or. App. 178, 214 P.3d 75 (2009)

■ COURT OF APPEALS CLOSES ANOTHER CHAPTER IN THE STORY OF THE METOLIUS RIVER DESTINATION RESORT WARS

In *Friends of the Metolius v. Jefferson County*, 230 Or. App. 150, 213 P.3d 1259 (2009), the Oregon Court of Appeals affirmed LUBA's decision to uphold Jefferson County's comprehensive plan amendments to its land use map, which set the boundaries for the Camp Sherman unicorporated community. The court held that petitioners Friends of the Metolius (Friends) had waived their challenge to the adequacy of those amendments by failing to seek judicial review of an adverse decision in earlier proceedings before LUBA. 230 Or. App. at 156.

Friends' challenge is part of a broader legal attack on developers' plans to site destination resorts near the Metolius River in central Oregon. Jefferson County's amendment of its comprehensive plan and zoning ordinance in 2007 sparked objections from Friends and others that the amendments would pave the way for development of destination resorts, which Friends contended would harm the Metolius River and strain the county's infrastructure. Proponents of the amendments contended that new destination resort developments within the Camp Sherman boundary would help spur economic growth in central Oregon.

Opponents' initial challenge to Jefferson County's comprehensive plan amendments began in 2007 with *Johnson v. Jefferson County*, 56 Or. LUBA 25 (2008), *aff'd*, 221 Or. App. 190, 189 P.3d 34 (2008). There, opponents of the county's comprehensive plan amendments, including petitioners Friends and Pete Schay, contended that the county violated OAR 660-022-0020(2), which states that

> [c]ounties shall establish boundaries of unicorported communities in order to distinguish lands within the community from exception areas, resource lands and other rural lands. The boundaries of unicorporated communities shall be shown on the county comprehensive plan map at a scale sufficient to determine accurately which properties are included.

Friends and Schay made several arguments in support of their challenge to the amended land use map. However, LUBA rejected all but one: That the map's scale, contrary to the second sentence of OAR 660-022-0020(2), was too small to determine accurately which properties were included within the Camp Sherman community boundary. LUBA ordered the county to develop a larger-scale map. Friends and Schay did not appeal any part of LUBA's decision in *Johnson*.

On remand in 2008, the county redrafted its map and revised the text of its zoning ordinance to reflect the changes ordered by LUBA. The county's findings of fact tied the 2008 map to other official county maps that showed the Camp Sherman boundary at larger scales. Subsequently, in *Friends of the Metolius*, Friends again appealed the county's comprehensive plan amendments to LUBA.

Friends conceded before LUBA that the county had complied with LUBA's instructions in *Johnson* and did not dispute that substantial evidence supported the county's findings on remand that the 2007 and 2008 maps, together with other more detailed maps, more precisely identified the Camp Sherman boundary. LUBA upheld the county's 2008 map amendment and petitioners appealed.

Because it held that Friends had conceded the issue before LUBA, the Court of Appeals did not address the challenge to the county's findings that the map depicted the Camp Sherman community at a sufficient scale in accordance with the second sentence of OAR 660-022-0020(2). Rather, the court addressed Friends' remaining argument, based on the first sentence of the rule, that the county had failed to establish with substantial evidence that each parcel depicted on the 2008 map was within the community's boundary.

The court explained that LUBA had already decided in *Johnson* that the 2007 map's depiction of the boundary complied with the rule's first sentence. Citing *Beck v. City of Tillamook*, 313 Or. 148, 831 P.2d 678 (1992), the court decided that LUBA's decision in *Johnson* barred Friends' subsequent challenge under that same provision. Consequently, the court affirmed LUBA's dismissal of the appeal. 230 Or. App. at 156

Glenn Fullilove

Friends of the Metolius v. Jefferson County, 230 Or. App. 150, 213 P.3d 1259 (2009)

■ COURT OF APPEALS DECIDES EASEMENT SURVIVES WHERE THERE IS NO ADVERSE POSSESSION AND ABANDONMENT IS NOT INTENDED

The Oregon Court of Appeals recently decided an easement case, *Stonier v. Kronenberger*, 230 Or. App. 11, 214 P.3d 41 (2009), in which the Klamath County

Circuit Court got it completely wrong.

In 1998, defendant John Kronenberger acquired his property—seven hundred acres bisected by the Sycan River in rural Klamath County. Three hundred of those acres lie to the east of the Sycan, which runs north and south. Kronenberger has access to this "back parcel" by driving across the river when it is low, but high water prevents fording the river for much of the year. Farther to the east lies the Stoniers' land, which effectively landlocks the back parcel when the river is high.

An easement for ingress and egress, expressly created by deed in 1977, connects the back parcel to a county road. It is described in Kronenberger's deed as sixty feet in width and 1,200 feet in length, running east and west along the entire northern boundary of the Stoniers' property. The Stoniers acquired their property in 2000, and the deed subjects their interest to Kronenberger's easement.

On the easternmost part of the easement, structures including a house, a garage, and various outbuildings partially obstruct it. The house and garage have existed for at least sixty years, long before the creation of the easement. Kronenberger and a prior landowner testified to the trial court that they simply drove around the buildings but stayed within the easement's boundaries. However, in September of 2002 the Stoniers rented the house to a horse owner who built a barbed wire fence across the entire width of the easement to enclose a pasture. The fence included a gate wide enough for horses but not vehicles. Kronenberger then had to drive around the enclosure to gain access to the easement.

In 2005, Kronenberger began to improve the easement with rock. He had been contracted to work with the United States Fish and Wildlife Service on a river restoration project on the Sycan. The project required a sturdier road for access to the river because large quantities of heavy material would be needed. Kronenberger told the Stoniers that the house and garage located within the easement might need to be removed. Over the Stoniers' objection, Kronenberger continued improving the easement and removed some of the fencing that obstructed his passage. The Stoniers commenced litigation, seeking a declaration that the easement was either extinguished by adverse possession or abandoned.

The Stoniers argued that the structures partially obstructing the easement effectively blocked Kronenberger's access and satisfied the adverse possession requirements for extinguishing an easement. They also argued that Kronenberger's predecessors had abandoned the easement through nonuse and had expressed just such an intention. The trial court ordered that the easement be moved to avoid going through the house and its curtilage, finding that the Stoniers' adverse possession argument was valid. But the court also recognized a prescriptive easement allowing Kronenberger access to the landlocked portion of his property. However, the court went on to restrict severely Kronenberger's use of the prescriptive easement and to reduce its width by half. Both parties appealed the trial court's decision.

The court of appeals began by laying out the elements a claimant must prove by clear and convincing evidence to establish adverse possession of an easement: The use must have been actual, open, notorious, exclusive, continuous, and hostile for ten years and "inconsistent with the use of the easement by the owners of the dominant estate." 230 Or. App. at 18. The court noted that ORS 105.620(1)(b) requires, in addition to the elements above, an "honest belief" on the part of the claimant, but only where the period of adverse possession extends beyond January 1, 1990. The Stoniers argued that that period ended in 1989, rendering the statute inapplicable.

The court found that the Stoniers failed to meet the standard of proof with regard to their assertion that the structures within the easement completely obstructed travel along that portion of it. Noting the inconsistency of finding prescriptive use in light of the fact that the buildings were in their present location at the time the easement was created, and emphasizing the evidence that Kronenberger and his predecessor used the easement by driving through the curtilage around the buildings during the prescriptive period (thus defeating the element of exclusive use), the court held that the adverse possession argument failed. *Id.* at 19.

Turning to the Stoniers' next argument, the court noted that "[a]bandonment is established by evidence of nonuse, together with conduct inconsistent with an intention to make further use of the easement. . . . Evidence of lack of use alone, however, does not suffice." *Id.* (internal citation omitted). Citing George W. Thompson, 2 *Thompson on Real Property* § 443 (1980), the court wrote that "the general rule appears to be that evidence of a deviation from a given way, by itself, is not sufficient to prove abandonment . . . ." *Id.* The court held that the Stoniers failed to meet the clear and convincing burden of proof for abandonment since they only argued "infrequent" use and presented no evidence of intent to abandon. *Id.* at 20-21. When Kronenberger appealed the trial court's decision, the Stoniers cross-appealed, arguing that the court wrongly recognized a prescriptive easement in favor of

Kronenberger because the Stoniers did not plead it and, therefore, the trial court lacked authority to award it. The court of appeals agreed with the Stoniers on this point, discussing *Shumate v. Robinson*, 52 Or. App. 199, 627 P.2d 1295 (1981), where the court expressed the proposition that easements by prescription are disfavored by the law and held that claimants must therefore give notice in pleadings that such claims are asserted.

Nicholas P. Merrill

Stonier v. Kronenberger, 230 Or. App. 11, 214 P.3d 41 (2009)

■ *COURT OF APPEALS REAFFIRMS THE RELATIONSHIP BETWEEN DEFERENCE UNDER ORS 197.829(1) AND THE STATUTORY CONSTRUCTION RULES OF* PGE V. BOLI

In *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or. App. 202, 214 P.3d 68 (2009), petitioners and rival travel plaza owners Western Land & Cattle, Inc. (Western Land) challenged a county decision approving a conditional use permit for the operation of a travel plaza on property owned by intervenor-respondent Flying J, Inc. on neighboring land zoned tourist commercial (TC). Although most of the travel plaza component uses were permitted on the property, the truck uses such as fueling, service, and washing were not allowed in the TC zone unless approved as conditional uses. The county granted an approval, finding that truck service stations and washing facilities are similar to automobile service stations, a use allowed in the TC zone.

Western Land argued that the county's interpretation was incorrect because another generally applicable "similar use" provision authorized allowing other unlisted uses but contained limiting language indicating that it applied only to those uses that are not otherwise listed in the code. Truck stops or terminals were explicitly listed in the county's Commercial Rural Center (CRC) zone code provisions, so Western Land asserted they could not be impliedly permitted elsewhere under the general similar use provision.

The county rejected Western Land's interpretation, finding that the purpose of the similar use provision was not to limit otherwise-allowed conditional uses and that the more specific similar use allowance in the TC zone prevailed over the more general provision. Given the deference owed to county interpretations under ORS 197.829(1), LUBA affirmed the county's decision. On appeal, Western Land argued that the county's interpretation was inconsistent with the express language of the code and, according to ORS 197.829(1)(a), LUBA improperly deferred to that interpretation.

The court began its analysis by explaining the relationship between the highly deferential standard of review imposed by statute and the rules of construction established by *Portland General Electric Company v. Bureau of Labor and Industries,* 317 Or. 606, 859 P.2d 1143 (1993). Under ORS 197.829(1)(a), LUBA must defer to a local government's interpretation unless it is "inconsistent with the express language of the . . . regulation . . . ." This requires determining "whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of [*PGE v. BOLI*]." *Western Land*, 230 Or. App. at 209 (quoting *Foland v. Jackson County*, 215 Or. App. 157, 164, 168 P.3d 1238 (2007), *rev. denied*, 343 Or. 690, 174 P.3d 1016 (2007)).

Considering the express language of the relevant provisions, the court found that the authorization for truck stops in the CRC zoning district says nothing about whether truck stops are allowed anywhere else. Therefore, if there is a negative corollary to such an authorization, it is implied and not express. The court held that Western Land's reliance on ORS 197.829(1)(a) to avoid deference must fail when it "relies on a rule of permissible inference as to the meaning of an ordinance and not on the express language of the enactment itself." *Id.* at 212. Therefore, the court found that the county's interpretation of the similar use authorization within the TC zone was not precluded by the express wording authorizing truck stops in the CRC zone or by the more general similar use authorization that is limited to other uses found elsewhere in the code.

Carrie A. Richter

Western Land & Cattle, Inc. v. Umatilla County, 230 Or. App. 202, 214 P.3d 68 (2009)

■ COURT OF APPEALS DETERMINES SPECIAL RIGHTS TO POSSESSION ENABLED BY FEDERAL LAND GRANTS TO RAILROADS

In *Wolf v. Central Oregon & Pacific Railroad, Inc.*, 230 Or. App. 269, ___ P.3d ___ (2009), the Wolfs appealed the trial court's entry of summary judgment in favor of defendant Central Oregon & Pacific Railroad, Inc. (COPR). The trial court's ruling concluded there was no genuine issue of material fact to support the Wolfs' claim to a prescriptive easement over a government-granted railroad right-of-way.

The Wolf property, located in Douglas County, is bisected by COPR railroad tracks that were originally authorized by Congress pursuant to an 1866 land grant. The grant provided for a 200-foot-wide right-of-way over the public lands. However, in 1880, before the land was surveyed, the Wolfs' predecessor-in-interest, Anderson, settled on the property. The public survey of the land was filed in June 1882. On August 24 of that year, the railroad filed a definite line location survey with the Secretary of Interior which plotted the course of the tracks, completed by 1884, over the Wolf property. On September 8, Anderson filed a preemption claim on the Wolf property and ultimately received a patent to the land from the federal government in 1887.

Presently, a portion of the Wolfs' home and part of their land are located north of the tracks; an additional fourteen acres is located on the south side of the tracks. The Wolfs access the south part by using a private grade crossing and have done so for many years. In August 2005 COPR removed the paved grade crossing, replacing it with gravel, and required the Wolfs to enter into a license agreement to continue using the crossing. In response, the Wolfs filed an action for a prescriptive right to cross the tracks.

On appeal, the court considered two major contentions of the parties in determining whether to uphold the trial court's summary judgment decision: (1) whether the Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempts state law governing the prescriptive right claim at issue here; and (2) whether, as a matter of law, a prescriptive easement can be established over a federally-granted railroad right-of-way.

First, in reviewing the ICCTA, the court noted that the statute expressly preempts state remedies relating to the physical instrumentalities and services involved in the movement of passengers and property. However, the court concluded that a grade crossing does not directly involve the movement of people or things along the tracks. Therefore, the ICCTA did not expressly preempt state law governing the prescriptive easement claimed by the Wolfs.

The court then turned to consideration of whether the ICCTA *implicitly* preempts state law since five federal circuits had concluded that it does preempt state laws of general applicability that burden rail transportation. The trial court's summary judgment record in this case provided no basis for a conclusion by the Court of Appeals that the grade crossing sought by the Wolfs would impose an unreasonable burden on rail transportation. Thus, the matter could not be preempted. Moreover, COPR's argument to the contrary conflicted with the fact that the Wolfs and their predecessors-in-interest had used the grade crossing at issue for decades with no apparent interference with railroad operations.

Since the ICCTA did not explicitly or implicitly preempt the Wolfs' claim of a prescriptive easement, the court turned to the second question of whether a prescriptive easement can be established over a federally-granted railroad right-of-way. The timeline of events during the 1860s through the 1880s demonstrates why the Wolfs could not claim a prescriptive easement over the COPR railroad tracks.

In this case, the railroad obtained a right to the exclusive use and occupancy of the right-of-way land through the 1866 land grant. Relying on railroad cases from as early as 1903, the court quoted in part from *Northern Pacific Railway v. Townsend*, 190 U.S. 267, 272, 23 S. Ct. 671, 47 L. Ed. 1044 (1903), when it wrote "[t]he whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes . . . ," and the right of-way may not be obtained by a private party through adverse possession. *Wolf*, 230 Or. App. at 6. However, noting that a prescriptive easement is a lesser interest than would be acquired in an action for title by adverse possession, the court looked more closely at whether such an easement would interfere with the exclusive use and occupancy of COPR's right-of-way.

The court considered the characteristics of a prescriptive easement. Finding that such an easement, though not a fully possessory interest, is, nonetheless, an interest in land, the court concluded that such a property interest in the railroad's right-of-way would appear on its face to conflict with the railroad's right to exclusive use and possession of the property. Significantly, the court's analysis

of precedent concluded that an easement over a federally-granted railroad right-of-way would interfere with a railroad company's right of exclusive use and control, even when use of the easement did not impede the operation of the railway. Therefore, such an easement could not be obtained by prescription.

The court found that Anderson's interest in the Wolf property began when he settled it in 1880, but only to the extent of possession of the land—not ownership. His possession was limited by virtue of the 1866 land grant, under which the U.S. government retained the right to grant a right-of-way over the land in Anderson's possession. Anderson's mere settlement of the property was not sufficient to divest the federal government of the ability to grant the land to another party.

Based on the 1866 land grant giving the railroad exclusive use and possession, the court considered the railroad's right to alienate the property. The court noted that although the railroad could not alienate, and others could not acquire, portions of the railroad right-of-way, revocable licenses were permissible because COPR would never thereby lose its right to possession and control of the right-of-way.

This case provides an in-depth background for those real estate matters involving railroad rights-of-way established through federal land grants across public lands. If real estate attorneys encounter a client matter involving similar historic land settlement, this case provides a clear path to understanding the implications of a federal land grant and interpreting the specific privileges and rights retained by the government in its land grant, as well as the impact on settlers' ownership rights around railroad areas.

Jennifer M. Bragar

Wolf v. Cent. Or. & Pac. R.R., Inc., 230 Or. App. 269, ___ P.3d ___ (2009)

Oregon Legislative Bill Summary

■ SB 794 CHANGES FEE RECOVERY IN CONDEMNATION

Fee recovery presents very real strategic issues for both a property owner and an agency in a condemnation action. For an owner, the ability to recover attorney and appraisal fees can be a significant factor in deciding whether to challenge an agency's estimate of compensation. For an agency, the risk of having to pay fees can be an equally significant factor in weighing whether to settle or try an eminent domain case. For many years, the measuring point for fees was near the end of a case, with the owner entitled to fees if the jury awarded more than the agency's final written offer made thirty days before trial. By that point, both sides were required to have exchanged appraisals and typically had a reasonably good idea of what the evidence was likely to show at trial. In 2006, Measure 39 upended fee recovery by moving the measuring point to the beginning of the case, with the owner entitled to fees if the jury simply awarded more than the agency's required initial offer made before the case was even filed. This past session, the Legislature in SB 794 effectively moved the measuring point back to the end of the case—but with several novel twists.

Under SB 794, settlement offers must be made at least ten days before trial. The agency's offer must include compensation for the property being taken and, if a partial taking, any severance damages. The offer may also include separate compensation for fees. The owner then has three days to accept the offer. An acceptance must be filed with the court. If not accepted, the offer is deemed withdrawn and cannot be used at trial. The owner, however, is not left with an "all or nothing" choice.

If the agency's offer did not include separate compensation for fees, then the owner can accept the offer and the court will then determine reasonable fees incurred before the agency served its offer. If the agency's offer did include separate compensation for fees, then the owner can either accept the entire offer or just the portion for the property concerned. If the latter, the court will determine reasonable fees incurred before the agency served its offer.

If the owner rejects an offer outright and the jury awards more at trial, then the owner is entitled to recover all fees through trial. (In situations where the offer included separate amounts for the property and fees, the owner is only entitled to all fees if the combined total of the jury's verdict and the amount in fees the owner

incurred prior to the offer exceeds the total offered by the agency.) If the owner rejects an offer and the jury awards less at trial, then the owner is still permitted to recover reasonable fees incurred before the offer.

In the unlikely situation when the agency makes no later settlement offer, the owner is entitled to fees if the jury's award exceeds the agency's highest written offer before the case was filed.

In its general approach, SB 794 is similar to Oregon Rule of Civil Procedure (ORCP) 54E, under which offers of compromise "cut off" further fees if not accepted. That is a change from the "all or nothing" approach long used in Oregon condemnation practice. SB 794, however, is consistent with Oregon condemnation practice in that the agency is not entitled to recover its fees (beyond usually nominal statutory costs) if it prevails and reasonable fees in any given case are determined by the trial court under the general procedures set out in ORCP 68 and ORS 20.075. Fee recovery also continues to include attorney, appraisal, and other expert expenses.

SB 794 will become part of ORS Chapter 35, which governs condemnation procedure. It is effective on January 1, 2010 and applies to new cases filed after that date.

Mark J. Fucile

Senate Bill 794 (2009)

Appellate Cases – Washington

■ A PERIMETER SETBACK IS NOT A "YARD" AND MAY BE INCLUDED IN CALCULATIONS OF OPEN SPACE

In *City of Gig Harbor v. North Pacific Design, Inc.*, 149 Wash. App. 159, 201 P.3d 1096 (2009), the Washington Court of Appeals resolved a controversy relating to maximum density requirements and the inclusion of perimeter setbacks in calculating minimum open space requirements. The appellate court affirmed the superior court's judgment in favor of North Pacific on both issues, holding that (1) the use of a Planned Residential Development (PRD) to reduce lot sizes and increase density did not constitute a rezone where it was expressly permitted as a conditional use in the underlying zone, 201 P.3d at 1101, and (2) the developers may include perimeter setback to satisfy open space requirements, *id.* at 1107.

At issue was North Pacific's application for a residential preliminary plat, a PRD, and a conditional-use permit (CUP) to develop 174 residential lots on 18.8 acres. The property was zoned Residential Business-2 (RB-2) under the Gig Harbor Municipal Code (GHMC). GHMC 17.30.050(G) established maximum density requirements, providing for eight dwelling units per acre outright and twelve dwelling units per acre as a conditional use, and required front yard setbacks to extend at least twenty feet from the structure. In addition, GHMC 17.89.110(A) required an open space set-aside at least thirty percent of the site. In an effort to reduce property lot sizes and increase the density beyond eight dwelling units per acre, North Pacific applied for a PRD and a CUP, calculating its proposed density at 11.75 dwelling units per acre. North Pacific proposed to set aside as open space 5.66 acres, or thirty-one percent of Skansie Park's total area, which was met by including the area of its required twenty-foot perimeter setback.

The city hearing examiner approved the proposal, finding (1) that the PRD and RB-2 regulations are to be interpreted harmoniously, and (2) that because the PRD application did not seek a density greater than that conditionally permitted in the underlying RB-2 zone, it did not constitute a rezone. However, as a condition of PRD approval, North Pacific was required to revise its open space calculation to exclude the development's perimeter setback areas.

On appeal, the city sought reversal of the development's increased density, while North Pacific sought reversal of the open space calculation. After the superior court ruled in favor of North Pacific on both issues, the city argued to the court of appeals that North Pacific (1) cannot use a PRD as a means to increase density because it conflicts with the underlying RB-2 zone, and (2) cannot include perimeter setback areas in the required PRD thirty-percent open space calculation.

The court rejected several of the city's arguments involving the issue of whether a PRD constitutes a rezone. First, the city argued that the approval of North Pacific's PRD application would create a rezone of the underlying RB-2 restrictions because the two zoning schemes were separate and distinct. The court reasoned that city code provisions expressly permitted twelve dwelling units per acre as a conditional use. The court held that the PRD did not create a rezone and that the hearing examiner properly harmonized the PRD with the underlying zone. Here the court recognized that the proposal was consistent with the RB-2 zoning, which allowed for increased density as a conditionally-permitted use, and also consistent with the

PRD, which allowed for "those primary, accessory, and conditional uses permitted in the underlying zoning district." GHMC 17.89.050(A). Second, the city contended that "density" was not a "use" for purposes of obtaining a CUP. However, the court ruled that such reasoning contradicted the express language of the underlying zoning ordinance, which expressly allowed for twelve dwelling units per acre as a conditional use. Third, the city argued that increasing density as part of a PRD conflicted with Gig Harbor's comprehensive plan. The court agreed with North Pacific's counterargument that the PRD zoning regulations were in harmony with the goals of the comprehensive plan, which sought to increase density and allow for greater flexibility to accommodate a growing population.

The effect of this decision is significant: Washington courts have traditionally held that PRDs and PUDs qualify as rezones as a matter of law. In approving North Pacific's application for a PRD, the court has turned to a case-by-case analysis of whether a PRD constitutes a rezone.

The appellate court next considered whether North Pacific's proposal satisfied the open space set-aside requirements when it included perimeter setbacks in its calculation. The main issue before the court was whether the twenty-foot PRD perimeter setback requirements created a new residential "yard." The court analyzed the distinction between "building setbacks" and "yards," recognizing that the GHMC provided a separate definition for each term. The court recognized that while "perimeter setbacks" were not separately defined, the GHMC required structures located on the perimeter of the PRD to be set back in accordance with the twenty-foot front yard setbacks of the underlying RB-2 zoning ordinance. The court reasoned that a "setback," unlike a "yard," can extend from the boundary line of the entire development site and not just the property line of an individual lot. The court agreed with North Pacific's argument that the GHMC excluded only the "required yards" for each of the residential lots bordering the perimeter and that perimeter setbacks did not create required "yards." Relying on instances where the GHMC distinguished between "setbacks" and "yards," the court concluded that "setbacks" had been intentionally omitted from the list of areas excluded from the open space calculation.

North Pacific also argued that its proposed "perimeter setback" was not a "required yard" because it was not part of an individual lot. GHMC defined a "yard" as open space on the same lot as the principal use. GHMC 17.04.880. "Lot" was defined as an area of land that is to be used, developed, or built upon as a single unit of land. GHMC 17.04.450. The court rejected the City's interpretation that the phrase "single unit of land" applied to the development site as a whole, thus making the perimeter setback equivalent to a "yard" because it would be on the same lot with the principal use. The court favored North Pacific's assertion that a "single unit of land" applied to each individual lot within the development site, that the development site consisted of 174 individual lots, and that the only "yards" within the development were those that were included as part of one of the 174 individual lots. Thus, the appellate court concluded that the perimeter setbacks were separate and distinct from individual building lots.

Christopher Schafer

City of Gig Harbor v. North Pacific Design, Inc., 149 Wash. App. 159, 201 P.3d 1096 (2009)

Cases From Other Jurisdictions

■ VERMONT SUPREME COURT REJECTS CHALLENGE TO WIND ENERGY PROJECT

In re UPC Vermont Wind, LLC, 969 A.2d 144 (Vt. 2009), involved appellate review of a certificate of public good issued by the Vermont Public Service Board (the Board) for a wind generation facility. The certificate was issued over the objections of Ridge Protectors, Inc., a citizen organization. The court described the Board's decision making process as a "legislative, policy-making process" to which the Board was given "great deference" with a "strong presumption of validity." 969 A.2d at 147 (quoting *In re Vermont Elec. Power Co.*, Inc., 895 A.2d 226 (Vt. 2006)). Petitioner UPC sought to construct a sixteen-turbine, forty megawatt wind facility on a ridgeline with wind turbines 420 feet tall. Petitioner proposed to sell the energy (which would supply 15,000 homes—about 45% of the total homes in northeast Vermont) to utility companies. The Board granted the request, recognizing the aesthetic concerns but not finding them to be "unduly adverse," *id.*, and required UPC to make a good faith effort to enter into fixed price, rather than variable market rate, contracts with the state's utilities following approval.

The first challenge considered was brought under the statutory requirement that a project result in an "economic benefit to the state and its resident." VT. STAT. ANN. tit. 30 § 248(b)(4) (2009). Opponents stressed the contract conditions and attacked them as insufficient. However, the court relied on other portions of the Board's order that found the project would result in new jobs, increased tax revenues, lease payments to land owners, and would rely upon local construction materials and firms. In addition to the tax revenues and availability of power to northeast Vermont utilities, these factors were part of the Board's conclusion that the project would "promote the general good of the state." *Id.* § 248(a)(1)(B). While there were no existing contracts for the use of the power before the Board, the condition supported the finding that the overall good of the state was served by issuing the certificate. Moreover, given the project's "not insignificant impacts" on aesthetics, the condition was valid to meet the overall standard through a post-certificate process to assure that this tradeoff was met.

An opposition issue that the Board must quantify the economic benefit in its findings was raised for the first time in the reply brief and was therefore rejected by the court as not timely raised.

The court turned to the second issue, whether the project would interfere with the "orderly development of the region," giving due consideration to the recommendations of local municipalities and the regional planning commission. The court noted that the applicable regional plan expressly recognized that wind energy was a resource needed to meet the current and future needs of the area and that it set out a number of criteria for evaluation of projects. The court also noted that the town in which the project was proposed to be located desired the same and had, in its recommendations, considered the needs of adjacent municipalities. The court found the project was consistent with some portions of the regional and local plans that were applicable, though not with all of them. However, the Board was only required to give "due consideration" to these factors, which it did. Moreover, the plan provisions indicated that development of wind power "should" be compatible with existing development. Even if the project has a visual impact, it does not follow that it would violate these plans or result in a "substantial regional impact." The court refused to re-weigh the evidence to reach a conclusion different from that of the Board.

The next applicable standard was that of aesthetic impacts. The applicable standard requires that a project would not have undue adverse effect on aesthetics with due regard to other statutory standards. The court found that the Board's findings were supported by the record. The court used a three-factor test to analyze whether a project might have undue impacts on aesthetics, including whether the project violated a clear written standard intended to protect aesthetics or scenic natural views, whether the project offends the sensibility of an average person, and whether the applicant failed to take generally understood mitigation steps that were reasonable. The Board found no violation of a clear community standard, that there was no guarantee that scenic views would never change, and that the applicant would take available mitigation steps. The Board's conclusions that the aesthetic impact was not undue under these circumstances were upheld.

The court then turned to petitioners' procedural claim alleging that most of the Board's findings were actually conclusions. The court responded that the function of findings were to provide a clear statement of what was decided and why. Under this standard, the findings in this case served those purposes. As to the substance of the findings, the court said it was aware that the Board had to evaluate competing evidence, but said the weight to be attributed to that evidence, as well as the credibility of witnesses, was a matter for the Board to determine. The court noted that the Board explained its decisions adequately and observed that every decision in this area was factually unique and that it was up to the Board to evaluate each case in terms of its evidence and explain its decision in exercising its discretion and expert judgment. Under these standards, the Board's decision was sufficient.

This is typical judicial review of an administrative decision. Petitioners sought to have the court second-guess the Board's order, but the court exercised only its review functions instead of re-hearing the entire matter. If administrative law is to flourish in this country, that distinction must be made constantly.

Edward J. Sullivan

In re UPC Vermont Wind, LLC, 969 A.2d 144 (Vt. 2009)

■ *REGIONAL GOVERNMENT ASSOCIATION HOUSING ALLOCATION BEYOND JUDICIAL REVIEW SAYS CALIFORNIA APPELLATE COURT*

City of Irvine v. Southern California Association of Governments, 175 Cal. App. 4th 506 (2009), involved the use of a statutory procedure wherein defendant Association of Governments undertook a process to allocate future housing needs to individual local governments after a state agency had allocated regional housing needs. After two sets of public hearings, the Association of Governments made its allocations to which plaintiff City of Irvine (City) objected and filed a writ of mandate (the usual method in California of challenging governmental decisions) against that determination. The Association of Governments demurred on jurisdictional grounds, arguing (1) that the 2004 California legislature had removed the statutory basis for a writ of mandate in such cases, (2) that the City's success would affect housing allocations of other governmental agencies within the region, and (3) that the trial court could not give the City the relief it sought. The trial court agreed and dismissed, and the City appealed.

On appeal, the court traced the history and purposes of statewide and regional housing allocations, as well as the process for allocation of housing needs among local governments by regional governments. Under the latter process, a local government may request a rehearing but the final state agency order following the regional review is deemed to be final and unappealable. The court said that while the legislature may not abolish special writs, it may abolish or alter the substantive grounds which would otherwise be the subject matter of a special writ.

In this case, the Association of Governments followed the required statutory procedure for allocations and the legislature was within its rights to render this process immune from further judicial intervention. The legislature may refuse to allow one jurisdiction, arguing that its allocation is too large, from affecting the housing allocations of other affected jurisdictions. Under the 2004 statutory revisions, there is no alternative to meeting the housing allocations determined by the state. Otherwise, the allocations must be either re-done or delayed under the City's proposed process, alternatives the legislature could reject. In this case, there is an extensive process for consultation and discussion of the allocations, required hearings, and a final order, as well as a review of the regional process by the affected state agency. Under these circumstances, the legislature could abolish judicial review of the allocation programs adopted by regional governments and supported by the affected state agency.

This case illustrates that, while individuals may have protected rights, the legislature may revise the review procedures for multi-governmental agency actions to achieve finality in housing allocations.

Edward J. Sullivan

City of Irvine v. S. Cal. Ass'n of Gov'ts, 175 Cal. App. 4th 506 (2009)

Oregon State Bar
Section on Real Estate and Land Use
16037 SW Upper Boones Ferry Rd
PO Box 231935
Tigard, OR 97281-1935

Recycled/Recyclable

Presorted Standard
U.S. Postage
PAID
Portland, Oregon
Permit No. 341