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Contents

Appellate Cases – Land Use

■ *HOSTILE USE AND ADVERSE POSSESSION*

In *Stiles v. Godsey*, 233 Or. App. 119, 225 P.3d 81 (2009), the Oregon Court of Appeals held that a mistaken belief of ownership fulfilled the element of hostile possession for a statutory claim of adverse possession under ORS 105.620.

In 1987 plaintiffs purchased their property, which is bordered on the east by a lot owned by one of the defendants. The defendant neighbor's lot was created in 1959 as part of a subdivision and included a ten-foot-wide easement bordering plaintiffs' lot to allow the owners of the remaining subdivision lots to access the nearby river. Defendant's lot has additional property to the north that accreted to the original lot as the course of the river shifted. Plaintiffs contend that they and their predecessors obtained ownership of the easement strip along defendant's lot, and an area of his lot on the riverbank, by adverse possession.

The court noted that the disputed area has three sections, each with a different character and use. The first section is the original easement strip, which runs along the westerly border of defendant's lot. This area is separated from the rest of defendant's lot and the other subdivision lots by fences. Plaintiffs' patio and driveway encroach into this area. A fence connects with plaintiffs' driveway gate effectively to block entry to the easement. The second section is a continuation of the easement north on land that accreted to defendant's lot and is not fenced. The third section is the "riverfront triangle," a section of land along the river to the east of the accreted easement. Plaintiffs have made some improvements to the second and third sections of the disputed area, including a stairway, lighting, and landscaping.

Although the legal description of plaintiffs' deeds do not include any part of the disputed area or any river frontage, plaintiffs testified that their predecessor in interest informed them at the time of the purchase that the lot ran from "fence line to fence line" and that the property boundary followed the edge of the landscaping down to the river.

Plaintiffs brought several claims for both common law and statutory adverse possession against two distinct groups of defendants. First, plaintiffs sought to acquire title to the disputed area from their neighbor by adverse possession. Second, plaintiffs sought to extinguish the ten-foot access easement held by the remaining defendants, also based on adverse possession. Alternatively, plaintiffs sought prescriptive easements over the disputed area in order to continue their use of the property. The trial court found in favor of defendants on the adverse possession claims, but granted a prescriptive easement over the disputed area to plaintiffs, allowing them to maintain their encroachments, carry out landscaping, and use the riverfront portion of the disputed area for recreational purposes. Plaintiffs appealed the denial of their claims for common law and statutory adverse possession.

After first noting that this case was subject to de novo review pursuant to ORS 19.415(3), the Court of Appeals addressed plaintiffs' common law claims for adverse possession. In 1989, the legislature codified the common law claim for adverse possession into ORS 105.620, which applies to all claims filed and interests vested after January 1, 1990. The court concluded that the

significant events relevant to plaintiffs' adverse possession claims occurred only after plaintiffs acquired the property in 1987, and there was no clear and convincing evidence of adverse possession prior to that time. Consequently, the court only considered plaintiffs' statutory claims for adverse possession of the easement area, the accreted easement, and the riverfront triangle.

Under ORS 105.620(1), a claim for adverse possession requires clear and convincing evidence of "actual, open, notorious, exclusive, hostile and continuous possession" for a period of 10 years. Reviewing the various activities and uses of the disputed area by plaintiffs, the court considered their maintenance and improvement to the fences on defendant's lot as open and visible notice that plaintiffs were asserting a claim to the fenced property. Similarly, the court noted that a covered patio that encroached onto the disputed area was significant. The long, continuous and open possession resulting from a building encroachment made out a prima facie common law claim for adverse possession. 233 Or. App. at 129 (citing *Green v. Ayres*, 272 Or. 117, 121, 535 P.2d 762 (1975)). Finding that all of the physical improvements to the easement area were obvious, observable, and permanent, the court concluded that plaintiffs had proven actual, open, notorious, exclusive, and continuous possession. *Id.* The court then turned to the remaining element of hostile possession.

The court first noted the statutory requirements for hostile possession. "A person maintains 'hostile possession' of property if the possession is under claim of right or with color of title." ORS 105.620(2)(a). A "claim of right" can be established by proof of "an honest but mistaken belief of ownership, resulting, for example, from a mistake as to the correct location of a boundary." *Hoffman v. Freeman Land and Timber, LLC*, 329 Or. 554, 561 n. 4, 994 P.2d 106 (1999). Additionally, the statute requires proof that when the claimant first entered into possession he had an "honest belief" that the he was the actual owner of the property. This honest belief must have (a) continued throughout the vesting period; (b) had an objective basis; and (c) been reasonable under the particular circumstances. ORS 105.620(1)(b).

The court then considered defendants' contention that plaintiffs had not fulfilled the element of hostile possession required by the statute. Defendants argued that plaintiffs' use of the easement area was not hostile because plaintiffs produced no written conveyance or evidence that their predecessors in interest intended to convey that property to plaintiffs. The court disagreed because "[p]ossession under a mistaken belief of ownership satisfies the requirement of hostile use to establish adverse possession." *Stiles*, 233 Or. App. at 130 (citing *Norgard et al. v. Busher et ux.*, 220 Or. 297, 303, 349 P.2d 490 (1960)). Plaintiffs proved a claim of right by proof of an honest belief of ownership inspired by an oral representation made by plaintiffs' predecessor at the time of sale. The court found this belief had an objective basis under ORS 105.620(1)(b)(B) because it was consistent with the fencing of the easement and the encroachments of the patio and driveway. *Id.*

The court also rejected defendants' argument that plaintiffs' belief of ownership of the disputed area was not "reasonable under the particular circumstances" as required by ORS 105.620(1)(b)(C). Citing its decision in *Clark v. Ranchero Acres Water Company*, the court noted that whether an honest belief is reasonable depends on the circumstances of each case, and that "the size of the property in relation to the discrepancy, the nature of the land, the experience of the parties, and what they had been told all bear on the reasonableness of the belief." *Id.* at 128 (quoting *Clark v. Ranchero Acres Water Co.*, 198 Or. App. 73, 83, 108 P.3d 31 (2005).

In the instant case, the court found the size of the property boundary discrepancy was small in relation to the size of the property and the area was exclusively occupied and used for residential purposes by plaintiffs and their predecessors. Plaintiffs' occupation of the easement area was inconsistent with its use by defendants, and no objections were made by defendants or their predecessors to those residential uses or to the improvements made by plaintiffs. The court concluded that plaintiffs' honest belief of ownership of the easement area was reasonable under the circumstances and, therefore, plaintiffs had established adverse possession of that area. *Id.* at 130.

The court then considered plaintiffs' claim for adverse possession of the accreted easement and the riverfront triangle areas. The court noted that plaintiffs had installed stairs and some other improvements which are the type of use a true owner would make of the property and were observable by anyone entering the property. The court found that plaintiffs had proven actual, exclusive, and continuous use of those areas. However, the court also found plaintiffs had failed to establish their use was open, notorious, and hostile for three reasons.

First, plaintiffs made no actual use of portions of the accreted easement and riverfront triangle. Second, some uses made of the area worked to facilitate access to the river, and were not inconsistent with use by the other defendants for river access.

Third, the court determined that any honest belief by plaintiffs that they owned the accreted easement and

riverfront triangle was not reasonable under the circumstances. The "fence to fence" representation of plaintiffs' predecessor didn't apply—there were no fence lines to mark the boundaries of those areas and the riverfront triangle is outside of a projection of a fence line. Additionally, the topography of those areas did not provide an objective basis for the boundaries of the accreted easement or the riverfront triangle. The court also noted that the riverfront triangle was "coveted river frontage," of a much different quality than the easement area. *Id.* at 132. Given those circumstances, any belief by plaintiffs that the property boundaries were straight courses, outside of the established yard, was unreasonable. The court held that plaintiffs had failed to establish adverse possession under ORS 105.620 of the accreted easement and riverfront triangle. *Id.* The court did, however, affirm the prescriptive easement for plaintiffs for those areas. *Id.*

This case provides a good summary of the elements for both common law and statutory claims for adverse possession, as well as an excellent discussion of hostile possession.

Raymond W. Greycloud

Stiles v. Godsey, 233 Or. App. 119, 225 P.3d 81 (2009)

■ *WHY MARION COUNTY'S APPROVAL OF A DESTINATION RESORT WAS VALID LONG AFTER ITS INITIAL REVIEW*

In 1980, a multi-use development was proposed for a large tract of land near the Little Fork of the Santiam River for purposes of a destination resort consisting of a golf course, housing, and some limited commercial development. In 1982, Marion County approved a conceptual plan for this proposed development and sought exceptions to certain land use goals. In 1984, LCDC approved the development proposals and the county applied the Statewide Planning Goals. The county then rezoned the property and the golf course was completed but no permits were sought for residential development. The developer, however, annually requested and received extensions for its plan approval. In 2007, the developer finally applied for subdivision approval, which was granted by the county in 2009. The county's approval was appealed to LUBA and upheld, and LUBA's decision was appealed to the Oregon Court of Appeals in *Friends of Marion County v. Marion County,* 233 Or. App. 488, 227 P.3d 198 (2010).

The court first considered the standard of review. For a LUBA determination that there is substantial evidence

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supporting a local decision, the court's role is to decide whether "LUBA's opinion is 'unlawful in substance' under ORS 197.850(9)(a)[—that is,] whether LUBA properly exercised its review authority." 233 Or. App. 488, 492 (quoting *Citizens for Responsibility v. Lane County,* 218 Or. App. 339, 345, 180 P.3d 35 (2008)). If LUBA's review was proper, the court will only reverse "when there is no evidence to support the finding or if the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review.'" *Id.*

The court then considered the county's approval of the destination resort. Petitioners alleged that the county, having first approved the resort in the early- to mid-1980s, should have applied the currently applicable statutes and version of Goal 8, the purpose of which is "[t]o satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts." OAR 660-015-0000(8). LUBA replied that the statutes and Goal 8 need not be considered when approval is received through an exceptions process, stating, "[C]ounties have the option of approving a destination resort either (1) under the statute and Goal 8, in which no exceptions are necessary, or (2) by taking Goal 3, 4, 11 and 14 exceptions, as necessary . . . ." *Friends of Marion County v. Marion County,* LUBA No. 2008-225, slip op. at 9 (Aug. 6, 2009). The court agreed.

The court then looked at whether the county had correctly applied Goal 14, under which counties may follow an exception process if they can show that a proposed urban development cannot reasonably be placed "in or through expansion of existing urban growth boundaries or by intensification of development in existing rural communities . . . ." OAR 660-014-0040(3)(a).

Petitioners argued that such an exception process was applicable here and that it required a determination of the "essential characteristics" of a proposed development followed by a determination that it cannot be accommodated on property for which no exception would be necessary. Petitioners further argued that LUBA erred in determining that proximity to a golf course was an "essential characteristic" of the development in this case. (Recall that the development was explicitly to include a golf course.) However, the court affirmed LUBA's holding that "[w]hen a county is taking a Goal 14 exception to implement a prior, approved development, the required features of that development can be regarded as 'essential characteristics' . . ." which may be considered in the exceptions process. 233 Or. App. at 496.

Petitioners' third and final assignment of error was a charge that LUBA "erred in affirming the County's application of Goal 5 requirements. . . ," which "require[] a local government to determine whether a development will have an adverse impact on specified resources. . . ." *Id.* at 497. Generally, the local government must make that determination "before approving a post-acknowledgement plan amendment (PAPA) . . . ," which is what was approved here. Id. OAR 660-023-0250(3)(b), however, provides that Goal 5 need not be considered for a PAPA "unless it allows 'new uses' that could conflict with a Goal 5 resource." *Id.*

LUBA held that the county correctly determined that the prior approved development did not "constitute a 'new use' [of the property] that could conflict with Goal 5 resources" because the county "had previously granted conceptual approval of all the uses [associated with the project] and the uses . . . had previously been acknowledged as permitted." The court agreed with and quoted the LUBA opinion as follows:

> The focus of OAR 660-023-0250(3)(b) is on a PAPA that 'allows new uses.' The challenged decision is a PAPA because it adopts Goal 11 and 14 exceptions. Whether Goal 5 must be addressed pursuant to OAR 660-023-0250(3)(b) depends on whether those goal exceptions permit 'new uses' of the subject property that were not already permitted under the previously acknowledged comprehensive plan and land use regulations. While the Goal 11 and 14 exceptions may have been necessary to approve the subdivision and complete resort, we disagree with petitioners that those exceptions authorized 'new uses' of property, within the meaning of OAR 660-023-0250(3)(b), that were not already authorized under the applicable plan and zoning designation. Under the acknowledged county comprehensive plan and land use regulations, . . . development of the subject property as a destination resort was not a 'new use.' Nothing about the . . . exceptions authorized anything more or different from what had already been previously approved and acknowledged, at least with respect to impacts on Goal 5 resources. . . .

Id. (quoting *Friends of Marion County v. Marion County,* LUBA No. 2008-225, slip op. at 28 (Aug. 6, 2009)).

Ruth Spetter

Friends of Marion County v. Marion County, 233 Or. App. 488, 227 P.3d 198 (2010)

■ WILDLIFE MITIGATION PLAN'S UNCERTAIN LOCATION PREVENTS FINAL APPROVAL OF RESORT

In *Gould v. Deschutes County*, 233 Or. App. 623, ___ P.3d ___ (2010), the Court of Appeals affirmed LUBA's interpretation of Deschutes County Code (DCC) 18.113.070(D), concluding that although a resort developer's wildlife mitigation plan need only mitigate damage to wildlife habitat, rather than damage to each species affected by the development, the plan at issue was still too indefinite to comply with the county ordinance.

This case marks the third time the Court of Appeals has addressed challenges to Thornburgh Resort Company, LLC's planned destination resort in Deschutes County. Following appeals to LUBA and the Court of Appeals, Deschutes County's initial approval of Thornburgh's conceptual master plan (CMP) for the resort was remanded for additional findings. *Gould v. Deschutes County*, 216 Or. App. 150, 171 P.3d 1017 (2007). After making additional findings, the County conditionally approved the CMP, and both LUBA and the Court of Appeals affirmed. *Gould v. Deschutes County*, 227 Or. App. 601, 206 P.3d 1106 (2009). This appeal arises from a LUBA decision remanding a Deschutes County hearings officer's approval of Thornburgh's final master plan (FMP) for the development.

In her present challenge, Gould first argued that LUBA misinterpreted DCC 18.113.070(D). That section, sometimes referred to as the "no net loss" standard, requires that "[a]ny negative impact [by the proposed development] on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource." Gould argued that the standard requires that developers mitigate damage to each affected species at no less than a one-to-one ratio. LUBA disagreed, affirming the hearings officer's interpretation of the ordinance as requiring only mitigation of damage to wildlife habitat in general. Relying on the context of DCC 18.113.070(D), the Court of Appeals affirmed, noting that the phrase "fish and wildlife resources," viewed in context, refers to wildlife habitat rather than individual species. 233 Or. App. 623, slip op. at 6. For that reason, Thornburgh's wildlife mitigation plan satisfied the no net loss standard.

Gould next argued that the hearings officer's conditions of approval of the FMP were inadequate, because they failed to ensure that Thornburgh's fish mitigation plan would comply with the no net loss standard. Affirming LUBA, the Court of Appeals concluded that the plan was properly included in the conditions of approval when the hearings officer labeled it as an "addendum" to the wildlife mitigation plan. *Id.*, slip op. at 7.

In its cross-petition, Thornburgh disagreed with LUBA's conclusion that the wildlife mitigation plan was still too indefinite to demonstrate adequate compliance with the no net loss standard. Thornburgh's wildlife mitigation plan identified a number of off-site habitat restoration activities it would undertake to mitigate the impact of the proposed development, but it failed to provide a specific location at which those activities would take place. Though Thornburgh had identified three likely locations on Bureau of Land Management (BLM) land for the restoration activities, the BLM could not legally commit to any of the locations. In the event the BLM locations fell through, Thornburgh proposed a back-up plan of a dedicated fund to be used by the Oregon Department of Fish and Wildlife for mitigation within Deschutes County. LUBA concluded that the lack of a reasonably definite location for the restoration activities precluded a showing that compliance with DCC 18.113.070(D) is "likely and reasonably certain to succeed," as required under *Meyer v. City of Portland*, 67 Or. App. 274, 678 P.2d 741 (1984). The Court of Appeals agreed, but noted that the wildlife mitigation plan would have been sufficiently definite if the mitigation activities were certain to occur on one of the three BLM parcels. 233 Or. App. 623, slip op. at 12. The court concluded, however, that the possibility that mitigation might occur anywhere within Deschutes County rendered the plan too indefinite, precluding any determination that it was likely to comply with the no net loss standard. *Id.*

Mackenzie S. Keith

Gould v. Deschutes County, 233 Or. App. 623, ___ P.3d ___ (2010)

■ INCLUSIVE "OR" IN STATUTE MEANS DEVELOPER CAN NEGOTIATE AND LITIGATE WHEN CITY FAILS TO TAKE FINAL ACTION

ORS 227.178(1) sets a 120-day deadline (subject to enumerated exceptions) for cities to take final action on an application for a permit, limited land use decision, or zone change. ORS 227.179(1) grants applicants the right to take a city to court, by way of petition for an alternative writ of mandamus, when it fails to render a final decision within 120 days. In *State ex rel. West Main Townhomes, LLC v. City of Medford*, 233 Or. App. 41, 225 P.3d 56 (2009),

the primary issue before the court was whether the developer had extended the 120-day period by continuing to negotiate with the city after the statutory period expired in the absence of a final city decision. The Oregon Court of Appeals interpreted the applicable statutes and applied case law to the advantage of the developer, reversing the trial court's decision in favor of the city and remanding for issuance of the writ.

West Main Townhomes, LLC ("developer") filed an application in 2007 with the City of Medford to develop property by building a multifamily apartment complex. Pursuant to ORS 227.178(5), developer filed two written requests for extension of the 120-day period due to ongoing negotiations with the city. The extensions resulted in a new deadline of September 8, 2007 for the city to take final action. Negotiations with the city continued after this date, and developer provided a new proposal to the city. The city did not make a preliminary or final decision and developer did not request another extension. On October 4, 2007, developer, apparently having lost confidence in the process, filed for a writ of mandamus in Jackson County Circuit Court.

ORS 227.179(4) states that, in the absence of a final decision within 120 days,

> the applicant may elect to proceed with the application according to the applicable provisions of the local comprehensive plan and land use regulations *or* to file a petition for a writ of mandamus under this section. If the applicant elects to proceed according to the local plan and regulations, the applicant may not file a petition for a writ of mandamus within 14 days *after* the governing body makes a preliminary decision, provided a final written decision is issued within 14 days of the preliminary decision.

ORS 227.179(4) (emphasis added). In the case at hand, the trial court cited that provision in dismissing developer's petition for the writ of mandamus, ruling that developer's submission of a new proposal constituted its election to continue with the application after the 120-day deadline and extended the period again.

Reversing the trial court, the court of appeals expressly rejected the city's argument that ORS 227.179(4) presents an "either/or" choice for applicants. The city had argued that, in the absence of a final decision on an application for development, the statute allowed the applicant either to proceed with the application or to file for a writ of mandamus, but not both. The court emphasized the second sentence of ORS 227.179(4) (quoted above), noting that it "clearly implies" that until a preliminary decision is made the applicant may file for a writ of mandamus even when the applicant has continued negotiating with the city. 233 Or. App. at 46. The word "or" in the first sentence of the statute, therefore, does not make developer's choices mutually exclusive. Rather, in this instance it is inclusive: it allows applicants for permits, limited land use decisions, or zone changes to continue negotiating with a city *and* (at least until a preliminary decision is made) take the city to court to force a decision. (The plain language of the second sentence of the statute also makes it clear that once a preliminary decision is made, the applicant may *not* file for a writ of mandamus unless the city again fails to render a final decision within 14 days of the preliminary decision.)

The court also made a point of identifying the objective of the 120-day deadline as backstopped by the procedure for mandamus: "prompt governmental action on applications for the use of property . . . ." *Id.* In that vein, this case confirms that cities must make final decisions within 120 days of receiving applications for development (excluding days added to the period at the applicant's written request) even if the applicant continues negotiating with the city. If a city fails to make a final decision within that time, the applicant may choose to simultaneously negotiate and litigate until the city makes a preliminary decision. If the city makes a preliminary decision after the 120-day period has run but before the applicant has commenced litigation, it has another 14 days to make a final decision before the applicant may file a petition for a writ of mandamus.

Nicholas P. Merrill

State ex rel. West Main Townhomes, LLC v. City of Medford, 233 Or. App. 41, 225 P.3d 56 (2009)

■ LOCAL AESTHETIC REGULATIONS CAN TRUMP THE FEDERAL TELECOMMUNICATIONS ACT

In *Sprint PCS Assets, LLC v. City of Palos Verdes Estates,* 583 F.3d 716 (9th Cir. 2009), the city appealed a grant of summary judgment in favor of Sprint PCS Assets, LLC (Sprint), ruling the city had violated the Telecommunications Act of 1996 (TCA), Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in various sections of U.S.C. titles 15, 18, and 47). Sprint was denied two of eight permits sought to construct wireless telecommunications facilities (WCF) based on the city's ordinance guarding against adverse aesthetic impacts.

During local review of the permit applications, the city considered a staff report detailing the potential aesthetic impacts of the WCF and confirming that cellular service from Sprint was already available in relevant locations in the city. The city council denied the permits because it found a WCF in one of the proposed locations would disrupt the residential ambience of the neighborhood and denied the second proposed location because it would detract from the natural beauty that was valued at one of the four main entrances to the city.

The TCA places several limitations on local government's control over the construction and modification of WCFs in order to encourage the rapid deployment of new telecommunications technologies. One of the limitations requires a city's decision to be in writing and supported by substantial evidence. However, the flip side of that limitation is that a court may not overturn a city's decision on substantial evidence grounds if that decision is (1) authorized by local law; and (2) supported by a reasonable amount of evidence.

Sprint appealed the city's decision in federal district court seeking a declaration that the denial constituted a violation of the TCA. The district court, relying on its legal conclusion that California law prohibits a city from basing its decision on aesthetic considerations, concluded that the city's decision was not supported by substantial evidence and therefore violated the TCA. In addition, the court concluded the city violated an additional portion of the TCA, which forbids local prohibitions on the provision of telecommunication service, by preventing Sprint from closing a significant gap in its coverage.

The city appealed the decision to the Ninth Circuit. On appeal, the court reversed, finding both that the city had authority to regulate based on aesthetics, 583 F.3d at 721-22, and that Sprint had not established the existence of a significant gap in service, *Id.* at 728.

The court determined that the California constitution gave the city the authority to regulate local aesthetics because aesthetic conditions have long been held to be valid exercises of a city's traditional police power. Further, the California Public Utility Code (PUC) did not divest the city of its authority to consider aesthetic impacts resulting from the WCF applications. Under the PUC, governing the public use of roads includes applying urban planning principles to that use. Such planning principles include maintaining an attractive streetscape to protect the visual fabric of neighborhoods. The court concluded that a telecommunications company can, under the PUC, "'access' a city's rights-of-way in both aesthetically benign and aesthetically offensive ways." *Id.* at 725. However, the court determined that it is within the city's authority to permit aesthetically benign access to public rights-of-way.

A city's denial of a WCF permit application remains subject to the TCA limitation that such denial shall not prohibit or have the effect of prohibiting the provision of personal wireless services. But the limitation only applies when the telecommunications company shows (1) a significant gap in service coverage, and (2) that it has made "some inquiry into the feasibility of alternative facilities or site locations." *Id.* at 726. Here, the court found that Sprint's mere presentation of radio frequency propagation maps was insufficient to establish the significance in the alleged gap in service coverage. The court therefore did not reach the question of the whether the company had relied on a valid alternatives analysis.

Aesthetic principles grounded in substantial evidence in the record allow local governments to deny WCF permits so long as such a decision does not prohibit the telecommunications company from filling a proven significant gap of service coverage, where no feasible alternative location exists.

Jennifer M. Bragar

Sprint PCS Assets, LLC v. City of Palos Verdes Estates, 583 F.3d 716 (9th Cir. 2009)

Cases From Other Jurisdictions

■ OHIO COURT GIVES CREDENCE TO COMPREHENSIVE PLAN

B.J. Alan Company v. Congress Township Board of Zoning Appeals, 918 N.E.2d 501 (Ohio 2009), involved an interpretation of Ohio's version of the Standard Zoning Enabling Act as applied to unincorporated portions of a county. The statute required all zoning requirements to be "in accordance with a comprehensive plan" but in this case the issue was whether the Township itself was required to adopt the plan or could rely upon a broader county-wide plan.

Plaintiffs sought land use approval to build a state-licensed fireworks stand outside incorporated towns and within defendant township. The township had established a rural zoning committee to create a zoning resolution for the area. The resolution was adopted by the township's voters and applied by its officials. The committee chair testified that the committee, during the drafting of its regulations, used the county's plan, which had only two zoning districts—one for farm use and the other for businesses. However, the zoning ordinance map had only the first category within the township boundaries, so any use other than farm use required a variance or a zone change. Plaintiff applied for, but was denied, a use variance. Plaintiff had argued that the township's zoning resolution was not in accordance with a comprehensive plan because there was no local comprehensive plan and there was only one local zone. The trial court upheld the decision but the Ohio Court of Appeals reversed since there was no locally-adopted comprehensive plan and the county's plan set out no specific goals or objectives for the township.

The Supreme Court of Ohio reversed the court of appeals, finding that the statute required compliance with a comprehensive plan, but did not specify which agency must adopt the plan. 918 N.E.2d 501, 506-507. The court also decided there was no requirement that the plan offer any direction to the township in the form of goals and objectives so long as there were county-wide recommendations for growth. The court saw the county plan as regional in nature and noted that it was "comprehensive" in that it covered the whole of the county and addressed short- and long-term issues dealing with urban and rural matters. The plan stated that the county would generally remain agricultural and made several references to the township. The court concluded that the county plan could be an adequate basis for the township to deny plaintiff's application but remanded the case to determine whether the single district zoning map was in accordance with the adopted comprehensive plan. *Id.* at 507.

This case is interesting because it does require a comprehensive plan separate from the zoning ordinance, which is not always the case in eastern states.

Edward J. Sullivan

B.J. Alan Co. v. Congress Township Bd. of Zoning Appeals, 918 N.E.2d 501 (Ohio 2009)

■ NEW YORK COURT OF APPEALS UPHOLDS ATLANTIC YARDS URBAN RENEWAL ACQUISITIONS

Goldstein v. New York State Urban Development Commission, 921 N.E.2d 164 (N.Y. 2009), tested the eminent domain power of a public corporation to acquire and develop the Atlantic Yards portion of Brooklyn under the state constitution and laws. Respondent was the Empire State Development Corporation (ESDC), which undertook acquisition of 22 acres for mixed-use development. The project included development of a sports arena, infrastructure, and residential and commercial uses. The residential portion would contain up to 6,430 dwelling units, over a third of which would be used for low- and moderate-income tenants. ESDC was required to find blight in the area, much of which is held by New York City for transportation purposes. However, there were several private parcels that ESDC had been unsuccessful in acquiring and which it now sought to obtain through condemnation. ESDC argued that the acquisition would satisfy the state eminent domain statutes by serving a "public use, benefit or purpose . . . ." 921 N.E.2d 164, 166.

Initially, petitioners filed their claims in federal court under the Fifth Amendment and brought pendent state law claims. However, the federal courts dismissed those claims and petitioners re-filed their state claims approximately six months later in state court. Petitioners asserted the condemnation violated the state constitution because it took property for the benefit of a private party, not for public use, and it did not limit occupancy of residential units to low income persons, as petitioners contended was required of a project financed using state loans or subsidies. The state court found the project and its acquisitions to be for a public use and also found that there was sufficient blight for the use of eminent domain.

After agreeing with the lower court that the case was timely filed under New York statutory law, the court of appeals found that the exercise of eminent domain was for a public use under the New York constitution and laws and that there was sufficient evidence of blight. While petitioners claimed that not all of the land was severely blighted, the court said that this decision regarding degree of blight belonged to ESDC, which made the determination of blight removal. The court said that blight may include underdeveloped and economically stagnant areas and that only if there is no room for reasonable difference of opinion would it intervene. The court stated further:

> It may be that the bar has now been set too low—that what will now pass as 'blight,' as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the legislature, not the courts. Properly involved in redrawing the range of the sovereign prerogative would not be a simple return to the days when private property rights were viewed as virtually inviolable, even when they stood in the way of meeting compelling public needs, but a re-weighing of public as against private interests and a reassessment of the need for and public utility of what may now be out-moded approaches to the revivification of the urban landscape. These are not tasks courts are suited to perform. They are appropriately situated in the policy-making branches of government.

Id. at 172-73.

Moreover, the court rejected an interpretation of the state constitutional requirement that, for certain slum clearance projects, low income persons who lived or have lived in the area be given first priority. In this case, the court noted there were only 146 persons dwelling in the affected area, not all of whom were low income. Because this project did not involve substantial slum clearance, the court found that it was not subject to the replacement housing provisions. The appellate court upheld the trial court's determination that ESDC's exercise of the eminent domain power was proper. *Id.* at 173.

The concurring judge would have dismissed the case for not having been filed within 30 days of the federal court disposition of the matter. He also would have interpreted state law as preventing delay of projects through prolonged litigation, adding that the majority had "opened up and exposed for all to see a whole new strategy for determined foes of a public project to exploit." *Id.* at 185.

The dissent found the project did not involve a public use and instead found a transfer of private property to another private owner, which was banned by the state constitution. The dissent found the incantation of blight to be insufficient and would not have deferred to the ESDC's findings that there was a blight exception to the state constitution's public use requirement. In this case, only part of the area slated for development was arguably blighted, and the dissent would not use eminent domain for the other portions of the property were not so obviously blighted. Finally, the dissent said that the court must use its own independent judgment as to whether the public corporation stayed within its statutory and constitutional limitations.

This case is decided under New York law, both statutory and constitutional, and may be seen differently by other states under the same circumstances. Nonetheless, this decision is an interesting post-*Kelo* decision on the nature of eminent domain.

Edward J. Sullivan

Goldstein v. New York State Urban Dev. Comm'n, 921 N.E.2d 164 (N.Y. 2009)

Land Use Board of Appeals

■ STATEWIDE PLANNING GOALS

LUBA's decision in *Oregon Shores Conservation Coalition v. Curry County*, LUBA No. 2009-119 (Feb. 9, 2010), applies LUBA's review standard for a local government interpretation of its comprehensive plan to the county's interpretation of a map. In this appeal, the county was asked to determine how property was zoned when it was mapped in 1981 as part of the Rogue River Estuary to comply with Statewide Planning Goal 16. Under the Goal, estuaries are classified into management units, including Natural and Conservation management units. The primary difference between the two is that "mining and mineral extraction" is allowed in a Conservation management unit, but not in a Natural management unit.

The applicant/intervenor in this appeal owned five tax lots (105, 107, 102, 1402 and 1404) and sought county approval to expand its gravel operation onto these lots or a declaration that its mining operation is a non-conforming use. The county denied both requests. The intervenor then asked the county to determine the location of Natural Management Unit 3 with respect to its tax lots under the 1981 Curry County Comprehensive Plan (CCCP) Estuarine Management Unit Map and the CCCP Estuarine Zoning Map. The county found that Tax Lots 105 and 107 are outside of Natural Management Unit 3, but that Tax Lot 102 is located within it. The county also determined that Tax Lots 108, 1404 and 1402 are outside the Natural management unit and within an adjoining Conservation Management Unit in which gravel operations are allowed. It is the determination concerning these three tax lots that petitioners challenged in this appeal.

Among the difficulties the county faced in making this decision was the fact that both the CCCP Estuarine Management Unit Map and the CCCP Estuarine Zoning Map were of a very small scale (1" equals 3,500 feet). The maps also showed somewhat different land and water configurations and imprecise zoning map designations. Additionally, the Rogue River's morphology has changed since 1981, so that the main channel has shifted north, two islands shown in the 1981 CCCP Estuarine Management Unit Map now exist in different locations, and a slough has receded so that its connection with the main channel is at the property line dividing Tax Lots 102 and 108. To help resolve the intervenor's request, the county planning staff created a Composite Map by enlarging the CCCP Estuarine Management Unit Map and superimposing it onto a larger scale map that showed the intervenor's tax lots.

On appeal, petitioners argued the county misinterpreted the Curry County Comprehensive Plan (CCCP) when it concluded that Tax Lots 108, 1402 and 1404 are located outside of Natural Management Unit 3 and inside the adjacent conservation management unit. Given the small scale of the relevant maps, LUBA concluded the county was required to interpret the CCCP, using any related CCCP text or refinement maps as context and interpretational aids. The county found that other maps and figures in the CCCP that could serve as potential interpretational aids were of little help, since they were equally small in scale and "crudely drawn." Instead, the county relied on the Composite Map and photographs from 1986 and 2005 that showed some evidence of mining activity on Tax Lots 108, 1402 and 1404.

LUBA agreed with the petitioners that the 1986 and 2005 photographs were not evidence that Tax Lots 108, 1402 and 1404 were actually used for mining activity in 1981. However, LUBA concluded the Composite Map "was the most reliable evidence that was available to the county" and the county's reliance on it to exclude the three lots from Natural Management Unit 3 was a plausible interpretation of the CCCP. LUBA's review of the text of Natural Management Unit 3 and the CCCP Estuarine Management Unit Map also supported its determination that the county's interpretation of the CCCP was not inconsistent with its express language, purpose, or policy. "Given the inherent limitations in preparing the composite map, the county's ultimate interpretation of the 1981 CCCP Estuarine Management Unit Map to exclude [Tax Lots 108, 1402 and 1404] is at least as plausible as petitioner's interpretation that all three tax lots are included in natural management unit 3." Slip op. at 13. Since the county selected between competing and plausible interpretations of the CCCP, LUBA concluded it must defer to the county's interpretation under ORS 197.829(1)(a) and LUBA affirmed the county's decision.

■ *LUBA JURISDICTION*

Petitioners in *VanGrinsven v. Klamath County*, LUBA No. 2009-041 (Jan. 8, 2010), challenged a county planner's letter informing petitioners that a previously issued "Land Use Compatibility Statement" (LUCS) expired because petitioners failed to obtain septic approvals required as a condition of the LUCS. The county apparently used a LUCS as a vehicle for issuing certain kinds of land use approvals, such as site plan review; in this case, the LUCS was not required by any state permitting agency. The county approved the LUCS to allow petitioners to expand and remodel an existing grocery/deli subject to conditions, including a condition requiring a sign-off by the county for sanitary septic approval. By its terms, the LUCS expired within 180 days if the construction activity covered by the LUCS was not commenced within that time period. Following completion of substantial construction activity, the county concluded petitioners needed to complete septic upgrades to their site. Petitioners disagreed and, after 180 days elapsed, a county planner sent a letter stating the LUCS expired because petitioners failed to obtain the necessary septic permits and explaining how petitioners could avoid an enforcement action.

Petitioners appealed to LUBA and the county moved to dismiss the appeal, contending the planner's letter is not a statutory land use decision because it does not concern the county's comprehensive plan or land use regulations.

Petitioners disagreed, arguing the planner's letter concerned the application of Article 14 of the county's land development code, which governs the revocation and enforcement of permits. LUBA agreed with the county. Article 14 describes the four "powers and responsibilities" granted to the "code enforcement officer" (the county planning director or his/her designee). In LUBA's view, the planner's letter does not exercise any of these four powers, either directly or implicitly, and the letter does not "concern" the application of the county's land development code. "[W]hether some explicit code provision authorizes county staff to issue letters informing permittees that the county believes their permit has expired, or whether staff have implicit authority to do so under the LDC, we do not believe the mere exercise of such authority is sufficient in itself to make a staff action 'concern' the 'application' of a land use regulation within the meaning of ORS 197.015(10)(a). Otherwise, every conceivable action taken by county staff under color of authority of its land use code could constitute a land use decision." Slip op. at 6-7. Accordingly, LUBA concluded the planner's letter is not a land use decision subject to its review jurisdiction and granted the petitioners' motion to transfer the appeal to county circuit court.

■ *LUBA PROCEDURE*

In *Smith v. City of Salem*, LUBA No. 2009-093 (Order, Jan. 27, 2010), LUBA considered whether the petitioner's signature on a pre-printed petition constituted sufficient participation in the local proceedings to give petitioner standing to appeal the city's decision to LUBA. Under ORS 197.620(1), a petitioner must have "participated either orally or in writing in the local government proceedings" to have standing to appeal a post-acknowledgment plan amendment (PAPA) to LUBA. Petitioner provided her signature and address on a petition that was submitted into the record by the attorney for a citizens group that opposed the PAPA at issue, a comprehensive plan map amendment and zone change to allow part of a golf course to be developed for commercial and residential use. The petition contained a statement that opposed the PAPA on the ground that the entire golf course parcel provides flood mitigation and should remain zoned for open space use to protect city residents' quality of life. The city approved the PAPA and petitioner appealed to LUBA.

The intervenor-respondents sought to dismiss the appeal on the ground that petitioner failed to participate in the local proceedings leading to approval of the PAPA and, therefore, lacked standing to appeal. Generally, a petitioner must have "appeared" locally to have standing to appeal a local land use decision under ORS 197.830(2) and a petition signature would not constitute an appearance under that statute. However, the requirement that a petitioner have "participated" in the local proceedings to have standing to appeal a PAPA requires something more than "a bare, neutral appearance." It requires that a petitioner "must assert some position on the merits" as LUBA and the Court of Appeals have construed ORS 197.620(1). (Order at 2) *See, Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 576, *aff'd*, 207 Or. App. 8, 139 P.3d 990 (2006). The intervenor argued that petitioner failed to satisfy this standard because she did not assert an individual position on the merits of the PAPA.

Conceding that it was a "close question," LUBA disagreed with the intervenor that petitioner's standing depended on whether she asserted a unique or individualized position on the merits. By signing the petition in this case, petitioner joined with others in stating a position on the merits of the PAPA and did more than merely "appear" in the city proceedings. The petition contained a statement explaining why the city should deny the application, which LUBA characterized as "a coherent, if brief, argument supporting petitioner's request." (Order at 5) LUBA also rejected the intervenor's argument the that petitioner must identify some comprehensive plan or zoning provision the PAPA would violate in order to sufficiently participate in the city proceedings for purposes of standing under state law and the city's procedural rules. In LUBA's view, the argument in the petition "clearly articulates a ground for objecting to the rezoning application, even if it does not expressly cite any particular approval standards." (Order at 5). That is all that is required under *Century Properties, LLC v. City of Corvallis* and LUBA denied the intervenor's motion to dismiss the appeal.

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