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Contents

■ *JUDGE SERCOMBE TIES UP LOOSE ENDS UNDER MEASURE 37*

Several challenges based on Measure 37 were again at issue in *Curry v. Clackamas County*, 240 Or. App. 531, 248 P.3d 1 (2011). Plaintiffs obtained state and county waivers of land use regulations. However, they alleged the waivers failed to avoid all of the offending regulations and that their property's value was still diminished as a result. They sued the county seeking monetary compensation and a declaration that their Measure 37 waivers would be transferrable to a subsequent owner. The county moved for summary judgment and, while the motions were pending, the voters passed Measure 49. The county then moved to dismiss and plaintiffs moved to amend their complaint related to the applicability and constitutionality of Measure 49. The trial court granted both motions and plaintiffs appealed.

The court of appeals began by noting that claims alleged for declaratory judgment required disposition through summary judgment rather than dismissing the claims. The court then turned to the merits and remanded for a judgment consistent with the court's ruling.

Plaintiffs' first claimed they had a constitutionally protected vested right in the Measure 37 waiver equivalent to that provided by a final judgment. The court disagreed, deciding that waivers are simply zoning permits, which do not create an enforceable right against a private or public entity and can be changed by subsequent law. The court cited to *Demendoza v. Huffman*, 334 Or. 425, 449, 51 P.3d 1232 (2002), for the proposition that

> [t]he "private property" protected from uncompensated taking under Article I, section 18, and the Fifth Amendment must be "something more than a mere expectation based upon the anticipated continuance of existing laws; [a vested right] must have become a title legal or equitable to the present or future enjoyment of property."

Curry, 240 Or. App. at 538. As a result, the waiver did not rise to the level of a property interest constitutionally protected from an uncompensated taking. (See *Smejkal v. DAS*, 239 Or. App. 553, 246 P.3d 1140 (2010), for a related decision denying relief under separation of powers based on waiver being the equivalent of a final judgment.)

The court also rejected plaintiffs' claim that they had a constitutionally protected vested right to develop their property because of their efforts to obtain relief under Measure 37. Plaintiffs' filing fees, attorney fees, and consulting fees, reasoned the court, were expenditures made to further litigation for monetary relief not made in furtherance of the physical development of plaintiffs' property and thus conferred no vested right.

Plaintiffs' equal protection, equal privileges, and First Amendment unconstitutional conditions doctrine claims were similarly rejected. The court noted that plaintiffs' equal protection and privileges argument did not allege that they belonged to a class distinct from the one created by Measure 49, or that Measure 49 failed to further a legitimate government interest rationally. As to the unconstitutional conditions doctrine under the First Amendment, the court found this argument was obscure at best and that a vested right under Measure 37 was not conditioned on plaintiffs' giving up any constitutional rights.

Shelby Rihala & Christopher A. Gilmore

Curry v. Clackamas County, 240 Or. App. 531, 248 P.3d 1 (2011)

■ VESTED RIGHTS UNDER MEASURE 49 SECTION 5(3) REQUIRE A DETERMINATION AND CONSIDERATION OF THE RATIO OF EXPENDITURES MADE AND TOTAL PROJECT COSTS

In *Damman v. Board of Commissioners of Yamhill County*, 241 Or. App. 321, 250 P.3d 933 (2011), the Oregon Court of Appeals issued its fourth opinion in a series of cases involving the retroactive impact of Measure 49 on landowners who were granted Measure 37 waivers. As it did in *Friends of Yamhill County v. Board of Commissioners*, 237 Or. App. 149, 238 P.3d 1016 (2010), *rev. allowed*, 349 Or. 602 (2011), the court contemplated whether a circuit court applied the correct legal standards in reviewing a county hearings officer's decision that landowners had vested rights to complete and continue development of a subdivision. Using the factors set out in *Clackamas County v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973), the court focused its inquiry on whether the claimant landowners had made substantial expenditures toward developing a subdivision by considering the ratio of expenditures made (the "numerator") to the total project costs (the "denominator") as of December 6, 2007, the date Measure 49 became effective (the "expenditure ratio"). Upon finding that the evidence in the record was insufficient to establish what expenditures were actually made by the claimant and what the anticipated total costs of development were as of December 6, 2007, the court remanded the case to the county to make those determinations.

Measure 37 required state and local governments to provide "just compensation" to property owners when the government enforced post-acquisition land use regulations that restricted the property's use and reduced its fair market value. ORS 197.305(1). Under the measure, the government could compensate a claimant who qualified for relief (1) by paying the claimant the amount of the reduction in the property's fair market value or (2) by modifying, removing, or not applying the land use regulation and allowing the owner to use the property as permitted when the owner acquired the property. ORS 197.305(2) and (8). The latter option became known as a "Measure 37 waiver."

In 2007, amid growing concerns about Measure 37's potential impact, Measure 49 was passed to narrow Measure 37's effect. Measure 49 revised the adjudicatory processes and standards enacted by Measure 37 and allowed relief for two classes of Measure 37 claims: those filed on or before June 28, 2007, and those filed thereafter. *Damman* concerns the former.

Because the claimant in *Damman* filed a claim before June 28, 2007 and was then issued a Measure 37 waiver before Measure 49 became effective, section 5(3) of Measure 49 applies. Measure 49 section 5(3) provides that a claimant who filed a Measure 37 claim prior to June 28, 2007 is entitled to just compensation as set forth in a waiver issued before December 6, 2007 to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right as of December 6, 2007 to complete and continue the use described in the waiver. Because neither party addressed whether the claimant's use of the property complied with the waiver, the court only considered whether the claimant had a common-law vested right.

The respondents, Charles and Ellen McClure, owned adjacent parcels of land near the urban growth boundary of the City of Newberg since 1967. The McClures received Measure 37 waivers from the state and county to use their property in accordance with land use regulations that were in effect in 1967 and subsequently began residential development of the property subject to those waivers. The McClures entered into a development agreement with the City of Newberg under which the city agreed to provide water services to the properties and the McClures agreed to develop roads, water lines, and sewerage facilities on the properties. As part of their arrangement with the city, the McClures executed a performance agreement and irrevocable letter of credit with the county. The performance agreement required the McClures to complete road and utility improvements for the subdivision and secure their performance with a $989,777 letter of credit from a bank. The letter of credit allowed the county to use the funds to complete the improvements if the McClures failed to deliver on their promise. After obtaining final subdivision approval, the McClures finished recording their residential lots on November 6, 2007, and as of December 6, 2007 had incurred $189,778 in development expenditures for street and utility costs and $416,087 in soft costs consisting of planning, legal, engineering, survey, and permit costs, as well as interest on borrowed money.

A county hearings officer provided the McClures with a Measure 49 certification of vested rights to complete their residential subdivision. The hearings officer determined that the expenditures made by the McClures were 'substantial' under the *Holmes* factors but neglected to calculate their expenditure ratio. The Yamhill County Circuit Court upheld the county's vested rights decision, and the petitioners sought review of the circuit court's ruling.

In its analysis, the court of appeals applied the following factors from *Holmes* to decide whether a claimant has a common-law vested right to complete and continue a land development project: (1) the ratio of project expenditures to the total project cost, (2) the good faith of the landowner in making the expenditures, (3) the relationship of the expenditures to the project as

opposed to other uses of the property, and (4) the nature, location, and ultimate cost of the project. *Holmes*, 265 Or. at 198-99. The court explained that all of the *Holmes* factors are material and that there must be an evaluation of the development's progress at the time of down-zoning, whether based on a substantial start of construction or substantial expenditures toward that particular end.

The court rejected the petitioners' arguments that initiating construction of homes is necessary for a residential use to vest under section 5(3) of Measure 49, and that any expenditures made after the referral date of Measure 49 (June 28, 2007) are necessarily made in bad faith and should not count toward the expenditure ratio. However, the court agreed with the petitioners that the hearings officer should have assessed the expenditure ratio, the calculation of which it found essential in order to determine whether the McClures made substantial expenditures toward the proposed vested use.

In response, the McClures argued that the county's failure to calculate the expenditure ratio was harmless because their project expenditures were eleven percent—including the letter of credit commitment—of the total costs of developing the subdivision and building homes of average cost. The McClures asserted that eleven percent is sufficient to support a vested rights determination. By contrast, the petitioners contended the letter of credit obligation is not an "expenditure" and should not be considered in calculating the numerator of the expenditure ratio. As a result, the petitioners advocated that the McClures' actual expenditures were only four percent of the total costs of developing the subdivision and building homes of average cost. The court decided that the evidence in the record was insufficient to establish the expenditures made and total project costs as contemplated by the McClures on December 6, 2007 and found that additional evidence would be needed to determine the expenditure ratio.

The court reasoned that the total project costs in this case would not include the cost of average homes because the residential development intended by the McClures on December 6, 2007 was one of "exceptional quality and design while . . . providing a superior quality of residential environment unequaled in the area." *Damman*, 241 Or. App. at 329. Rather than using the cost of average homes to set the denominator of the expenditure ratio, the court found it incumbent upon the claimant to consider the size and character of the buildings that were intended as of December 6, 2007 when establishing the total project cost. Because the development did not anticipate average homes, the county must determine the actual cost of the contemplated residential development before assessing whether the McClures had a cognizable vested right.

The court also decided that a letter of credit could be an expenditure, depending on the circumstances. To

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illustrate, the court posited there is no real difference, in this context, between a developer who makes cash outlays and one who assumes an irrevocable financial obligation. Therefore, whether a letter of credit is considered an expenditure and properly included in the numerator of the expenditure ratio depends on the certainty of liability, whether it is revocable or contingent, and its likelihood of being spent. Because the letter of credit in *Damman* was not in the record, the court ordered the circuit court to make this assessment on remand.

In its final ruling, the court summarily rejected the McClures' contention that their right to use the property as described in their Measure 37 waivers vested as a matter of law when the county granted final plat approval. Essentially, the McClures argued that Measure 49 has no impact on their waiver and final subdivision approval. The court explained that Measure 49 was intended to have retroactive effect on Measure 37 waivers by depriving them of all continued viability, with the single exception of vested rights determinations under section 5(3). Thus, Measure 49 clearly controlled. This case and its companion cases demonstrate the importance, and necessity, of determining and considering a specific ratio of expenditures made to the total project costs when deciding whether a claimant has a vested right under Measure 49 section 5(3). However, by remanding for a full and accurate calculation of the expenditure ratio, the court left landowners without any guidance as to what percentage from the expenditure ratio would constitute 'substantial expenditures' sufficient to justify finding a common-law vested right to complete and continue the land use described in a Measure 37 waiver.

Tyler Bellis

Damman v. Board of Comm'rs of Yamhill County, 241 Or. App. 321, 250 P.3d 933 (2011)

■ COURT OF APPEALS RULES ON VALUATION OF SPECIAL USE PROPERTIES IN CONDEMNATION

Most properties are valued in condemnation using either the "market" approach or the "income" approach. The former looks at recent sales of comparable properties to estimate a value for the property at issue, and the latter values the property based on the stream of income it produces. Single-family homes are ready examples of properties valued using the market approach and apartment complexes are equally ready examples of properties valued using the income approach. Special use properties, however, such as schools and churches may not have either comparable sales or income. Although relatively rare, Oregon recognizes a third valuation method—the "cost" approach—in that circumstance. The cost approach generally values specialized properties using the reproduction cost less depreciation and obsolescence. Appellate decisions analyzing the cost approach are few, but the Oregon Court of Appeals recently addressed the cost approach at length in *City of Bend v. Juniper Utility Company*, 242 Or. App. 9, 252 P.3d 341 (2011).

Juniper Utility involved the condemnation of a private water and sewer utility by a municipality. The central issue at trial was the appropriate valuation method. Both sides conceded that the market approach was unavailable because there were no comparable sales. They hotly disputed, however, the applicability of the income and cost approaches. The city contended that the income approach should be used because the utility had paying customers. The utility, in turn, argued that the income approach was inappropriate because its regulated rates were artificially low and, therefore, not an accurate measure of constitutional just compensation in eminent domain. Rather, the utility suggested that the cost approach was the only reasonable basis for valuation given the special nature of the assets involved (and the defects noted under the circumstances with the market and income approaches). The trial court agreed and the Court of Appeals affirmed.

The court began its discussion by holding as a matter of first impression in Oregon that the determination of the appropriate method of valuation in a condemnation case is a question of fact. For appellate purposes, then, the review focuses on whether there was any evidence in the record to support a trial court's decision rather than whether that decision was correct as a matter of law. The court readily found the requisite evidentiary support given the specialized nature of the property involved. The court also agreed with the trial court that regulated utility rates were not a definitive measure of income production in condemnation because utility ratemaking focuses on a reasonable return on a delineated asset base and eminent domain is concerned with fair market value of the property being acquired. This latter finding was significant because if the other recognized methods of valuation are available, the cost approach generally cannot be used under *State Board of Higher Education v. First Methodist Church of Ashland*, 6 Or. App. 492, 495-96, 488 P.2d 835 (1971), and *State Department of Transportation v. Southern Pacific*, 89 Or. App. 344, 347-48, 749 P.2d 1233 (1988).

Juniper Utility adds to a small but important body of law that is central to valuing special use properties in condemnation.

Mark J. Fucile

City of Bend v. Juniper Utility Co., 242 Or. App. 9, 252 P.3d 341 (2011)

REQUEST FOR CONTINUANCE WAIVED FOR LACK OF SPECIFICITY

In *Pliska v. Umatilla County*, 240 Or. App. 238, 246 P.3d 1146 (2010), the Oregon Court of Appeals upheld LUBA's affirmance of a county decision approving a conditional use permit for the construction of a travel plaza on property owned by Flying J, Inc. The county's decision responded to LUBA's remand of its initial decision in *Western Land & Cattle, Inc. v. Umatilla County*, 48 Or LUBA 295, *aff'd,* 230 Or. App. 202, 214 P.3d 68 (2009).

Petitioner Pliska contended that LUBA erred when it found that petitioner did not have an unqualified right to a continuance pursuant to the county's development code because this issue was not properly raised before the county. LUBA specifically determined that petitioner's letter requesting continuance submitted to the county prior to the public hearing in this case cited only ORS 197.763(6) and was not sufficient to raise the issue of a continuance pursuant to section 152.772(F)(12) of the Umatilla County Development Code (UCDC).

The court next reviewed briefly the history of the "raise it or waive it" principle and noted the letter petitioner had submitted cited ORS 197.763(6) as the basis for the request for a continuance. It was not until the LUBA appeal that petitioners argued UCDC 152.772(F) provided them with a right to a continuance. It further noted that although petitioners contended their letter requesting a continuance raised the county code issue, the cited code section does not concern a continuance requested before a public hearing commences, which is when petitioners requested a continuance in this case, As a result, the court held LUBA was correct in declining to address the merits of petitioners' argument.

Noah W. Winchester

Pliska v. Umatilla County, 240 Or. App. 238, 246 P.3d 1146 (2010)

SUBMISSION OF ALTERNATIVE PLAN DID NOT EXTEND CITY'S 120-DAY DEADLINE TO ISSUE FINAL DECISION

In *State ex rel. Stewart v. City of Salem*, 241 Or. App. 528, 251 P.3d 783 (2011), the court of appeals held that the trial court had erred by dismissing relator Stewart's mandamus petition pursuant to ORS 227.179(a) seeking to compel the City of Salem to approve his application under ORS 92.040 to partition his property. 241 Or. App. at 536.

In October 2008, Stewart filed an application with the city to partition his property. Pursuant to ORS 227.178(2), the city sent him a request for missing information. The city received a letter on December 2, 2008 in which Stewart provided some of the requested information, wrote that no other additional information would be submitted, and requested that the city "consider my application complete by operation of law." *Id.* at 531. On December 4, 2008, he submitted an alternative plan to reconfigure some of the lot lines for the partition. The city wrote a letter asking him to confirm whether he wanted the city to process his original application or to withdraw it and have the alternative plan considered. On December 8, 2008, the city received a voicemail from Stewart stating that he wished to proceed on the original application. The city planning division then issued a decision approving his application. However, at a March 30 hearing the city council voted to rescind the planning division's decision and to deny the application.

When the city had not yet issued its final written decision by April 1 (120 days from December 2, 2008), Stewart filed an alternative writ of mandamus under ORS 227.179(1) on April 2. On April 6, 2009, the city issued a final written order denying his partition proposal. The city then moved to dismiss the petition and order for a writ of mandamus because the submission of an "alternative tentative plan" was either a modification or a de facto withdrawal and submission of a new application, which had the effect of restarting the 120-day clock. The city argued it had the discretion to deem the application complete as of December 10, 2008 and that the 120-day clock did not expire until April 9, 2009. The trial court agreed, dismissing the petition as prematurely filed.

On appeal, the city argued that ORS 227.178(2) does not address situations "where an applicant, after providing written notice as described in ORS 227.178(2)(b), then submits different alternatives and tells the local government to process both within the same application." *Id.* at 533. Because of the "procedural limbo" this put the city in, the city argued it should have been able reasonably to deem the application complete after it received clarification from Stewart as to which alternative partition plan he wanted the city to process.

The court of appeals disagreed with the city and agreed with Stewart that the text and context of ORS 227.178(2) required his application to have been "deemed complete" on December 2, 2008, the date that the city received the requested additional materials.

The court stated that, under ORS 227.178 (1),

> a city ***shall*** take final action on a limited land use application within 120 days after the application is "deemed complete." If the city, within 30 days of receipt of the application, provides the applicant with written notice that the application is incomplete pursuant to ORS 227.178(2), that statute[] requires that the city ***shall*** deem an application complete, starting the 120-day clock,

on the date that the city receives either the additional requested materials, some materials and written notice that the rest will not be provided, or written notice that none of the requested materials will be provided.

Id. at 534 (citing ORS 227.178(2)(a)-(c)). The court went on to state that "[n]othing else in the statutory text suggests that the legislature otherwise intended to permit a local government the discretion to choose any other date on which to deem an application complete." *Id.* In addition, the court concluded that the context for ORS 227.178(2) supported the conclusion that an application must be "deemed complete" on the date that requested additional information is received. *Id.* The court stated that the surrounding statutory scheme provided only one circumstance by which the 120-day deadline may be extended: If, under ORS 227.178(5), the applicant requests an extension in writing.

The court declined to view Stewart's "submission on December 4, 2008, and subsequent withdrawal via voicemail on December 8, to permit an extension of the 120-day deadline or to otherwise allow the city to set a new 'deemed complete' date of December 10." *Id.* at 535. The court concluded that the statute was mandatory in nature so that "the city had no discretion but to take final action within the 120-day deadline established when the city received relator's response to its request for missing information." *Id.* Therefore, "[b]ecause the city had not yet taken final action on relator's application by April 1, relator's mandamus petition was properly filed pursuant to ORS 227.179 (1)." *Id.* at 536.

Marisol Ricoy McAllister

State ex rel. Stewart v. City of Salem, 241 Or. App. 528, 251 P.3d 783 (2011)

Cases From Other Jurisdictions

■ NINTH CIRCUIT FINDS NO "ROUGH PROPORTIONALITY" OBLIGATION FOR OFFSITE IMPROVEMENTS

In *West Linn Corporate Park LLC v. City of West Linn*, 2011 WL 1461372 (9th Cir. 2011), the Ninth Circuit issued an unpublished opinion following the Oregon Supreme Court's decision in *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 240 P.3d 29 (2010), answering questions the Ninth Circuit had certified to it. The 9th Circuit accepted the Oregon Supreme Court's decision that there is no "taking" under the Oregon constitution where the government imposes a condition on development to construct off-site improvements with personal property (money, piping, sand and gravel, etc.) but does not require dedication of any interest in the applicant's own real property. The court also held that the rough proportionality analysis of *Nollan* and *Dolan* does not give rise to a federal takings claim under these circumstances. In a footnote, the court went on to explain that this holding did not foreclose a regulatory taking claim under *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), or a due process claim against the city for imposing arbitrary conditions of development. *Lingle v. Chevron USA, Inc.*, 544 U.S 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Given its finding that no state or federal taking occurred, the court did not need to decide the constitutional question of ripeness, and it vacated the magistrate judge's determination that the claim was not ripe.

The Ninth Circuit agreed with the Oregon Supreme Court that the failure to follow the landowner consent requirements for a city-initiated vacation did not make the resulting vacation *ultra vires*, and that the subsequent requirement to rededicate a portion of the vacated street gave rise to an actionable damages claim. The Ninth Circuit found that the magistrate's determination that the city's vacating the street and then requiring a public easement to accommodate the street effected a taking was not erroneous and affirmed the $5,100 damage award to West Linn Corporate Park (WLCP). However, the court did not affirm the magistrate's award of $165,000 in fees for First Amendment retaliation against WLCP by one of its employees, determining that the First Amendment protects only conduct that is "inherently expressive" and conveys a "particularized message." Here, the public works director's refusal to release a performance bond posted by WLCP until WLCP dedicated its interest in the disputed intersection did not equate to retaliation against WLCP's petitioning the government for redress of grievances. Because there was no First Amendment conduct at issue, the Ninth Circuit remanded the decision to the district court to reapportion the fee award to include only the vacation and easement takings issues.

Carrie A. Richter

West Linn Corporate Park LLC v. City of West Linn, 2011 WL 1461372 (9th Cir. 2011)

■ NINTH CIRCUIT AFFIRMS "RAIL OVER BUS" CHOICE BY METROPOLITAN TRANSPORTATION AUTHORITY

Darensburg v. Metropolitan Transportation Commission, 636 F.3d 511 (9th Cir. 2011), involved a class action challenging minority bus transit users

in the San Francisco Bay Area to defendant's adoption of the Regional Transit Expansion Plan ("RTEP") as allegedly placing a disproportionate emphasis on rail over bus facilities. Plaintiffs contended the plan unlawfully discriminates against minorities who comprise 66.3% of bus riders and 51.6% of rail riders. Plaintiffs claimed that the RTEP has a disproportionate impact on minorities, given the history of rail facilities that primarily benefit white riders, the interactions between defendant and minority advisory groups, and allegedly inconsistent application of selection criteria for rail and bus projects which, plaintiffs claimed, amounted to intentional discrimination.

The trial court granted summary judgment to defendant on the intentional discrimination claims but allowed the disparate impact claims to proceed to trial. On these claims, the trial court found the plaintiffs established a ***prima facie*** case of discriminatory impact as to selection of rail and bus projects but also found defendant established a "substantial legitimate justification" for its choices. This shifted the burden to plaintiffs to show a less discriminatory alternative which was equally effective. The trial court found plaintiffs failed to do so.

Defendant is the Transportation Planning, Coordinating and Financing Agency for the nine-county Bay Area and receives state and federal transportation grants, allocating these and other funds for transportation projects through its Board of Commissioners, the MTC. Twenty-six independent transportation operators exist within the district and have funds provided both by defendant and by other sources such as local sales taxes, over which defendant has no control. Plaintiffs claimed harm from fare increases, service cuts, failure to make transportation improvements, and the like. They alleged seven operators constitute 95% of the area's transit trips and minorities constitute 61% of all transit riders. Some operators provide only bus, some only rail, and some a mix of those services, which are part of an interconnected transportation system.

The RTEP is a complete transportation plan adopted every four years. Federal funds are distributed according to certain guidelines, including considerations of human health and environmental effects of transportation projects, particularly those that may have a "disproportionately high and adverse effect on minorities and low income populations" and requires opportunities for members of such population groups in planning and development activities. 636 F.3d at 517 (quoting Order 5680.1, U.S. Dep't of Transp. (1997)). In this case, defendant claimed a "roughly equivalent" evaluation process for rail and bus projects. In 2001, defendant adopted an RTEP that expended $10.519 billion, of which the majority was in rail projects. In 2006, the RTEP projected a $13.503 billion expenditure, again largely oriented toward rail projects.

Plaintiffs alleged both intentional and disparate impact claims under state and federal law. Only the state law disparate impact claims went to trial, but the state and federal structures for such claims are similar. The court determined that a disparate impact case must have a solid statistical basis, which a court is not required to review as inherently reliable. In this case, the trial court never found minorities were adversely affected by the RTEPs, but it measured the effects on changes to individual transportation options. There was no measurement of impacts on minorities in the system as a whole.

On appeal, the Ninth Circuit affirmed the dismissal, but for a different reason: the evidence to present a ***prima facie*** case of discriminatory impact was found to be unsound. Even though minorities make up a larger percentage of bus riders, it does not necessarily follow that the expansion plans harm minorities, who do and will benefit from rail travel or that bus expansion projects were required to be given greater weight. Without a better statistical base, the court found it impossible to show whether minorities are helped or hurt by rail projects over bus projects. The court observed:

> Plaintiffs' regional-level population statistics fail to explain with any precision the effect the Regional Transit Expansion Plan will have on minority transit users. Under Plaintiffs' theory, so long as the population of bus riders contains a greater percentage of minorities than the population of rail riders, any RTEP that emphasizes rail expansion over bus expansion, even where such a plan may confer a far greater benefit upon minorities than whites, would be subject to legal challenge. Indeed, MTC could be effectively prevented from any efforts to expand rail service to accommodate more minority riders out of fear that they could be sued for discriminating against precisely the groups that they seek to integrate into the regional transit system.

Id. at 521.

The court concluded the inappropriate statistical measure and the logical fallacy were "clearly erroneous" measurements and that plaintiffs had failed to bring a ***prima facie*** case. Because plaintiffs failed to show any disparate impact, they were not able to use that evidence to infer intentional discrimination either. The court did not comment on other aspects of the decision of the trial court, but affirmed the result.

Judge Noonan concurred, but expressed the concern the courts were called upon to referee expenditures of large amounts which courts were clearly unprepared to undertake.

This case demonstrates the difficulty of showing that an expenditure program violates constitutional standards

and the heavy burden of providing appropriate statistical proof.

Edward J. Sullivan

Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511 (9th Cir. 2011)

Recent RLUIPA Cases

Second Circuit Upholds Injunction Against City's Enforcement Based on RLUIPA's "Equal Terms" Provision

In *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667 (2d Cir. 2010), the Second Circuit Court of Appeals considered an equal terms challenge to the city's decision prohibiting the use of a church facility for private, catered events. In exchange for paying for capital building improvements and ongoing church operating expenses, a catering company received the right to hold private functions in the church building. The neighbors complained and the city revoked a previously-granted permit finding the catering use was not accessory to the religious activities.

As comparisons for its equal terms challenge under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000) (RLUIPA), the church looked to an apartment and hotel that operated restaurants and event facilities that were similarly located in the R-10 zone. The city distinguished those uses, arguing that the hotel restaurant and event activities constituted accessory uses at those properties, while they were primary activities at the church. The city also argued that the hotels were non-conforming; they never obtained formal land use approval. The court found these to be distinctions without any difference.

> In a formal sense, the City may be correct that the hotels and the Church were differently situated from this point of view. RLUIPA, however, is less concerned with whether formal differences may be found between religious and non-religious institutions—they almost always can—than with whether, in practical terms, secular and religious institutions are treated equally.

626 F.3d at 671. In this case, all of the entities were allegedly operating in violation of the zoning rules, and the district court reasonably concluded the city responded differently to each entity.

> Most notably, the City's revocation letter appears, under threat of sanction, to deny the Church the opportunity to hold ***any*** catering events, thus denying it the benefit of the accessory-use law altogether . . . . [I]n contrast to the firm prohibition embodied in the Intent to Revoke, there is no evidence that the City ever threatened to shutter the catering facilities at either hotel . . . .

*Id.*at 672.

Ripeness Remains a Basis to Reject RLUIPA Claims

In *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010), members of the Miles Christi Order resided in a five-bedroom home and conducted private daily masses in a small eighteen-person chapel in a residential neighborhood. In response to neighbor complaints about traffic and parking, township planners required that Miles Christi obtain site plan approval establishing sufficient parking and landscaping or seek a variance to the same.

After Miles Christi failed to respond to the township's request, an enforcement action was filed. Miles Christi filed an action in federal court claiming a violation of RLUIPA and of the free exercise clause of the First and Fourteenth Amendments. The court rejected these claims on ripeness grounds. Given that Miles Christi had not sought site plan approval or a variance, the court found that Miles Christi would not suffer any hardship by delaying a federal court decision until the zoning board acted. The court noted that, without a definitive statement about which ordinances apply from the zoning board, the entity charged with interpreting the zoning ordinances, the court was unable to determine whether the township had gone too far.

In *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172 (D. Mass. 2011) the diocese, citing a decline in parishioners, closed Our Lady of Hope Parish, built in 1925. Although redevelopment plans had not been finalized, the diocese was moving forward with the process of deconsecrating the building, including removing Catholic symbols and a sale of the property. Concerned about the fate of the building, the City created a new historic district encompassing the church. Once designated, any exterior alteration required either a certificate of appropriateness or an exemption.

Rather than file for such a certificate, the diocese filed a claim in district court and alleged violation of the free exercise of religion, equal protection, RLUIPA and due process. The diocese argued that the "mere enactment of the Ordinance violates its rights" and that the City targeted the church property because the ordinance only burdened Our Lady of Hope Church and no other properties. 760 F. Supp. 2d at 181. The court disagreed, finding that it was impossible to determine whether the diocese's plan would be unsatisfactory until after the plan was created and reviewed.

As to the RLUIPA claim, the court determined that deconsecrating the church was protected by RLUIPA.

However, the court determined that the diocese failed to show a substantial burden—that the obligation to seek administrative review of its plan was "anything more than an inconvenience." *Id.* at 188.

Carrie A. Richter

Land Use Applications and the Telecommunications Act: The FCC's "Shot Clock" Rule

Developments continue in the fascinating interplay between the Federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 153 et seq., and state and local land use regulations affecting wireless communication facilities. This article summarizes three areas of particular importance to practitioners: (1) applicable time limits for final decisions, (2) authority of local governments to deny siting applications based on the current level of available service in the area, and (3) the lawfulness of variance requirements in local ordinances. There has been a recent increase in siting applications, and the Federal Communications Commission has just weighed in—again—as well.

1. Time limits for final decisions

In November 2009, the Federal Communications Commission (FCC) unanimously adopted a declaratory ruling addressing "presumptively reasonable period[s] of time" in which state and local zoning authorities must act on land use applications involving collocation and siting of wireless communications facilities. ***Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance***, 24 FCC Rcd. 13994 (2009). The FCC reasoned that expeditious deployment of wireless broadband infrastructure is integral to our nation's economic success, and the cost of having to wait for governmental land use decisions is ultimately shouldered by customers and slows innovation. For purposes of this rule, a "collocation" does not involve a "substantial increase" in the size of a wireless communication tower. The decision is commonly referred to as the "Shot Clock rule."

Under the Shot Clock rule, applications for collocation on existing facilities must be decided by the zoning authority within ninety days, and final decisions on applications for siting new facilities must be made within 150 days of receiving the application (the ninety and 150 day timeframes may be extended by mutual consent of the zoning authority and applicant). The timeframes do not include the time taken by applicants to respond to a zoning authority's request for additional information, ***provided that*** the zoning authority notifies the applicant within thirty days of an incomplete application.

As to remedies, the FCC declared that if a zoning authority does not act within these timeframes it constitutes a "failure to act," allowing the applicant to bring an action in court under section 332(c)(7)(B)(v) of the Act. However, the FCC ruled that a zoning authority's failure to act does not result in an automatic approval of the application; rather, the court must determine if the delay was in fact reasonable.

Under § 332(c)(7)(B)(v), the applicant has thirty days to file an action after the time limitation for local action has run. The zoning authority then has the burden to show that, given the nature of the application, it was reasonable to take longer than the established timeframes to act on the application. The court would then provide a case-specific remedy such as approving the application.

In practice in Oregon, the FCC ruling had fewer immediate impacts than it did in other states. ORS 227.178 already requires local land use decisions to be made within 120 days in cities (150 days in counties) or be subject to a potential mandamus proceeding in circuit court. Nevertheless, following adoption of the Shot Clock rule, zoning authorities generally worked even more carefully to track these applications according to the provided timelines, verify and document application completeness, and develop forms for mutually extending timelines.

Despite our familiarity in Oregon with strict processing timelines, the new federal remedy and the ninety-day decision limit for collocation applications changed the landscape of local review proceedings, at least in part because local decision makers were very concerned about the threat of a federal lawsuit. As discussed more fully below, the legal standards applicable in these cases are complex and unique, making prompt application review more challenging.

2. Impact of a Single Service Provider

On a substantive level, the FCC ruling also clarified that a zoning authority may not deny a wireless facility siting application on the sole basis that one or more providers currently provide service to the area. Over the past few years since passage of the Act, this has been an issue of controversy resulting in a split in authority among the federal courts of appeal.

The issue arises in the context of land use applications for wireless facilities because, under the Act, state and local governments may not take actions that prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). The Ninth Circuit has adopted a two-part test for determining

whether denial of an application results in prohibition of wireless services. First, a provider must demonstrate it has been "prevented from filling a significant gap in its own service coverage." Second, if the provider can demonstrate a significant gap, the provider must then show that the manner in which it proposes to fill the gap "is the least intrusive on the values that the denial sought to serve." ***MetroPCS v. City and County of San Francisco***, 400 F.3d 715 (9th Cir. 2005); ***Sprint PCS Assets, LLC v. City of Palos Verdes Estates***, 583 F.3d 716 (9th Cir. 2009); ***T-Mobile USA, Inc. v. City of Anacortes***, 572 F. 3d 987 (9th Cir. 2009). (The related decision in ***Sprint PCS v. County of San Diego,*** 543 F.3d 571 (9th Cir. 2008), also applies limitations to local government land use decisions arising out of the Act's section 253. That case represented another important development but is beyond the scope of this article.)

Prior to the Shot Clock ruling, courts in other federal appellate circuits had held that, as long as at least one provider made service available, the denial of another provider's facility-siting application did not constitute an "effective prohibition" of wireless service. In the Shot Clock ruling, the FCC ruled that this so-called "single-provider" rule undermines the Act's goal of improving wireless services because it limits customer choice. The FCC found it possible that the first carrier to a locality might not serve the entire area, which could leave the population underserved.

This does not mean that local zoning authorities must grant all applications; rather, denial of an application must be based on other articulated grounds that pass muster under the Act. Careful findings based on a solid evidentiary record are key in these decisions, which are highly fact-specific.

3. No preemption of variance requirements

Finally, the FCC Shot Clock ruling declined to preempt state and local ordinances that require a variance or waiver for every wireless siting application. The FCC found that CTIA, the petitioner representing the international wireless communications industry in the proceeding, failed to present sufficient evidence or information of a specific controversy necessary to justify preemption.

This ruling does not mean that zoning regulations requiring such variances are forever free from preemption under the Act. Another petitioner, providing different facts and evidence, could potentially argue with success that section 253 of the Act (which bars laws and ordinances that effectively prevent the provision of wireless communications services) is violated when applicants are required to obtain a zoning variance, which often requires an applicant to meet a higher application threshold. Such so-called "blanket" variance requirements appear vulnerable to future challenge either before the FCC or in other forums.

4. Epilogue: It's not over yet . . .

On April 7, 2011, the Federal Communications Commission issued a Notice of Inquiry (NOI) seeking public comment concerning whether it should go even further in "improving government policies" affecting the siting of wireless telecommunications facilities. ***In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59, Notice of Inquiry*** (April 7, 2011). (As of the preparation of this article, the NOI had not yet been published in the Federal Register.) This proceeding is clearly a first step toward potential future rulemaking by the FCC, and in fact the Commission so states in the NOI. The potential additional impact on zoning decisions concerning wireless facilities siting remains to be seen.

Pamela J. Beery and Courtney A. Lords

Land Use Board of Appeals

■ *ATTORNEY FEES*

Two recent orders grapple with novel issues concerning awards of attorney fees.

Pro se petitioner receiving attorney assistance

LUBA's order in ***Stewart v. City of Salem***, LUBA No. 2009-009 (May 26, 2011), resolves the pro se petitioner's efforts to obtain attorney fees in an appeal that went from LUBA to the Oregon Court of Appeals and back. The petitioner represented himself before LUBA and succeeded in obtaining a reversal of the appealed city decision. However, LUBA denied the petitioner's request for attorney fees, ruling that ORS 197.835(10)(b) only permits an award for attorney fees for parties that are actually represented by an attorney. Although petitioner obtained assistance with his appeal from an attorney, the attorney did not file pleadings or otherwise appear on his behalf before LUBA. On appeal, the court of appeals reversed LUBA's decision on this issue, concluding that the statute's use of the term "attorney fees" means the "reasonable value of legal services provided by an attorney that are related to the applicant's appeal of a local government decision to LUBA." ***Stewart v. City of Salem***, 240 Or. App. 466, 472, 47 P.3d 763 (2011). In the court's view, this can include advice and other help the petitioner obtained from an attorney concerning his appeal before LUBA. ***Id***.

On remand from the court of appeals, LUBA addressed the petitioner's motion for an award of $8,604.73, consisting of $8,460.00 in attorney fees (43.05 hours at $200 per hour) and $144.73 in expenses (copying, printing, and postage). Some of the requested fees and expenses were incurred on January 2, 8, 11, and 12, 2009 while the appealed land use decision was pending before the city. LUBA denied the expenses incurred on January 2nd because they involved advice to the petitioner concerning his testimony before the city council. Expenses for the remaining three dates were incurred after the city council made an oral decision and, in LUBA's view, were related to and anticipated an appeal to LUBA (including services for researching LUBA's administrative rules, and editing petitioner's "brief" and a notice of intent to appeal). Although recognizing it is a question of first impression, LUBA concluded it was appropriate to allow petitioner to recover these expenses totaling $1,660.

LUBA also granted the bulk of petitioner's request for attorney fees, consisting of 17.75 hours of legal assistance in reviewing and editing a 47-page brief petitioner drafted, time for travelling to and attending oral argument (3.75 hours), and completing time keeping records (2.5 hours). Despite the city's objection that the amount of time and expense incurred for these services were unreasonable, LUBA noted ORS 197.835(10)(b) simply allows an award of "attorney fees to the applicant" and does not include the modifier "reasonable." Given the complexity of the issues petitioner raised in his appeal, LUBA concluded the claimed fees were neither unreasonable nor excessive. Finally, even though ORS 197.835(10)(b) authorizes recovery of only "attorney fees," LUBA granted petitioner's request to recover his attorney's expenses of $144.73 for copying, printing, and postage in the absence of any objection by the city. All totaled, LUBA awarded the petitioner $8,254.73 for attorney fees and expenses.

Waiver and the probable cause standard

In *McGovern v. Crook County*, LUBA No. 2009-069 (May 26, 2011), LUBA addressed the murky issue of when attorney fees should be awarded to a prevailing local government in an appeal involving claims of waiver and claims that issues were wrongly decided on the merits. In his original appeal, petitioner challenged the county's approval of a partition to create a nonfarm parcel under ORS 215.253(5)(a)(B). Petitioner argued the proposed nonfarm parcel was not part of a parcel "lawfully created" before July 1, 2001 as the statute requires, but was created by actions taken in 2005 and 2006. Petitioner did not dispute the legality of a 2000 boundary line adjustment involving the affected property, which was similarly not addressed in the county's decision. LUBA concluded the county's decision did not adequately discuss what actions occurred after July 1, 2001 that may have affected the parent parcel and remanded the decision to the county on that basis. *McGovern v. Crook County*, 57 Or. LUBA 443 (2008) *(McGovern I)*.

Following an evidentiary hearing on remand, the county again approved the partition, finding nothing after July 1, 2001 affected the original parcel and it was lawfully created by a 1999 partition. The county rejected the petitioner's argument that the 2000 boundary line adjustment creating the original parcel configuration did so in violation of the applicable law, and, therefore, the parcel was not lawfully created until after July 1, 2001. The county based its decision on alternative grounds, finding petitioner waived the right to challenge the 2000 boundary line adjustment and, even if petitioner did not, the boundary adjustment was lawful and did not "create" the parcel for which it approved the partition.

On appeal to LUBA, petitioner raised a single assignment of error concerning the lawfulness of the 2000 boundary line adjustment and again asserted the partition involved a parcel that was not lawfully created before July 1, 2001. Petitioner did not challenge the county's waiver findings. In its response brief, the county argued LUBA must affirm the challenged decision because petitioner failed to assign error to the county's waiver findings, petitioner failed to raise the issue in *McGovern I*, and, on the merits, the county's decision was correct. In his reply brief, the petitioner asserted he had no obligation to address the waiver issue until the county raised it in its response brief and proceeded to argue why he had not waived the right to argue the effect of the 2000 boundary line adjustment on the merits of the county's decision. LUBA sided with the county and affirmed the partition approval. *McGovern v. Crook County*, 60 Or. LUBA 177, 181 (2009), *aff'd*, 234 Or. App. 365, 228 P.3d 736 (2010) *(McGovern II)*.

In addressing the county's subsequent motion for an award of attorney fees, LUBA wrestled with two issues under its attorney fees standard: For purposes of determining whether every argument in petitioner's presentation lacks probable cause, (1) what was petitioner's "entire presentation?" and (2) which positions did the petitioner present? On the first issue, the county argued the entire presentation must address both the waiver and substantive grounds for the county's decision. LUBA agreed, noting

> We have chosen to treat waiver issues as being such an integral part of the merits for purposes of a probable cause analysis under ORS 197.830(15)(b) that, to avoid attorney fees, a party must present probable cause arguments with respect to ***both*** the waiver issue and the merits of the issue that is allegedly waived.

McGovern I, 2, slip op. at 10. Here, the county conceded

and LUBA concluded the petitioner's assignment of error challenging the substantive basis for the county's decision cleared the probable cause threshold.

Turning to the waiver issue, LUBA concluded that given the evolving state of its case law on the topic, it was reasonable for petitioner to believe he could address the waiver issue in a reply brief responding to the county's arguments, rather than assign error to the county's waiver findings in his petition for review. Petitioner's tactical choice was "a decision that was open to doubt, and subject to rational, reasonable, and honest discussion." ***McGovern v. Crook County***, LUBA No. 2009-069, slip op. at 17 (May 26, 2011). In LUBA's view, the arguments in petitioner's reply brief were sufficient to satisfy the low probable cause threshold. Since the petitioner would have been "in no danger of an award of attorney fees" if he had addressed the waiver issue in his petition for review, LUBA concluded that awarding attorney fees because he argued the waiver issue only in his reply brief "would be punishing petitioner for what amounted to a pleading error." ***Id***. As a result, LUBA denied the county's motion for an award of attorney fees.

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