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Appellate Cases – Land Use

■ *LOCAL GOVERNMENT MAY CHOOSE AMONG PLAUSIBLE INTERPRETATIONS*

In *Siporen v. City of Medford*, 231 Or. App. 585, 220 P.3d 427 (2009) (*Siporen III*), the Court of Appeals reversed LUBA's interpretation of the Medford Land Development Code (MLDC) and upheld the city's interpretation. The court applied *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), and ORS 197.829 and concluded that the choice between two plausible interpretations is one of policy and that it rests with the local governing body.

This case is one in a series of appeals relating to the siting of a Wal-Mart retail store in the City of Medford. Wal-Mart applied and was appealed twice to LUBA in *Siporen v. City of Medford*, 55 Or. LUBA 29 (2007) (*Siporen I*), and *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or. LUBA 52 (2005). This appeal is from the application filed by Wal-Mart on remand in *Siporen I*. The application was approved by the Site Plan and Architectural Commission (SPAC) on behalf of the City. The sole issue presented was whether a comprehensive traffic impact analysis (TIA) is required to identify improvements necessary to maintain the level of service on surrounding transportation facilities. The city concluded that no TIA was required. LUBA disagreed, *Siporen v. City of Medford*, 2009 WL 1979737 (Or LUBA 2009) (*Siporen II*), but the Court of Appeals reversed, *Siporen III*, 231 Or. App. at 602.

The MLDC requires a TIA when "a proposed application has the potential of generating more than 250 net average daily trips . . . or the Public Works Department has concerns due to operations or accident history . . . ." MLDC § 10.461. If the TIA predicts sub-par service levels, "*development* is not permitted unless the *developer* makes the roadway or other improvements necessary . . . ." *Id.* § 10.462 (emphases in original). ("Development" and "developer" are both broadly defined under the MLDC.)

Although the requirements for producing a TIA and for maintaining the level of service were clear, the question of *when* those standards apply was not. Both the Court of Appeals and LUBA relied heavily on context in deciding whether a TIA was required as part of the site plan and architectural review process or as part of the process for rezoning the property. The former is decided by SPAC while zone changes are decided by the planning commission. Given this separate review authority, the question of when these relatively clear standards apply was critical.

As part of the site plan and architectural review application, an applicant is required to include information about (1) off-street parking, both existing and proposed; (2) access; (3) street dedication and improvements; and (4) existing public improvements "and such other data as may be required to permit [SPAC] to make the required findings." *Id.* § 10.287. A TIA is not listed as a submittal requirement.

With this information SPAC is then required to make findings and approve the application if the "proposed development complies with the *applicable* provisions of all city ordinances . . . ." *Id.* § 10.290. In addition, SPAC may require " the installation of appropriate public facilities and services and dedication of land to accommodate public facilities when needed"; require "the improvement of an existing, dedicated alley which will be used for ingress or egress for a development"; and control "the number and location of parking and loading facilities, points of ingress and egress and providing for the internal circulation of motorized vehicles, bicycles, public transit and pedestrians . . . ." *Id.* § 10.291.

Under a separate provision of the city code, mirrored in the city's Transportation System Plan, the planning commission is authorized to approve a quasi-judicial zone change. *Id.* § 10.227. As part of the process, an applicant must commit to provide adequate urban services and facilities.

Wal-Mart's opponents argued that SPAC cannot approve an application unless it "complies with the *applicable* provisions of all city ordinances . . . ," as required by MLDC § 10.290, including the requirement of a TIA. Because this requirement applies to any

development under MLDC § 10.462, they argued, Wal-Mart must address these standards.

The city and Wal-Mart, on the other hand, focused on the limited authority of SPAC under the code and concluded that, because SPAC is not authorized to review TIAs and because the planning commission is expressly required to determine whether there are adequate services to the property, a TIA is not required during the site plan and architectural review process.

LUBA concluded that the city council had failed to view the relevant provisions of the code as a whole and reasoned that the requirements under MLDC §10.461 and §10.462 include no reference to either zone changes or site plan applications but instead apply broadly to all development.

The Court of Appeals, while conceding that "there is no express statement in the MLDC that a comprehensive TIA is required only at the time of rezoning," nonetheless reversed LUBA based on text and context. *Siporen III*, 231 Or. App. 585, 600. The court phrased the question before it as whether LUBA's order correctly applied the standard of review in OR 197.829(1)(a), which directs LUBA to affirm a local government's interpretation of its ordinance unless it is "inconsistent with the express language" of the ordinance. As explained in *Foland v. Jackson County*, 215 Or. App. 157, 164, 168 P.3d 1238 (2007), an interpretation is consistent if it is "plausible, given the interpretive principles" applicable to the construction of ordinances under *PGE v. BOLI*, 317 Or. 606, 859 P.2d 1143 (1993).

The court reasoned that the city's interpretation was plausible, that SPAC's authority was limited under the code, and that the planning commission—not SPAC—was expressly authorized to address adequacy of service. The court concluded that, "[n]otwithstanding that neither party's contentions fully harmonize all cited provisions of the city's code, both parties present plausible interpretations of the code. Under such circumstances, LUBA must affirm the city's interpretation . . . ." *Id.* at 602.

This case confirms that policy choices among different plausible interpretations are up to local government under ORS 197.829(1) and that LUBA must defer to that choice on review. A petition for review was filed with the Oregon Supreme Court asking for clarification of the standard under ORS 197.829.

Christopher A. Gilmore

Siporen v. City of Medford, 231 Or. App. 585, 220 P.3d 427 (2009)

■ *TRANSPORTATION FACILITIES MUST BE CONSIDERED IN ZONE CHANGES*

In *Willamette Oaks, LLC v. City of Eugene*, 232 Or. App. 29, 220 P.3d 445 (2009), the Court of Appeals determined that the city could not approve a zoning change without first determining whether transportation facilities would be significantly affected.

The owner of a 23-acre site located on a dead-end street in Eugene applied to change its zone designation from medium-density residential to limited high-density residential. The city's hearings officer approved the change, which was affirmed by the city's planning commission. Although the city ruled that the Transportation Planning Rule (TPR) dealing with transportation planning and land use regulation amendments, OAR 660-012-0060, applied to this change, it did not evaluate the impact of the zone change on the city's transportation facilities. Instead, the city attempted to defer that evaluation until later in the development process by making it a condition of approval. The petitioner appealed the city's decision and LUBA affirmed.

In *Jaqua v. City of Springfield*, 193 Or. App. 573, 91 P.3d 817 (2004), the court had already determined that a local government may not make land use decisions without considering whether the existing transportation systems can accommodate the proposed use. Therefore, the relevant issue in this case was when that determination must be made.

In holding that the determination must be made before the land use decision approving the zone change, 232 Or. App. at 37, the court closely reviewed the language of OAR 660-012-0060. The relevant section of that rule states,

> Where an amendment to a . . . land use regulation *would* significantly affect an existing or planned transportation facility, *the local government shall put in place measures* as provided in section (2) of this rule to [insure] that allowed land uses are consistent with the identified function, capacity and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. . . .

OAR 660-012-0060(1) (emphases added). The court reasoned that the use of the word "would" necessarily requires that a determination be made before the plan amendment is approved, just as "shall" mandates that the measures be put in place. Only after a determination that the change affects the transportation facility can the necessary measures be put in place and the land use regulation be amended. Therefore, the court stressed, the plain text of the rule imposes a timing requirement. The court pointed out that the current version of OAR 660-012-0060 is even clearer in imposing a timing requirement than the version in effect when *Jaqua* was decided. Other rules in Division 12 of Chapter 660 explicitly provide for the deferral of decisions required under the rule, whereas the portion of the rules in question does not. On these bases, the court held that the city must determine the effects on the transportation facilities prior to approving a zone amendment. 232 Or. App. at 37.

Kathleen S. Sieler

Willamette Oaks, LLC v. City of Eugene, 232 Or. App. 29, 220 P.3d 445 (2009)

Appellate Cases – Washington

■ SHRINKING THE SCOPE OF LUPA AND THE EXPANDING PROCEDURAL DUE PROCESS IN LAND USE DECISION-MAKING

The Washington Supreme Court established two principles regarding land use decisions in *Post v. City of Tacoma*, 167 Wash. 2d 300, 217 P.3d 1179 (2009). First, the scope of Washington's Land Use Petition Act (LUPA), Chapter 36.70C Revised Code of Washington (RCW), should be limited. Second, when additional, consecutive penalties are imposed against the same code violation, a party should have an opportunity to be heard on each individual penalty assessment.

LUPA replaced the writ of certiorari and reformed the process by which land use decisions are appealed in the State of Washington. LUPA requires any party seeking to challenge a land use decision to file a petition in Superior Court within 21 days of the issuance of the decision. If the decision qualifies as a "land use decision," the challenging party is entitled to judicial review under the standards established under LUPA. A land use decision is defined in LUPA as a "final determination" by a local jurisdiction on

> (a) An application for a project permit . . . (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinance or rules regulating the improvement, development, modification, maintenance or use of real property; and (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance or use of real property.

RCW 36.70C.020(2) (2009). The definition includes a relevant exception, stating that "when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under [LUPA]." RCW 36.70C.020(2)(c).

In this case, Paul Post, an owner of several rental properties in Tacoma, sought to have the city's Municipal Building and Structures Code (MBSC) declared unconstitutional. Pursuant to MBSC, Post had received notices of code violations against 24 of his rental properties. Post did not challenge the notices. Instead, he agreed to remedy some of the violations, but did not respond to others. The city then imposed penalties against the noncompliant properties, eventually increasing the penalty amount and frequency in subsequent notices. However, Post was not offered an opportunity to appeal the subsequent penalties under MBSC. Both the Pierce County Superior Court and the Court of Appeals held that the penalties were "land use decisions" subject to LUPA, and because Post failed to file within the 21-day deadline, his challenges to the penalties were time-barred. The Washington Supreme Court, however, disagreed with both lower courts and held that LUPA did not apply. 167 Wash. 2d at 308.

Although the penalties imposed by Tacoma arose from a code enforcement action and likely qualified as a "land use decision," the Washington Supreme Court focused on the language creating the exception. As noted above, under the exception, challenges to ordi-

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nances that *must* be enforced in a court of limited jurisdiction cannot be brought under LUPA. Because Post's violations of the MBSC were civil infractions, Tacoma had two options under Chapter 7.80 RCW in terms of issuing and enforcing such infractions. First, the city could proceed under the default system, under which courts of limited jurisdiction governed the entire infraction system. Second, the city was entitled to establish its own system to govern civil infractions. The court recognized that Tacoma had established its own system when it came to the initial penalty imposed under MBSC, but found that no such system was established to govern the subsequent penalties. In the court's view, to approve of a process in which Tacoma imposes penalties without a hearing is to authorize a system of unlimited, unreviewable punishment on civil defendants. *Id.* at 312. Therefore, the court held that in regards to the subsequent penalties the default system applied under Chapter 7.80 RCW, and that the subsequent penalties must be enforced in courts of limited jurisdiction. LUPA did not apply, and Post's challenge was not time-barred.

The dissent disagreed with the majority's assessment, arguing that the imposition of penalties against Post constituted a land use decision under LUPA. The dissent opined that part (c) of the definition of land use decision, which concerns the enforcement of regulations relating to the "improvement, development, modification, maintenance or use of real property," was clearly at issue in this building code enforcement action. Moreover, the dissent argued that the LUPA exception did not apply because Tacoma established its own system for enforcement and did not resort to the courts of limited jurisdiction. *Id.* at 319.

The majority also held that the enforcement of the MBSC violated Post's due process rights because it provided for review of only the initial penalty and not the subsequent ones. *Id.* at 305. Although Post failed to challenge any of the initial findings of noncompliance, he argued that he should have an opportunity to be heard on each separate and subsequent penalty assessment (from continuing noncompliance). Tacoma objected, claiming the additional hearings would allow owners to relitigate the underlying violations. The court rejected Tacoma's concern as misleading, finding that the city could limit the scope of such hearings to the condition of the property at the time that subsequent penalties were assessed, and that in any event owners like Post should be entitled to present evidence of any repairs made or other efforts to come into compliance following the initial penalty. *Id.* at 314. The failure to provide Post with an opportunity to be heard regarding the additional penalties violated Post's procedural due process rights.

The *Post* decision has two implications. First, the Washington Supreme Court has indicated that the scope of LUPA's jurisdiction is not expansive as once believed. Second, the court has burdened local jurisdictions with the task of providing a challenging party with an opportunity to be heard on each penalty (and not just the finding of noncompliance) assessed against it.

Anna Binau

Post v. City of Tacoma, 167 Wash. 2d 300, 217 P.3d 1179 (2009)

Cases From Other Jurisdictions

THE SEVENTH CIRCUIT CONSIDERS THE MEANING OF "ASSEMBLY" UNDER THE EQUAL TERMS PRONG OF RLUIPA

In *River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d 364 (7th Cir. 2009), the 7th Circuit Court of Appeals considered whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibited the village from denying a special use permit for a church in a "Service Business District" (B-2 zone), in which commercial uses are permitted but religious uses are not allowed. The church was aware of this limitation, but it bought the property anyway hoping it would receive a special use permit which, unbeknownst to the church, was no longer available under the current zoning ordinance. At the time that the church filed its complaint challenging the ordinance, the ordinance, which implemented an urban redevelopment and tax increment financing plan, allowed general commercial and retail uses, gas stations, hotels, taverns, offices, and meeting halls. While the motion for a preliminary injunction was pending, the village amended its ordinance also to exclude community centers, non-religious schools, meeting halls, art galleries, and recreational uses from the B-2 zone. The district court denied the church's motion for a preliminary injunction, finding that the church had only a slim chance of success on the merits.

The church argued that the village's ordinance, even as amended, violated RLUIPA's Equal Terms provision because it allowed non-religious assemblies such as gymnasiums, health clubs, salons, day care centers, and hotels. The village argued that its amendment removing "meeting halls" and other non-commercial institutions from the list of permissible uses cured any potential RLUIPA concerns. According to the village, hotels, commercial gyms, health clubs, and other related uses could not be considered "assemblies."

The court summarized two other circuits' consideration of the term "assembly" as it relates to the Equal Terms provision. In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), the Eleventh Circuit held that a town's ordinance that prevented a synagogue from relocating in the business district violated the Equal Terms provisions. The district in question allowed retail, shopping, theaters, restaurants, private clubs, and lodge halls. Relying on Webster's and Black's Law Dictionary, the court found that private clubs and lodges were "assemblies" similarly situated to churches and synagogues and to exclude synagogues but permit private clubs was to treat religious assemblies on less-than-equal terms. The court found the ordinance violated RLUIPA but went on to apply strict scrutiny to determine whether the ordinance was narrowly tailored to advance a compelling interest.

The Third Circuit, by contrast, found that the Equal Terms provision codified existing Free Exercise Clause jurisprudence, all of which considered regulations presumptively valid if they were neutral and of general applicability and did not place religious assemblies on "less than equal" terms. Therefore, the Third Circuit held that "if a land use regulation treats religious assemblies or institutions on less than equal terms with non-religious assemblies or institutions that are no less harmful to the governmental objec-

tives in enacting the regulation, that regulation—without more—fails under RLUIPA." *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 272 (3rd Cir. 2007).

The Seventh Circuit in this case noted that the two different approaches would alter the outcome here. Under the Third Circuit's approach, the non-religious "assemblies" identified by the church (such as hotels and gymnasiums) are all commercial entities that contribute to the business district in ways a church cannot. Following *Midrash,* the church would only need to demonstrate that one of the permitted uses was an "assembly" to establish a RLUIPA violation and require strict scrutiny. The Court found that the term "less than equal" does not mean that religious and non-religious institutions must always be treated identically by land use regulations. Rather, they can differentiate between them for legitimate, non-religious reasons. Just because a law refers to a religious practice but has a discernible secular meaning does not render it facially discriminatory. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). Quoting from *Lighthouse,* 510 F.3d at 268, the court noted the dangers of an expansive reading of the Equal Terms provision: "If a town allows a local, ten-member book club to meet in the senior center . . . , it must permit a religious assembly with rituals involving the sacrificial killings of animals or the participation of wild bears [] to locate in the same neighborhood . . . ." *Centro Familiar Cristiano Buenas Nuevas v. City of Uma*, 615 F. Supp. 2d 980, 994 (D. Ariz. 2009).

The court found that the Third Circuit's approach was more workable in that it permitted a determination about whether the ordinance targets religious assemblies for non-secular reasons or whether it is indeed neutral and generally applicable. The court went on to reject application of strict scrutiny to the Equal Terms provision, noting that RLUIPA only requires strict scrutiny under the Substantial Burden provision.

Applied to the facts of this case, the court found little similarity between the church and the uses permitted in the B-2 district. Assuming that some of the permitted uses may be considered assemblies, the court found their effects on the village's goals were distinguishable. The village sought to create a tax revenue-generating commercial district near the mass transit area. The permitted uses are commercial in nature, while churches, meeting halls, community centers, and schools are not. A locality seeking to create commercial areas should be able to exclude non-commercial uses that do not contribute to its goal without violating RLUIPA.

Notwithstanding finding a low likelihood of success on the merits, the court went on to consider whether refusal to grant a preliminary injunction would cause irreparable harm to the church. The court applied a sliding scale approach explaining that the "less likely a plaintiff is to win on the merits, the more heavily the balance of harm must weigh in his favor to warrant a preliminary injunction." 585 F.3d 364, 376 (7th Cir. 2009). The court found that the village's revitalization goals outweighed the impact to the church because allowing the church to relocate, even temporarily, would result in land use that is incompatible with the village's redevelopment plan. Promoting economic development is a traditional function of government that furthers the citizens' best interests. Therefore, the church's harm did not significantly outweigh the harm to the village and, given the minimal prospect of success on the merits, the court affirmed the district court's decision to deny the preliminary injunction.

Carrie A. Richter

River of Life Kingdom Ministries v. Village of Hazel Crest, 585 F.3d 364 (7th Cir. 2009)

■ *WE MEANT WHAT WE SAID THE FIRST TIME, SAYS SIXTH CIRCUIT*

Pagan v. Village of Glendale, Ohio, 559 F.3d 477 (6th Cir. 2009), involved a second Sixth Circuit review of defendant village's sign regulations in which Pagan's challenge had initially been successful. *See Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007), *cert. denied*, 552 U.S. 1062, 1285 S. Ct. 711, 169 L. Ed. 2d 554 (2007) (*Pagan I*). Following the remand in that case, the village here argued that the trial court had entered an order inconsistent with the Sixth Circuit's directions.

Pagan attempted to sell his car by placing a sign in its window and parking it in the street but got a notice from the police chief that the village's ordinance prohibited such a sign "for the purpose of displaying it for sale." 559 F.3d at 478. Plaintiff removed the sign and brought suit, alleging the ordinance violated the First Amendment. The trial court granted the village's summary judgment motion. The Sixth Circuit reversed and remanded the matter for further for further proceedings consistent with its opinion. On remand, the village contended that the direction given by the Sixth Circuit did not mean its ordinance was unconstitutional and the result was as if the summary judgment motion had not been granted. Pagan sought only nominal damages and a declaration that the ordinance was unconstitutional, which was what the trial court did.

On appeal, the court here held that the "further proceedings" included a declaration of unconstitutionality. 559 F.3d at 479. The Sixth Circuit had found in the first case that the village failed to demonstrate that the challenged ordinance directly advanced its interest so as to justify the "narrowly tailored" requirement of the First Amendment case law. The court had held that this lack of evidence was dispositive in the case. *Pagan I*, 492 F.3d at 778. Given this unequivocal language in its original opinion, the court found no basis to relitigate the constitutionality of the challenged ordinance. The village had contended there were no material facts in dispute when it brought its original motion for summary judgment in the first proceeding and relied solely on an affidavit of its police chief. Under these circumstances, the court decided, the village could not now claim that the result was unfair.

This case demonstrates the strategic choices of bringing a motion for summary judgment as a defendant in commercial speech case and relying solely on the evidence contained in the motion. In any event, the village should not have assumed under the circumstances that it was entitled to a second bite at the apple.

Edward J. Sullivan

Pagan v. Village of Glendale, Ohio, 559 F.3d 477 (6th Cir. 2009)

■ CALIFORNIA APPELLATE COURT FINDS SMALL TRACT AIRPORT PLANNING AND REGULATION TO BE LEGISLATIVE

Citizens for Planning Responsibly v. County of San Luis Obispo, 176 Cal. App. 4th 357, 97 Cal. Rptr. 3d 636 (2009), involved an initiative adopted by county voters to amend the county's General (comprehensive) Plan to allow mixed use development on a 131-acre parcel near a county airport. The State Aeronautics Act (SAA) established a system whereby an airport land use commission deals with planning and land use regulation around airports. Citizens for Planning Responsibly challenged adoption of the initiative on grounds of preemption and the ability of the voters to adopt a small-tract amendment to the county's plan and regulations. The trial court agreed and the county appealed.

The California Court of Appeals reviewed the case *de novo* and gave "broad deference" to the electorate's power to adopt laws by initiative, which it said must be upheld unless it is "clearly, positively, and unmistakably . . ." unconstitutional. 176 Cal. App. 4th 357, 366. The court further stated that plan amendments are legislative acts (which "declare a public purpose") rather than quasi-judicial acts ("which implement that purpose"). *Id.* at 367. Like rezoning, California precedent categorically classifies plan amendments as legislative acts.

As to preemption, the court explained that there is a rebuttable presumption that "the legislative decisions of a local governing body are subject to initiative and referendum." *Id.* at 371. Opponents bear the burden of proof in such a case. The court went on to determine that the legislature did not explicitly preempt local land use regulations in airports or areas around them, nor did the SAA fully occupy the field. It is the local governing body, rather than the airport commission established under the SAA, that has the final and conclusive say in land use regulation and planning of airports. The court also noted that the SAA did not delegate exclusive authority to the local governing body to plan for and regulate lands in and around airports. The court concluded that the legislature did not intend to prevent use of the initiative or referendum power in these circumstances, especially since land use regulation is seen as a "quintessentially municipal affair," *id.* at 375, where restriction of the initiative or referendum powers must be clearly stated by the legislature.

Moreover, the court found sufficient indication that no preemption was intended in the statutory authority given cities and counties to override an airport land use commission decision on whether a proposed use was consistent with an airport land use plan. In many California cases, state requirements for notice hearing and findings have been found to be subordinate to the initiative and referendum power, the court finding these requirements to restrict only the governing body rather than the electorate. In so doing, the court was following a long line of cases beginning with *Arnel Development Company v. City of Costa Mesa,* 28 Cal. 3d. 511, 620 P.2d 565 (1980). Additionally, the court determined that findings of plan consistency are legislative functions, noting that the initiative in this case also amended potentially inconsistent portions of the remainder of the county's General Plan by the same act. The court said it would not usurp this function, especially in the absence of a legislative determination of plan inconsistency by the county. Thus the argument that the electorate's action was preempted was overruled, and the court found the small-tract plan amendment to be legislative in nature.

The degree to which preemption applies is a peculiar state law matter. However, the wrong-headed approach of categorizing every plan amendment and zone change as "legislative" so as to uphold the powers of the initiative and referendum to small-tract re-designations is an appalling California phenomenon which has existed since *Arnel*. That argument does not improve with age.

Edward J. Sullivan

Citizens for Planning Responsibly v. County of San Luis Obispo, 176 Cal. App. 4th 357, 97 Cal. Rptr. 3d 636 (2009)

Land Use Board of Appeals

■ RELIGIOUS LAND USE

The question before LUBA in *Catholic Diocese of Baker v. Crook County,* LUBA No. 2009-071 (Dec. 7, 2009), was whether the county's decision denying site plan approval for a diocesan pastoral center in an EFU zone violates the protections for religious land uses provided by ORS 215.441(1) and the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 USC 2000cc-2000cc-5 (2000) (RLUIPA). LUBA concluded the answer is "no" because the Diocese failed to make the necessary showing under state law that a pastoral center providing diocesan-wide services is an activity customarily associated with the adjacent rural retreat center under ORS 215.441(1) and, under RLUIPA, that the inability to co-locate the two uses imposes a substantial burden on religious exercise.

In 2007, the Diocese sought approval to use its EFU-zoned property in Powell Butte for a variety of uses, including a chapel, bishop's residence, and retreat center-related facilities (conference building, staff house, cabins, recreational vehicle spaces, and bath house). The application also sought approval of a chancery, which would house diocesan administrative offices. The county denied the chancery, but approved all other proposed uses. In 2008, the Diocese again applied for approval of a pastoral center (containing the same uses as the chancery proposed in the 2007 application) to relocate diocesan-wide offices from their current location in Bend to the Powell Butte property. Rejecting the Diocese's claims that ORS 215.441(1) and RLUIPA required the county to approve its application, the county again denied the proposed pastoral center.

On appeal, LUBA first disposed of the Diocese's claims that one of the county commissioners participated improperly in the county proceedings because he had an actual conflict of interest and was biased. The evidence in the record pertaining to this claim indicated that the commissioner's property was located 700 feet from the Diocese's property and his home was approximately 1.2 miles away. The commissioner also attended the planning commission hearing on the Diocese's proposal at which his wife testified in opposition. He did not testify. LUBA concluded that the commis-

sioner's ownership of nearby property was at most a potential conflict of interest requiring the commissioner to make a disclosure at the county court hearing on the application, which the record shows he did. Nothing in the record suggested that the commissioner had a private pecuniary interest in the Diocese's application sufficient to give rise to an actual conflict of interest. Nor did the record contain sufficient evidence of emotional commitment to a particular outcome on this application or an inability to act as an impartial decision maker sufficient to support a claim of bias.

The Diocese's state statutory claim focused on ORS 215.441(1), which provides that if state law or a county zoning ordinance allows real property to be used for "a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship . . . , a county shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity . . . ." In LUBA's view, this statute requires a two-step inquiry. Under step one, the question is whether the proposed use is among the specific types of religious land uses listed in the statute. LUBA agreed with the county's negative answer to this question because the proposed pastoral center is a business office with mixed religious and secular functions.

Under step two, the question is whether the proposed activity is customarily associated with the practices of the religious activity—that is customarily associated with the "church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship . . ." identified in step one. As LUBA explained, "the custom of the particular place of worship dictates the scope of the protected activities." LUBA No. 2009-071, slip op. at 11. The Diocese argued that, because the existing retreat center supports the entire diocese, which serves a 17-county area, anything that supports the retreat center—including the proposed pastoral center—is protected by ORS 215.441(1). Again, LUBA agreed with the county and rejected the Diocese's broad reading of the statute. While it might be customary for diocesan offices to be located adjacent to a diocesan cathedral, LUBA concluded there is no substantial evidence that "it is customary for Catholic dioceses to site their diocesan chancery/pastoral centers next to rural diocesan retreat centers or the chapels that serve those retreat centers, simply because those retreat centers serve the entire diocese." *Id.*, slip op. at 16.

LUBA was equally unpersuaded by the Diocese's claims that the county violated both the "substantial burden" and "equal terms" provisions of RLUIPA. The "substantial burden" test prohibits the county from imposing or implementing a land use regulation in a way that substantially burdens a person's or religious assembly's religious exercise unless the county shows that the substantial burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. LUBA agreed that the proposed pastoral center is a religious exercise under RLUIPA. However, LUBA concluded the Diocese failed to show that requiring the Diocese's offices to remain in Bend, rather than relocating to the Powell Butte property, would impose a substantial burden—economic or otherwise—on the Diocese's religious exercise.

Finally, LUBA rejected the Diocese's claim that the EFU zone permits other uses that can have a greater impact on farm uses than the proposed pastoral center and, therefore, the county's decision violates RLUIPA's requirement that religious and nonreligious assemblies or institutions must be treated on equal terms. The Diocese failed to raise this issue during the local proceedings and waived the right to raise it on appeal. Accordingly, LUBA affirmed the county's decision.

■ *LOCAL PROCEDURE—FEE SCHEDULES*

LUBA's decision in *1000 Friends of Oregon v. Crook County*, LUBA No. 2009-077 (Dec. 17, 2009), offers a useful reminder to local governments about heeding statutory guidelines when establishing fee schedules for local appeals. Petitioners in *1000 Friends* challenged the county's adoption of a fee schedule that included the fees for appealing planning commission decisions to the county court. Under ORS 215.422(1)(c), a county may establish fees for local appeals that are "reasonable" and "no more than the average cost of such appeals."

The county calculated the average cost of a local appeal based on a memorandum from the county counsel that identified the tasks and costs associated with a "typical appeal." Some of the costs were fixed while others were variable and described in terms of a range. From the sum of these costs, the county counsel calculated a "total average cost" for an appeal that ranged between $1,805 and $6,331. The county then used a formula to establish the challenged appeal fees. The formula applied a base rate of $1,850 and added 20% of the application fee for the underlying land use review to calculate appeal fees. Since land use application fees range from $100 (site plan review) to $25,000 (destination resort), applying the formula yielded appeal fees ranging from $1,870 to $6,850. Comparing these fees with the costs described in the county counsel's memorandum, the county court concluded the proposed fees were not more than the average cost of appeals consistent with ORS 215.422(1)(c).

On appeal, petitioners argued the county erred by estimating a range of costs rather than calculating an arithmetical average as required by the statute and by establishing different appeal fees for different types of land use applications. LUBA acknowledged that ORS 215.442(1) is silent about how the county calculates "average" costs, what evidence must be used in making this calculation, or how the county ensures that appeal fees are not excessive. Applying the dictionary definition of the word "average," LUBA agreed with the petitioners that "determining the 'average cost of such appeals' for purposes of ORS 215.422(1)(c) requires some kind of arithmetic calculation of the average of a set of numbers, meaning the sum of the numbers in that set divided by the count of the numbers." LUBA No. 2009-077, slip op. at 7. Further, to calculate a typical or common average cost of appeals, the county must use a broadly representative set of numbers, rather than the range of appeal costs (i.e., two data points reflecting a high and a low) the county counsel estimated. While the evidentiary support for this calculation will be more accurate if it is based on "a contemporaneous accounting of actual staff time and costs in past appeals," LUBA declined to say that it was error for the county to rely on estimates of staff time and costs. *Id.*, slip op. at 9. However, if estimated costs are used, they must fairly represent the types of appeals the county typically hears and related costs, not just a high and low range as the county used here.

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LUBA disagreed with the petitioners that ORS 215.422(1)(c) limits the county to a single fee for all local appeals. The purpose of establishing different appeal fees for different kinds of land use applications is to reflect the range of complexity and associated costs with hearing appeals of these applications. LUBA noted that the statute uses the plural term "fees" and thereby suggests that it is possible to have multiple appeal fees. Moreover, the focus of the statute is to limit the maximum amounts a county may charge for appeal fees. Establishing different appeal fees for different types of land use applications is not contrary to the statute as long as the fees do not exceed the average costs of each type of appeal. Finally, LUBA observed that construing the statute to require a county to impose a single appeal feel would mean that some appellants subsidize appeals that are more expensive to process. So long as there is substantial evidence to support the calculation of appeal fees for each category of appeals, LUBA concluded the county is not limited to establishing a single appeal fee for all appeals.

The final issue petitioners raised concerned language in ORS 214.422(1)(c) that allows the county to establish a reasonable transcript fee not exceeding the actual cost or $500 or, in the alternative, to allow any party to prepare a transcript of "relevant portions of the proceedings conducted at the lower level at the party's own expense." Petitioners argued the county violated this statutory requirement by requiring that, in lieu of a transcript fee, "the appellant must also provide transcripts of relevant meeting tapes at appellant's expense." *Id.*, slip op. at 14. In petitioners' view, this requirement violates the statute because it requires the appellant to prepare a transcript of the *entire* lower level proceedings.

LUBA agreed with the petitioners that the challenged county order could be read to require an appellant to provide a transcript of the entire lower level hearing that is relevant to the appealed decision. The statute, however, allows the county to require a transcript of only a relevant "portion" of the lower level hearing. The choice of which portion of the hearing is relevant to the appeal is up to the appellant. Based on the flaws identified in the county's calculation of appeal fees and transcript requirement, LUBA remanded the county's decision.

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