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Appellate Cases -- Real Estate

■ *UNDISCLOSED LEAKY BASEMENT FLOATS PLAINTIFF'S UTPA CLAIM*

In *Fowler v. Cooley*, 239 Or. App. 338, 245 P.3d 155 (2010), plaintiff brought an Unlawful Trade Practices Act (UTPA) claim alleging misrepresentation and failure to disclose a material defect in connection with the purchase of a single-family home. The Oregon Court of Appeals held that plaintiff had established a ***prima facie*** case of a UTPA violation and that the measure of damages was properly awarded.

Plaintiff inspected a home for sale in the Kenton neighborhood of Portland and saw workers repairing sheetrock near a sump pump. As plaintiff later testified, he subsequently asked defendant if there had been any water leaks in the basement and defendant replied there had not and that the sump pump was there as a precaution. Unbeknownst to plaintiff, the previous year defendant had sold the house to another person who had experienced several water leaks in the basement after heavy rainfall. After making various attempts to fix the leaks the previous buyer terminated the purchase contract. Defendant declared a contract forfeiture and hired a contractor to fix the leaky basement.

Rather than a purchase agreement, plaintiff and defendant entered into a lease option. Several months later, plaintiff exercised his option and purchased the property on a land sale contract. One month later, heavy rains caused significant water leaks in the basement. Plaintiff attempted to adjust the sump pump to alleviate the flooding, but the leaking continued. As a result, plaintiff stopped making payments on the contract. In May 2007 defendant again declared a contract forfeiture and reclaimed possession of the property. Thereafter plaintiff filed the UTPA claim against defendant asserting that he had entered into the contract based on defendant's misrepresentation of the property's history and characteristics and defendant's failure to disclose the basement leak. After a bench trial, plaintiff was awarded the full amount of the requested damages, which included the costs of improvements to the property, the down payment and escrow fees, and payments made on the lease agreement and the purchase contract.

Defendant's argument on appeal was that the trial court erred in denying her ORCP 54 B(2) motion to dismiss plaintiff's claim because plaintiff failed to present sufficient evidence to support a finding that he had purchased the house "for personal, family or household purposes . . . ," pursuant to ORS 646.605(6). As a result, defendant argued, the transaction was not subject to the UTPA.

During the trial, there was testimony that plaintiff did intend to make personal use of the house. There was also evidence showing that plaintiff might use the house for investment purposes. The court of appeals reviewed "the entire record to determine whether sufficient evidence was presented to establish a ***prima facie*** case . . . ." 239 Or. App. 338, 344. One witness testified that plaintiff stated he was looking for a place to live in that part of town because friends lived there. The court found that testimony sufficient to infer that plaintiff intended to make personal use of the house when he purchased it in October 2006. Thus, the trial court was correct in finding the transaction subject to the UTPA.

Defendant next argued that the trial court erred in concluding that she had violated the UTPA because no evidence was presented at trial that she knew when she tendered delivery of the house that the basement leaked. Thus, continued the argument, plaintiff failed to establish that defendant had violated ORS 646.608(1)(t) by failing to disclose a material defect.

Plaintiff alleged that defendant had violated both ORS 646.608(1)(e) and (t), but defendant's assignment of error only implicated 646.608(1)(t). The court rejected defendant's argument because the trial court's general judgment did not differentiate between the two UTPA allegations. Instead, the judgment stated that the court "returned a verdict in favor of plaintiff on his First Claim for Relief, Unlawful Trade Practices." ***Id.*** at 346-47 (internal quotation marks omitted). Accordingly, continued the court, defendant could not show "that the trial court

erred by relying on a violation of ORS 656.608(1)(t) as a basis for its verdict." *Id.* at 347.

Finally, defendant argued that the trial court erred in denying defendant's motion to strike plaintiff's damages. Defendant argued that the proper measure of damages under the UTPA for the sale of property is the difference between the value of the property as represented and its actual value. Defendant argued that plaintiff had not presented any evidence of such a difference and, therefore, was limited in damages to the statutory minimum of $200.

In rejecting this assignment, the Court held that the "actual damages" provision of ORS 646.630 allows for "restitution for economic loss suffered by a consumer as a result of a deceptive trade practice . . . ." *Id.* at 348 (quoting *Gross-Haentjens v. Thorpe*, 38 Or. App. 313, 317, 589 P.2d 1209 (1979)). The court also noted that ORS 646.656 provides that remedies in the UTPA "are in addition to all other civil remedies existing at common law, [indicating] legislative intent to create a special remedy *different* from those that exist at common law." *Id.* (quoting *Raudebaugh v. Action Pest Control, Inc.*, 59 Or. App. 166, 171, 650 P.2d 1006 (1982)). Thus, the court concluded, the UTPA "provides an independent means for plaintiffs to obtain damages that provide restitution for ascertainable losses caused by a defendant's unlawful trade practice." *Id.* at 348-49. The court found this "to be true even where, as here, the purchaser relinquishes the property but does not do so by an express rescission of the contract." *Id.* at 349.

Gary K. Kahn

Fowler v. Cooley, 239 Or. App. 338, 245 P.3d 155 (2010)

Appellate Cases -- Land Use

■ OFF-SITE IMPROVEMENTS PROTECTED AGAINST MIDSTREAM CHANGES IN CONSTRUCTION REGULATIONS

In *Athletic Club of Bend, Inc. v. City of Bend*, 239 Or. App. 89, 243 P.3d 824 (2010), the Athletic Club of Bend (the Club) sought site plan approval for a new driveway to its existing facility in Mount Bachelor Village, a subdivision that had been approved in December 2000. The proposed new driveway required improvements on land owned by the Club, and also on Century Drive, a public street owned by the City of Bend.

The city's hearings officer denied the site plan approval request for failure to meet roadway access requirements of the city's Development Code. Those requirements did not exist when the subdivision was approved in 2000. In reaching his decision, the hearings officer considered ORS 92.040(2), which provides that:

> [W]hen a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise.

He concluded that, to the extent some of the requested improvements were on city-owned right-of-way, the proposed construction was not "on the property" and therefore the statute did not apply. LUBA upheld the hearings officer on appeal.

The court of appeals considered the legislative history of ORS 92.040(2) and reversed. The court found that the purpose of ORS 92.040(2) was to rectify past practices where local governments made zoning code changes after a final subdivision plat was approved that frustrated construction on the platted lots. The legislative history of subsection (2), including testimony from proponents of this subsection, demonstrated to the court's satisfaction that the legislature sought to provide regulatory certainty to land developers. To limit that protection only to wholly on-site improvements, the court reasoned, would improperly narrow the scope of the protection provided. Recognizing that many land development construction projects involve off-site improvements, the court held that it was more plausible and more consistent with legislative intent to apply ORS 92.040(2) "whenever the approval of on-property development depends on the approval of off-property construction on rights-of-way and roadways adjacent to subdivision lots that occurs as a consequence of on-property development." 239 Or. App. at 99-100. Thus, the Club's site plan review request should have been considered under the city's Development Code that existed when the subdivision was approved in December 2000, free from application of the newer roadway access standards.

David J. Petersen

Athletic Club of Bend, Inc. v. City of Bend, 239 Or. App. 89, 243 P.3d 824 (2010)

■ COUNTY CANNOT RELY ON A "REASONS" EXCEPTION TO CIRCUMVENT ITS OWN ZONING RESTRICTIONS

In *Waste Not of Yamhill County v. Yamhill County*, 240 Or. App. 285, 246 P.3d 493 (2010), Riverbend Landfill Company, Inc. (Riverbend) sought approval to expand its landfill operation onto property planned and zoned for Exclusive Farm Use (EF-80). Yamhill County's EF-80 zone does not allow landfill operations, but the county approved the necessary comprehensive plan and zone changes, floodplain development permit, and site plan to accommodate the expansion. The approval was based in part upon a "reasons" exception to compliance with Goal 3.

Waste Not of Yamhill County (Waste Not) appealed the approval to LUBA, challenging, *inter alia*, the county's use of a "reasons" exception to Goal 3 to support the allowance of a landfill operation on EFU property, where the county's own code prohibits such a use. LUBA agreed and reversed the county's approval.

The court of appeals affirmed LUBA's reversal of the county's approval. The court went through the exception process in detail, explaining that a local government can adopt a property-specific plan that is inconsistent with a goal requirement (e.g., preserving agricultural lands for agricultural purposes) if there are "reasons" that the land is needed for a use that is not allowed by a goal policy. This is known as a "reasons" exception.

Goal 3 allows "[a] site for the disposal of solid waste . . . ," so long as it has been approved as a conditional use by the local government and the Department of Environmental Quality has granted the appropriate permit under ORS 459.245. ORS 215.283(2)(k). Yamhill County simply opted for more restrictive provisions and chose not to allow landfill operations in any zone other than the Public Works/ Safety (PWS) zone. Notwithstanding the fact that the proposal was permissible under Goal 3, when considering Riverbend's expansion application the county adopted a "reasons" exception to Goal 3 in order to allow the plan amendments and zone changes from EFU to PWS.

Waste Not argued that the proposed expansion is consistent with Goal 3, so no exception is required or appropriate and could not be used to accomplish comprehensive plan amendments and zone changes. Quoting ***DLCD v. Yamhill County***, 183 Or. App. 556, 53 P.3d 462 (2002), ***review dismissed***, 336 Or. 126, 81 P.3d 709 (2003), the court noted that the

> exceptions process is not designed to allow plan amendments and zone changes in order to permit uses that are, in fact, allowed by the applicable goals. . . . A use that is permitted under the applicable goal must conform to the requirements of the goal. It is only when a use is ***not*** permitted at all under the applicable goal that the exceptions process may come into play.

Waste Not, 240 Or. App. at 293. LUBA agreed that the holding in ***DLCD v. Yamhill County*** required reversal of the county's decision. LUBA explained that:

> [T]he county may not approve an exception to allow a use that is allowed by Goal 3 and the statutory EFU zone. If the county wishes to allow landfills on agricultural land, it must amend its EFU zone to allow them under the standards set forth in the statutory EFU zone, with any supplementary regulation that the county wishes to adopt.

Id. at 294. On appeal, Riverbend argued that an exception could be taken to avoid a use preclusion that is imposed by local laws. The court of appeals disagreed, finding that Riverbend's position was inconsistent with the statutory and rule definition of "exception." ORS 197.732(1)(b) and Goal 2, Part 2, define "exception" as "a comprehensive plan provision . . . that . . . [d]oes not comply with some or all goal requirements . . . ." The court specifically noted that "[a]n exception avoids the imposition of goal requirements that otherwise apply to the adoption or amendment of a comprehensive plan," and that "[a] zoning ordinance is not a "goal requirement." *Id.* at 295.

The exception process is designed to address situations in which a proposed use is ***inconsistent with statewide planning goal requirements***. If Yamhill County wishes to

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change its zoning allowance for landfills, it can amend its comprehensive plan to authorize that new zoning policy, but only if the amendment meets the applicable goal requirements. *Id.* The county cannot circumvent its zoning restrictions through the Statewide Planning Goal exception process.

NOTE: The court of appeals reconsidered its decision in this case, and on February 23rd modified its original opinion by deleting the following language regarding LUBA's remand: "LUBA's remand to the county will allow a more careful focus on the plan designation and nature of any exception to be taken for the expansion area, as well as the implementing zoning for that plan designation." The court otherwise affirmed its prior opinion but found that this language was inconsistent with its affirmance of LUBA's opinion.

Peggy Hennessy

Waste Not of Yamhill County v. Yamhill County, 240 Or. App. 285, 246 P.3d 493 (2010)

■ CASE UPDATE: WEST LINN CORPORATE PARK

On March 21st, the Ninth Circuit heard oral argument in light of *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 240 P. 3d 29 (2010), the Oregon Supreme Court's response to the appeals court's certified questions.

■ MEASURE 37 AND MEASURE 49 CASES

Measure 37 Claimants Seek Vested Rights Determinations

The court of appeals had a busy final quarter of 2010 deciding whether property owners obtained vested rights in their Measure 37 waivers or whether they would be subject to the limited remedies available under Measure 49.

The November 2010 issue of the RELU Digest contains a comprehensive summary of the decision in *Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County*, 237 Or. App. 149, 238 P.3d 1016 (2010). A brief summary of this case follows since it was the first time the court of appeals considered whether a claimant's Measure 37 waiver confers a vested right, and because it sets the stage for subsequent decisions on vested rights.

In *Friends of Yamhill County*, the Measure 37 claimant owned a 38.8-acre parcel in rural Yamhill County that is zoned AF-80 (Agriculture Forestry). The property contained one existing residence and the Measure 37 waiver granted the right to divide the property into ten separate parcels and to build nine new residences. Before the effective date of Measure 49, the applicant spent $155,000 in constructing subdivision roads, arranging for the construction of electrical service, and widening the adjacent county road. Having satisfied the condition for preliminary subdivision approval, the applicant also recorded the final plat. The court applied the factors from *Clackamas County v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973), to determine whether the claimant had a vested right to the waiver. Those factors include the ratio of expenditures incurred to the total cost of the project, good faith of the landowner, whether or not he or she had notice of any proposed zoning or amendatory zoning before starting the improvements, and the type of expenditures.

The court ruled that the county's decision failed to comply with its vested rights ordinance because it did not contain findings to explain how the approved use of the property was consistent with the issued waivers. As for the county's application of the *Holmes* factors, the court focused on whether the county erred by not requiring the claimant to compare the substantial expenditures towards the residential development to the total cost of the development. The court ruled that, since the record did not contain an estimate of the total cost of development, the county erred in its consideration of the expenditure ratio factor. The court also addressed the good faith factor for expenditures after Measure 49 was referred to voters but prior to its effective date. The court ruled that most vested rights cases will meet the good faith test because Section 5(3) of the measure allows the continuance of uses that have vested on the effective date, December 6, 2007. Therefore, expenditures made prior to that date can be considered in determining whether vested rights apply.

The court next considered *Biggerstaff v. Board of Commissioners of Yamhill County*, 240 Or. App. 46, 238 P.3d 1016 (2010). Petitioners appealed the county's decision that the Johnsons had a vested right in their Measure 37 waivers to construct a forty-one-lot subdivision. The court ruled that the trial court should have remanded the decision to the county to determine the total project cost and to give proper weight to the expenditure ratio under the circumstances of this case in line with its previous decision in *Friends of Yamhill County*. The Johnsons had provided a total project cost based on temporary dwellings that were more like storage sheds than the residential uses contemplated by the Measure 37 waivers. The sheds were built with plumbing and electricity to meet the county's definition of "dwelling" but only cost the Johnsons $16,000 each. The estimated total project cost thus artificially lowered the project cost so that the ratio of expenditures to project cost would appear to meet the vested rights test.

In *Kleikamp v. Board of Commissioners of Yamhill County*, 240 Or. App. 57, 246 P.3d 56 (2010), petitioners appealed the county's decision that the Greggs had a vested right in their Measure 37 waivers to construct a thirteen-lot residential subdivision and equestrian center. As in *Friends of Yamhill County* and *Biggerstaff*, the court ruled that the trial court should have remanded the decision to the county to determine the total project cost and to give proper weight to the expenditure. The Greggs expended approximately $488,255 to develop the property, record the final subdivision plat for the development, and obtain building permits before Measure 49 became effective.

The trial court concluded that an estimate of the total project cost in analyzing the expenditure ratio is not necessary in every case. The court of appeals clarified how the expenditure ratio is analyzed. First, the court instructed that in all but the most exceptional Measure 49 case, total project cost must be identified before a legal determination concerning vested rights can be made. Such an exceptional

case occurs where the other *Holmes* vesting factors (e.g., good faith, nature and location of the project) are so compelling as to preclude any other outcome. Second, for vesting purposes, the concept of "substantial expenditures" requires an examination of both the absolute amount expended and the percentage yielded by the expenditure ratio. Third, because consideration of the expenditure ratio is necessary in determining whether a property owner has made "substantial expenditures," property owners must demonstrate the likely costs of completing the particular development sought to be vested based on construction costs as of December 6, 2007. Fourth, a cogent assessment of total project cost (and, concomitantly, the expenditure ratio) will, in turn, require particular identification of the development that the property owner sought to vest as of that date. Since the Greggs did not provide any estimate of total project cost, the court remanded to the county to reconsider the expenditure ratio.

In *Davis v. Jefferson County*, 239 Or. App. 564, 245 P.3d 665 (2010), the claimant acquired a non-zoned 67.78-acre parcel that was subsequently zoned exclusive farm use. Claimant sought and obtained Measure 37 waivers of the post-acquisition zoning laws from the county and the state. On November 8, 2006, the county approved claimant's thirty-one-lot subdivision consistent with those waivers. By December 6, 2007, claimant had spent approximately $300,655 on the subdivision. After the adoption of Measure 49, the claimant then sought and obtained a vested-rights determination from the county. The vested rights decision applied the *Holmes* factors. The county's decision was based on an estimate of the total cost of construction that did not include the cost of constructing the individual residences. In addition, the county made an alternative finding that even if the cost of the residences were included, the expenditure factor would be met.

Petitioner challenged the county's decision on several grounds. Relying on *Friends of Yamhill County*, the court explained that the term "use of property" in Measure 49, Section 5(3) is the employment of land for a particular purpose, and in the context of a vested right to develop a subdivision it refers to "the actual employment of land for a residential purpose." *Davis*, 239 Or. App. at 572 (quoting *Friends of Yamhill County*, 237 Or. App. at 167). Therefore, the court again concluded that expenditures for roads and utilities are sufficient to establish a use of the property for residential purposes. However, the court found that the expenditure had to be compared to the total cost of the project, including construction costs for the residential portions. The court remanded because the county's alternative finding was not based on substantial evidence in the record reflecting the total cost of the subdivision. Further, the court remanded for a lack of substantial evidence to support the expenditures that had been made for the engineering work, legal work, and improvements.

These cases signify that claimants attempting to establish a vested right to Measure 37 waivers must provide hard data to support their claim and the court of appeals will scrutinize these data to prevent claimants from gaming the system by failing to provide the necessary baseline information prior to undertaking the expenditure ratio test.

Measure 49 is Constitutional

The debate about the constitutionality of replacing Measure 37's relief provisions with those of Measure 49 also continued at the appellate court level in the final quarter of 2010. The following provides a summary of relevant cases related to recent constitutional questions related to Measure 49.

The court considered *Powell v. State ex rel. Oregon Department of Land Conservation and Development*, 238 Or. App. 678, 243 P.3d 798 (2010), and again upheld the constitutionality of Measure 49. Plaintiff initially filed a claim under Measure 37 before the enactment of Measure 49, only to have that pending claim extinguished in the circuit court after Measure 49 went into effect. On appeal, plaintiff raised two arguments: 1) Measure 49, by its terms, does not apply retroactively; and, in the alternative, 2) if Measure 49 is retroactive, its application so as to moot ongoing litigation violates the Due Process Clause of the Fourteenth Amendment.

As to the first argument, the court cited *Bleeg v. Metro*, 229 Or. App. 210, 211 P.3d 302 (2009), *rev. denied*, 349 Or. 56, 240 P.3d 1097 (2010), rejecting that contention, and plaintiff conceded that *Bleeg* was controlling. As to the due process claim, the plaintiff claimed she had a "vested right in her Measure 37 litigation" and that retroactive application of Measure 49 is "arbitrary and irrational" as applied to her. Plaintiff relied on early 20th century U.S. Supreme Court cases to support her vested right argument. However, the court reviewed its more recent analyses of substantial due process in the area of economic legislation and found that the court's reasoning is now framed in terms of rationality rather than "vested rights." The court found further support for retroactive application of Measure 49 in this context based on a showing that retroactive application of the legislation itself is justified by a rational legislative purpose. That purpose passes muster because it rebalanced public and private land use interests. Further, the court concluded that it was rational to accomplish that rebalancing retroactively. Therefore, the court of appeals upheld the circuit court's dismissal of plaintiff's complaint.

The court also considered *Smejkal v. State of Oregon*, 239 Or. App. 553, 246 P.3d 1140 (2010). This case is the state's analysis of the questions raised in the federal case *Citizens for Constitutional Fairness v. Jackson County*, 388 Fed. Appx. 710 (9th Cir. 2010). Smejkal, the plaintiff, contended that Measure 37 waivers are contracts between the plaintiff and the state or county, and that implementation of Measure 49 constituted an impairment of those contracts. In addition, plaintiff contended that Measure 49's replacement of Measure 37 remedies was a violation of the separation of powers.

The court held that Measure 37 waivers do not create contracts because a statutory duty of a government is not contractual in character. Statutory obligations of governments can become contractual in nature when the statute clearly announces the obligation is immune from statutory changes, but Measure 37 contained no such immunity. As to the separation of powers argument, plaintiff argued that the issuance of waivers by the county board and the Department of Land Conservation and Development

(DLCD) director were actions of the judicial department because an adjudicatory process was used to approve the waivers. The court found that Washington County commissioners and the DLCD director are not judges and therefore are not members of the judicial branch even if they make quasi-judicial decisions. Thus, these Measure 37/Measure 49 participants cannot violate the separation of powers.

In *Bruner v. Josephine County*, 240 Or. App. 276, 246 P.3d 46 (2010), plaintiffs purchased a forty-acre property in 1984 that was zoned residential for one-acre home sites. Subsequently, the property was down-zoned to agricultural zoning with a minimum of eighty acres required for a dwelling. Plaintiffs obtained a county waiver but not a state waiver under Measure 37. The county did not act on plaintiffs' planned unit development application before Measure 49 took effect. Plaintiffs filed suit in trial court and the case was dismissed since Measure 49 replaced all relief available under Measure 37. On appeal, the court relied on ***Smejkal*** to deny plaintiffs' claims for breach of contract, impairment of contract, and interference with judicial functioning.

Plaintiffs also raised a takings argument, complaining that the augmented value of their real property under Measure 37 had been diminished by the legal effect of Measure 49 in vitiating their waiver and that loss of value is a taking under the Fifth Amendment. Since Measure 49 gave plaintiffs the right to construct additional residences on the parcels, they could not argue that they have been deprived of all economically viable uses of their property sufficient to create a ***per se*** takings under the Fifth Amendment.

The court also based its decision in *Rood ex rel. Richards v. Coos County*, 240 Or. App. 68, 246 P.3d 69 (2010) on the ***Smejkal*** case, ruling that plaintiffs' Measure 37 waivers were not contracts and that Measure 49 does not violate the separation of powers. Further, the court ruled that plaintiffs did not have a vested right in their waivers because they did not prove actual substantial expenditures. The court upheld the trial court's summary judgment in favor of the county.

In a final opinion based on ***Smejkal,*** the Court decided *Norwood v. Washington County*, 239 Or. App. 452, 244 P.3d 904 (2010). Plaintiffs purchased a twenty-eight-acre tract of property in rural Washington County in 1962. The property was not zoned at the time, but much later was rezoned Exclusive Forest Conservation which does not allow residential development. Plaintiffs appealed a summary judgment decision arguing the trial court erred in concluding that their Measure 37 waiver did not create a contract with the county and in determining that their activities and expenditures were insufficient to vest a right to develop the property. Relying on ***Smejkal***, the court ruled that the Measure 37 waiver was not a contract. Turning to the vested rights question, the Court noted that DLCD had not granted a state waiver before Measure 49 went into effect.

Further, plaintiffs set about to ready the site for development without seeking development or grading permits for the site, and the county never granted subdivision approval. The county argued that no vested right to develop a subdivision occurred because plaintiffs' development activities were not a lawful use of property so as to qualify as a vested use. The county's waiver conditioned any residential development, including the construction of roads and utilities for residential purposes, on the county's approval of a land use permit as well as obtaining a state Measure 37 waiver. Because plaintiffs had neither, their use of the property did not comply with the county's waiver. The court agreed with the county that Measure 49, Section 5(3) requires a use that is consistent with a waiver and that plaintiffs' use of the property here was inconsistent with the waiver.

Lastly, the court considered a case challenging Measure 49's replacement of the relief available under Measure 37. The plaintiffs in *Luethe v. Multnomah County*, 240 Or. App. 263, 246 P.3d 487 (2010), own approximately nineteen acres in Multnomah County that they purchased in 1973 from a family member. Under Measure 37, plaintiffs obtained a state waiver of some, but not all, of the state land use regulations that plaintiffs alleged reduced the value of their property. The county did not act on plaintiffs' demand because it determined that their claim was not complete.

In September 2006, plaintiffs filed a lawsuit seeking just compensation. The case went to trial on November 5, 2007, the day before Measure 49 was adopted. On November 14, 2007, while Measure 49 was not yet in effect, the trial court orally ruled in favor of plaintiffs, finding that certain state and county land use regulations reduced the fair market value of their property in the amount of $750,000. The court also orally ruled that defendants were not obliged to pay plaintiffs compensation in the liquidated amount, but, rather, that defendants could elect to do so. Plaintiffs submitted a proposed judgment with findings of fact and conclusions of law to defendants, who thereafter filed objections to that judgment.

On December 6, 2007, while those objections were pending before the trial court, Measure 49 became effective. The county subsequently filed a motion to dismiss plaintiffs' case because Measure 49 made it moot, and the trial court granted the motion. On appeal, plaintiffs argued they had a vested right in the oral ruling for damages made November 14, 2007. Plaintiffs relied on a seventy-five-year-old Oregon Supreme Court case to argue their point. However, the court distinguished the circumstances in that case, where a later-enacted statute did not abrogate the plaintiffs' rights to its tort damages, from the current case where Measure 49 expressly replaced all Measure 37 remedies. The court further denied plaintiffs' claim of a taking because plaintiffs had not yet received a final, unreviewable judgment on their Measure 37 claims when Measure 49 became. Therefore, plaintiffs had no cognizable property interest protected by the Fifth Amendment.

The court is unambiguously finding Measure 49 constitutional even as petitioners throw the kitchen sink of constitutional questions before the panels.

Jennifer M. Bragar

Cases From Other Jurisdictions

■ BANNING PROTEST SIGN UNCONSTITUTIONAL, SAYS NORTH CAROLINA FEDERAL COURT

Bowden v. Town of Cary, ___ F. Supp. 2d ___, 2010 WL 5071613 (E.D.N.C. 2010), involved a homeowner who was assessed for a road improvement project that he claimed resulted in directing storm drainage onto his property. Plaintiff rejected several town efforts to settle the case and spray-painted "Screwed by the Town of Carey" on the side of his house in fluorescent orange and pink paint over a 48-square-foot surface. Plaintiff was served with a notice of zoning violation under the Town's sign regulations and brought the instant proceedings in federal court, alleging violations of the free speech clauses of the federal and North Carolina constitutions.

The regulations at issue, which were inclusive of all signs, had both dimensional and other standards but contained exceptions for, *inter alia*, traffic and official signs, "holiday decorations with no message displayed between November 15 and January 15," and "works of art." The town later removed the latter two exceptions but then excluded them from the definition of "sign." The town first notified plaintiff his sign violated the dimensional requirements of the ordinance but a later notice stated that the fluorescent paint also violated the "colors" standards of the regulations. Following the filing of this suit, both sides moved for summary judgment.

The court began its analysis with the special status accorded home signs with political content as a means of participating in public debate in a cheap and convenient way, citing *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994). The court granted summary judgment to plaintiff and denied the town's motion, agreeing with plaintiff that the ordinance was content-based. The court had no trouble finding plaintiff had standing, as the Notice of Zoning Violation constituted an "injury in fact." A causal connection to the ordinance was that the injury was "fairly traceable" to defendant's actions and the injury could be redressed by a favorable decision.

The court found the ordinance to be content-based because it distinguished one type of "favored" speech from another, based on the ideas conveyed and by conferring benefits (in this case the exemption) or imposing detriments. Under the ordinance, a sign saying "Merry Christmas" at certain times of the year would be exempt under the holiday decoration provisions, whether it was oversized, flashing, or fluorescent; however, plaintiff's political sign would be banned. As in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), the exemptions from the sign regulations put non-commercial signs, for which there was no exemption, in a disfavored category. The Fourth Circuit, which includes North Carolina, used the *Metromedia* opinion to establish its precedent in *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007), a precedent the court found applicable to this case. The court rejected the town's defense that there was no stated purpose to repress free speech, countering that the lack of such purpose does not render a sign ordinance content-neutral if the effect is otherwise.

The court concluded Cary's ordinance, which was content-based, differed from the ordinance challenged in *Ladue*, which prohibited too much speech by banning most residential signs. Cary's ordinance was not saved by the fact that it allowed two residential signs per house because of the court's conclusion that it distinguished between signs on the basis of content. To pass constitutional muster, the ordinance must be based on a compelling state interest and be narrowly drawn to achieve its end. While the traffic safety and aesthetic interests Cary asserted are "substantial governmental interests," the court held they are not "compelling state interests" sufficient to justify content-based regulations. Nor is the ordinance narrowly drawn (an exempt flashing Christmas sign could still cause accidents). The court concluded the plaintiff satisfied the requirements for an injunction and enjoined the town from enforcing the sign ordinance against the plaintiff.

This is yet another sign case that illustrates the need for careful drafting so as to avoid free speech issues. If the town had hoped to avoid the annoying sign at issue, it should have tightened the scope of its requirements and exemptions.

Edward J. Sullivan

Bowden v. Town of Cary, ___ F. Supp. 2d ___, 2010 WL 5071613 (E.D.N.C. 2010)