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Contents

- 1 **CC&R Provisions Trump Subdivision Request**
- 2 **Court of Appeals Examines Deference to Decisions and Definitions**
- 4 **Interpretation That Dog Kennel Constitutes "Animal Husbandry" Affirmed**
- 4 **Change to Homebuyer Protection Act May Catch Unwary Sellers**
- 7 **Vesting Rights: Timing Remains the Name of the Game**
- 8 **Third Circuit Finds Redevelopment Plan Violates Federal Affordable Housing Obligations**
- 10 **Land Use Board of Appeals**

Appellate Cases -- Real Estate

■ CC&R PROVISIONS TRUMP SUBDIVISION REQUEST

In the recent case *Hawkins View Architectural Control Committee v. Cooper*, 241 Or. App. 269, 250 P.3d 380 (2011), the Oregon Court of Appeals upheld a trial court's decision preventing defendants—owners of a single lot in a planned development—from subdividing their property for the purpose of creating multiple lots on which they planned to build additional homes. Both the trial court and the court of appeals relied on express language in the declaration establishing the planned development, which the courts found to prevent unambiguously the property owners' proposed subdivision without the consent of 85% of the other owners in the development.

The primary issue the court addressed was whether the conditions, covenants, and restrictions ("CC&Rs") applicable to defendants' property restricted defendants from unilaterally subdividing the property. The plaintiff in the case, the Architectural Control Committee (the "Committee"), established by the CC&Rs, asserted that the CC&Rs required defendants to obtain the consent of 85% of the property owners in the development. The court also considered whether the Committee could even enforce the CC&Rs against defendants.

Because the issue before the court depended on the meaning and application of a contract—the CC&Rs—the court analyzed the issues using the method described in *Yogman v. Parrott*, 325 Or. 358, 937 P.2d 1019 (1997). That method requires a court first to look to the text and context of a document to determine its meaning. If a review of the text and context reveals an unambiguous meaning, the court will declare that meaning as a matter of law. If the meaning is ambiguous, however, the court will then go on to utilize extrinsic evidence to determine the intent of the contracting parties, such as the manner in which the parties actually applied the provisions of the contract.

In this case, the court did not have to go beyond the text and context of the CC&Rs because it found the text and context of the document to be unambiguous.

First, the court concluded that the Committee was expressly authorized to enforce the provisions of the CC&Rs. The court therefore rejected defendants' argument that the Committee lacked authority to bring the action to prevent defendants from subdividing the property. Although the CC&Rs contained some language describing a specific role for the Committee with respect to approving the design and construction of improvements within the planned development, the court determined that language was not inconsistent with other, broader language in the CC&Rs granting the Committee the exclusive authority to enforce the CC&Rs.

Second, the court concluded, based on the defined terms in the CC&Rs, that the provision in the CC&Rs requiring 85% approval to amend its terms applied not only to the CC&Rs themselves but also to the entire declaration containing the CC&Rs, including property descriptions and any amendments subsequently made to that document. Based on that conclusion, the court held that if the defendants' proposed subdivision

amended the declaration, the proposal would require approval from 85% of the other owners in the planned development. 241 Or. App. at 278.

Defendants relied in part on a provision in the declaration that “[t]here shall be no limitation on the number of Lots and/or Lots which may be developed in the Development.” *Id.* at 272. The court agreed that this language was unambiguous and allowed expansion of the development, but only through the “addition of property to the development.” *Id.* at 278. That same language, according to the court, did not allow further subdividing property once it was included in the development. When it was added to the development, defendants’ property was added “as platted and recorded” in the county’s records. The court reasoned that if defendants subdivided the property, it would be platted differently and, therefore, constitute an amendment to the declaration. Because defendants had not obtained the consent of 85% of the other owners in the development, the court upheld the trial court’s injunction preventing the subdivision of defendants’ lot.

The court’s analysis in this case appears to be a straightforward application of *Yogman*, indicating the court’s continued reluctance to go beyond the express terms of any CC&Rs to resolve property disputes subject to such contractual limitations.

Tommy A. Brooks

[Hawkins View Architectural Control Comm. v. Cooper](#), 241 Or. App. 269, 250 P.3d 380 (2011)

Appellate Cases -- Land Use

■ COURT OF APPEALS EXAMINES DEFERENCE TO DECISIONS AND DEFINITIONS

In *Green v. Douglas County*, 245 Or. App. 430, 263 P.3d 355 (2011), the court of appeals took up the questions of (1) when a local government has adequately interpreted its ordinance in order to be entitled to deference on review and (2) the meaning of the word “building” in the context of a home occupation in an exclusive farm use zone permitted by ORS 215.448(1)(c).

The case involved an application for an amended conditional use permit to allow the Hesters to expand their business, “Romantic River Gardens,” on the Umpqua River where they host special events. The Hesters’ property is zoned as exclusive farm use (“EFU”) and allows, as a conditional use, “[h]ome occupation as a use accessory to an existing dwelling.” Douglas County Land Use and Development Ordinance (“LUDO”) 3.4.100(9). The Hesters sought to increase the number, frequency, and types of events that they could hold pursuant to their conditional use permit. The Douglas County Planning Commission approved the application as requested and the board of county commissioners denied review. The Greens, the Hesters’ neighbors, then appealed to LUBA and the Hesters intervened.

Before the county, the Greens had claimed that the county had to consider past violations of the conditional use permit before approving the amendment, pursuant to LUDO 1.040.2. However, the county concluded that the action before it was not a proceeding to determine whether the Hesters had complied with the approval conditions and that “[t]hat would be the proper subject of an enforcement action.” 245 Or. App. 430, 435. LUBA found the planning commission “implicitly interpreted” LUDO 1.040.2 and the county’s interpretation was not erroneous under ORS 197.835(9)(a)(D) (which requires LUBA to reverse or remand a decision when a local government improperly construes applicable law). *Id.* However, the court of appeals disagreed.

Relying on the Oregon Supreme Court’s recent decision in *Siporen v. City of Medford*, 349 Or. 247, 243 P.3d 776 (2010), the court of appeals found that LUBA should give deference to an interpretation pursuant to ORS 197.829(1) when “(1) a governing body of a local government; (2) makes an ‘interpretation’ of its own land use policies; (3) that is plausible and not inconsistent with the standards set out in the statute.” *Id.* at 437.

Turning then to whether the county had made a reviewable interpretation of LUDO 1.040.2, the court found it had not. The test for a reviewable decision is fluid but, at a minimum, the interpretation must “suffice ‘to identify and explain in writing the decisionmaker’s understanding of the meaning of the local legislation.’” *Id.* at 438, citing *Weeks v. City of Tillamook*, 117 Or. App. 449, 452-53 n.3, 844 P.2d 914 (1992). Here, the county’s

findings did not discuss the “text or substance” of the ordinance and the conclusion seemed to contradict itself as to whether LUDO 1.040.2 even applied.

The court also concluded that the county had not “implicitly interpreted” the ordinance because “a local government’s implicit interpretation of an ordinance must carry with it only one possible meaning of the ordinance provision and an easily inferred explanation of that meaning.” *Id.* at 439. The county’s decision, on the other hand, left open several different alternative interpretations and failed to explain its reasoning. Because the county did not adequately interpret LUDO 1.040.2 in its decision, LUBA’s contrary conclusion was “unlawful in substance” under ORS 197.850(9) (a). *Id.* at 440. The court remanded the proceeding to the county in order to interpret LUDO 1.040.2, concluding the county was better situated to interpret its own ordinance.

The final issue was statutory interpretation of the word “building” in the EFU home occupation statute. LUBA examined the statute and focused on the purpose: to “not unreasonably interfere with other uses permitted in the zone in which the property is located.” ORS 215.448(1)(d). Based on this purpose, LUBA concluded that a “building” under ORS 215.448(1)(c) was an enclosed structure because the walls would hide the external effects. However, this was a flawed approach according to the court because the legislature did not have to intend that “each component of a statutory term advance the same definition.” *Id.* In fact, “[e]ach component of the home occupation definition arguably advances a particular objective” *Id.* at 445. The only limiting factor that the legislature intended to apply to that section was one expressly stated: whether the building was “normally associated with uses permitted in the zone in which the property is located.” ORS 215.448(1)(c)(B). The court cited Board Member Holstun’s concurring opinion that construed the word “building” in the context of other structures normally found in an EFU zone, including pole barns and other farm structures. Agreeing that his concurrence is the “better analysis,” the court held LUBA’s requirement that a home occupation building be enclosed by walls was therefore erroneous. Accordingly, the court reversed and remanded LUBA’s decision.

Shelby Rihala

[*Green v. Douglas County*](#), 245 Or. App. 430, 263 P.3d 355 (2011)

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■ INTERPRETATION THAT DOG KENNEL CONSTITUTES “ANIMAL HUSBANDRY” AFFIRMED

Siegert v. Crook County, 246 Or. App. 500, ___ P.3d ___ (2011), involved a dispute over whether a dog breeding kennel that had been in existence since the 1970s qualified as a lawful use under the 1973 code allowing farm uses, including “animal husbandry.” If so, then the dog kennel was a non-conforming use that could remain.

Crook County determined that a dog kennel constituted “animal husbandry,” an allowed use under its 1973 code. In reaching this determination, the county primarily relied on *Lynn County v. Hickey*, 98 Or. App. 100, 778 P.2d 509 (1989) (holding that a pre-1985 version of the exclusive farm use statute, ORS 215.203, permitted a dog-breeding kennel as “animal husbandry”). The county also relied on the testimony of a county commissioner who had been a commissioner since 1971 and had personal knowledge of the purpose and intent of the 1973 code. Neither LUBA nor the court of appeals gave any weight to the testimony of the county commissioner, but both found that any reliance on the commissioner’s statements as legislative history was harmless and affirmed the interpretation under ORS 197.829 and the supreme court’s opinion in *Siporen v. City of Medford*, 349 Or. 247, 243 P.3d 776 (2010).

The petitioner argued that the 1973 code allowed dog kennels in several other zones where dog kennels were specifically listed as a permitted or conditional use and that by implication dog kennels were not allowed in the zone at issue here. The court of appeals held that a “redundancy” is a fairly common feature of legislative drafting and does not necessarily render the county’s interpretation implausible. Because the county’s interpretation was plausible, the court of appeals affirmed.

The results in the *Siegert* case are not surprising, but the case does contain a good summary of the “plausibility” standard for local governing bodies for interpretation under ORS 197.829, as interpreted by the supreme court in the *Siporen* case.

Steve Morasch

[Siegert v. Crook County](#), 246 Or. App. 500, ___ P.3d ___ (2011)

Legislation

■ CHANGE TO HOMEBUYER PROTECTION ACT MAY CATCH UNWARY SELLERS

An owner who sells new or substantially remodeled or repaired residential property that was completed within three months before the date of sale may find herself facing additional costs and potential liability for failing to comply with the Homebuyer Protection Act (the “HPA”). A small change—the deletion of the option to obtain the purchaser’s waiver of protection under the HPA—means that a law that has been on the books since 2003 is more likely to create liability or expense for the unwary seller.

The 2003 legislature added the HPA (ORS 87.007) to the Oregon Lien Law (ORS 87.001 to 87.060 and 87.075 to 87.093) to protect homebuyers from the risk of having to pay for construction work twice: Once as part of the purchase price and then again to discharge construction liens that arose from pre-sale construction activities.

The HPA regulates owners who sell new residential property for \$50,000 or more, or who have improved existing residential property for a contract price of \$50,000 or more, if the work on the property was completed within three months before the date of the sale. “Residential property” is defined as a single-family dwelling, a condominium unit, or a building of not more than four dwelling units. Under the Oregon Lien Law, the term “owner” includes not only fee title owners, but also owners of lesser estates, lessees, and contract vendors.

A common scenario that the HPA is designed to avoid might involve an owner who performs substantial remodeling or repairs in order to prepare a residential structure for sale. Perhaps unbeknownst to the owner, one of the subcontractors fails to pay a material supplier, who, after the sale of the residential property occurs,

records a claim of construction lien for unpaid materials. The purchaser is now in the unenviable position of having either to pay the supplier to discharge the lien or to seek to compel the owner to pay or remove the lien. Otherwise, the homeowner is potentially subject to foreclosure by the lien claimant (as well as significant liability under his trust deed for attorney fees if the lender hires its own attorney as is a common practice).

The HPA was designed to give the new homeowner in the above scenario a more effective remedy than simply making an indemnity claim upon the seller or filing a claim against the seller's Construction Contractor's Board licensure bond (if the seller was a licensed contractor). Until December 31, 2010, however, the application of the HPA could be avoided by simply obtaining the purchaser's written waiver of protection under the HPA. Anecdotally, this is exactly what most owners did, thereby making the owner's compliance with the HPA a matter of simply requiring the purchasers to sign one more piece of paper (the HPA waiver) at closing.

For covered sales completed on or after January 1, 2011, the legislature deleted the waiver option. OR. LAWS 2010, ch. 77, § 1. Instead, the owner now must provide the purchaser a completed "Notice of Compliance with the HPA" at the time of sale that shows the owner is relying upon one of the five protections more specifically described in ORS 87.007(2)(a-e). (A copy of the Notice of Compliance can be obtained from the Oregon Construction Contractor's Board website at: http://www.oregon.gov/CCB/publications.shtml#Miscellaneous_Publications_and_Information.)

The five statutory protections found in ORS 87.007(2)(a-e) from which a covered seller must choose are as follows.

"(P)urchase or otherwise provide" title insurance that does not contain an exception for construction liens

Often, this type of title insurance is referred to as "early-issue title insurance." A typical title insurance policy excludes coverage for recorded and unrecorded construction liens and, therefore, is not sufficient under the HPA. The removal of the lien exclusion from the title policy generally requires not only payment of an additional premium but also the provision of an indemnity to the title company for any liens that are recorded. A title company, however, may not be willing to issue such a policy if the seller does not meet its underwriting requirements, which may include providing adequate security for payment of liens.

Anecdotally, some sellers argue that if the purchaser's lender requires the purchaser to obtain early-issue title insurance as a condition of the purchase loan, the title insurance has been "otherwise provide[d]" to the purchaser, so the seller is not responsible for the title policy premium. Such an argument appears at odds, however, with the mandatory statutory language that "[f]or purposes of protecting purchasers . . . the owner *shall provide*" one of the five listed protections. ORS 87.007(2) (emphasis added).

Retain 25% of the sale price in escrow with instructions to pay construction liens

The instructions must provide for payment upon the purchaser's demand of any liens recorded against the property after the date of sale. The funds may not be released until 90 days have passed since the date construction was completed without any liens being recorded or, if a lien is recorded, 135 days have passed since the date of recording and all such liens have been released or waived. Although not explicit, presumably the statute contemplates that permitting the lien to expire by operation of law constitutes a "waiver." See ORS 87.055 regarding the deadline to file an action to foreclose the construction lien.

Maintain a bond or letter of credit for 25% of the sale price

The Oregon Construction Contractor's Board regulations provide the requirements for the form of bond and the letter of credit. See OAR 812-12-0145 (bonds) and 812-12-0150 (letters of credit). Among the requirements for the letter of credit is that it may be called upon the purchaser's demand if a lien is recorded unless the owner first obtains a written lien release or provides proof of removing the lien by filing a cash deposit or lien release bond pursuant to the procedures under ORS 87.076 to 87.081.

Obtain and provide to the purchaser at closing written waivers received from every person that claims a lien that exceeds \$5,000

Although the HPA is unclear, the Oregon Lien Law contemplates that a person who claims a lien need not actually file a construction lien in the real property records until the deadline for doing so. See ORS 87.035(1-2) (distinguishing between “claiming” a lien and “perfecting” a lien by recording the claim of lien in the appropriate form). Accordingly, a homeowner could argue that compliance with this provision requires not only obtaining the written waiver of everyone who *has* filed a lien for \$5,000 or more, but everyone who *could* file a lien for \$5,000 or more.

Obtaining a waiver from every subcontractor and supplier who has mailed the owner a Notice of Right to a Lien pursuant to ORS 87.021 may not, however, be sufficient under particular circumstances. For example, consider a business entity that owns a spec home or condominium. The business entity will never occupy the home or condominium as a residence (as it is impossible for an artificial entity to do so). Accordingly, a subcontractor or supplier may argue that mailing a Notice of Right to a Lien is not required to record a valid lien against the spec home or condominium based upon the more narrow definition of “residential building” under the notice statute. See ORS 87.021(1) (general requirement to mail notice) and (3)(b) (exclusion from notice requirement for commercial improvements and applicable definitions).

Complete the sale after the deadline for perfecting liens pursuant to ORS 87.035

Depending on the nature of what the lien claimant provided and the date of work, a valid lien may be recorded as late as seventy-five days after completion of construction of the improvement. See ORS 87.035(1) and 87.045. Sometimes when “completion of construction” occurs may be difficult to ascertain or subject to dispute. For example, despite the homeowner moving in and using the home as a residence, the Oregon Supreme Court in *Farrell v. Lacey*, 264 Or. 505, 507 P.2d 31 (1973), permitted a lien to be enforced for new work requested by the homeowner. The lien would have been invalid had the owners’ move-in date been considered “completion of construction” under former ORS 87.035. See *Farrell* at 511-512 (installation of a sump pump after a basement flood extended the time for recording a lien; see former ORS 87.035). A seller is well-advised to proceed conservatively when contemplating the use of this provision as proof of compliance with the HPA.

As made clear by the last option of waiting to complete the sale until after the lien-recording deadline expires, the temporal coverage of the HPA is not co-extensive with the deadline for recording a valid construction lien. The HPA applies to construction that is completed within three months of the sale. A construction lien for labor, materials, and rental equipment must be recorded within the earlier of seventy-five days of the last day of substantial work or completion of construction. ORS 87.035(1). A lien for the services of various design professionals must be recorded within seventy-five days from “completion of construction.” *Id.* Generally, for purposes of recording a construction lien, “completion of construction” is found in ORS 87.045 and often occurs when “the improvement is substantially complete,” but may also occur when a completion notice is posted and recorded in compliance with the statute or when the improvement is abandoned (or “not” abandoned) in accordance with the statute.

What is unclear from the text of the statute is whether the HPA’s use of the term “completion” for measuring the date from which the three month period of regulation applies is to be determined by the same test as “completion” for a construction lien under ORS 87.045. If so, determining “when” the “three month” period from completion of construction commences—as demonstrated by the *Farrell v. Lacey* example above—may be subject to some dispute and should itself be determined conservatively.

An owner’s failure to comply with the HPA, particularly if a construction lien is filed, can create significant liability. A violation of the HPA constitutes a Class A violation. More importantly, a violation of the HPA provides the purchaser with a statutory claim against the seller for twice any actual damages incurred, attorney fees, and possibly an Oregon Unlawful Trade Practices Act (“UTPA”) claim. See ORS 646.608(1)(zz). A claim under the HPA has a two-year statute of limitation from the sale, as opposed to a one (1) year statute of limitation from the date of discovering the unlawful practice for UTPA claims. Compare ORS 87.007(6) with ORS 646.638(6). A real estate licensee acting in his or her professional capacity is not liable in any criminal, civil, or administrative proceeding that arises from an owner’s non-compliance with the HPA. ORS 87.007(4).

The owner may have defenses to HPA and UTPA. ORS 87.007 (7 & 9) provides various defenses to civil and criminal HPA proceedings including proof that the lien is invalid, obtaining a release of the claim of lien, or showing the liens are a result of work or supplies provided at the request of the purchaser. Although not explicit, presumably the “release” of the lien defense under subsection 7(b) includes the owner’s use of the procedures under ORS 87.076 to 87.081 to remove the lien from the property by recording a lien release bond or making a cash deposit with the County treasurer for 150% of the lien amount. Further, there are other carve-outs. If the seller is disputing the lien in a judicial proceeding or through the Construction Contractor’s Board, the seller shall not be deemed in violation of the HPA during the period of the pending dispute. ORS 87.007(8).

In sum, complexities that have been lurking in the HPA since its passage in 2003 seem to have been avoided largely due to the ease of obtaining a waiver of the purchaser’s rights at closing. Since the legislature’s removal of this option effective January 1, 2011, many more owners—from sophisticated developer-contractors to small residential owners—may find themselves subject to significant liability should the residential property purchaser face post-closing construction liens.

Doug Gallagher, with thanks to Alan Brickley

Update to ORS 87.007

Appellate Cases -- Washington

■ *VESTING RIGHTS: TIMING REMAINS THE NAME OF THE GAME*

In *Deer Creek Developers, LLC v. Spokane County*, 157 Wash. App. 1, 236 P.3d 906 (2010), Division III was called upon to determine how Washington’s vested rights doctrine applies to phased developments that are halted by intervening prohibitory zoning amendments. Phase I of Deer Creek’s project was approved, and although Phase I rights had vested, the lower court held that the developer’s failure to file building permit applications prior to the zoning amendment was fatal to its vested rights claim for Phase II. Deer Creek appealed.

The Deer Creek development contemplated the construction of twenty-three buildings containing 280 residential units, to be constructed in two phases. Prior to the zoning amendment, Deer Creek filed and received building and grading permits for Phase I, completed a State Environmental Policy Act (SEPA) checklist that incorporated both Phase I and II, completed a unified site plan for both Phase I and II, and began construction of Phase I and the infrastructure for Phase II. On October 3, 2006, Spokane County adopted a zoning amendment that prohibited the Phase II residential uses contemplated in Deer Creek’s project.

Deer Creek, in contending that Phase II had vested in the Phase I development process, relied on the Washington Supreme Court’s decision in *Noble Manner Co., v. Pierce County*, 133 Wash. 2d 269, 943 P.2d 1378 (1997), which extended the vested rights doctrine to the subdivision process and provided an entitlement to complete the proposed land uses disclosed in the preliminary plat application. However, *Noble Manor* concerned vested rights in the subdivision process—a factor not present in Deer Creek’s application.

Outside of the subdivision process, Washington law provides that development rights vest at the time a completed development application is filed:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

RCW 19.27.095(1). Deer Creek argued that Phase II rights vested when the initial development documents were submitted, which included a SEPA checklist and a unified site plan for both phases. The appellate court rejected the argument and held that, under RCW 19.27.095(1), development rights vest only when a building permit has been filed. When the initial development documents were submitted, a building permit was not filed for Phase II, and therefore the development rights did not vest prior to the date of the amendment.

Deer Creek asked the court to expand the Washington vested rights doctrine to include site plan applications. Deer Creek made three arguments for this expansion: that the cost of a site plan application indicates a level of commitment; that the permit process results in delays that will interfere with large projects; and that an expansion of the doctrine “would harmonize the common law vesting doctrine, provide certainty to developers, protect developers’ expectations against fluctuating land use policies, and update a doctrine that has failed to keep pace with increasingly complex changes in the land development process.” 157 Wash. App. at 12.

The court rejected the request to expand the doctrine of vested rights, deciding that such a change was better left to the legislature. Further, the court found nothing in RCW 19.27.095(1) to restrict a developer from vesting a development plan by filing a site plan and a building permit application together. Deer Creek choose not to file a building permit application for Phase II.

Finally, Deer Creek pointed out that Spokane County had legislatively modified the standards for vesting, allowing a complete application for a site plan review to vest development rights. Deer Creek argued that its unified site plan for both phases should have triggered its vested rights under the Spokane County code. The court rejected this argument because Deer Creek had not completed the application process. The Spokane County code requires a public hearing for site plan review and Deer Creek never requested such a hearing.

Charles Gottlieb

Deer Creek Developers, LLC v. Spokane County, 157 Wash. App. 1, 236 P.3d 906 (2010)

Cases From Other Jurisdictions

■ **THIRD CIRCUIT FINDS REDEVELOPMENT PLAN VIOLATES FEDERAL AFFORDABLE HOUSING OBLIGATIONS**

Mt. Holly Gardens Citizens in Action v. Township of Mt. Holly, 658 F.3d 375 (3rd Cir. 2011), involved a redevelopment plan that would replace low and moderate income housing with “significantly more expensive housing units.” 658 F.3d 375, 377. Plaintiffs were an organization of area residents plus individual residents who challenged the plan under federal antidiscrimination laws. The trial court granted summary judgment before discovery commenced and plaintiffs appealed.

The redevelopment plan area consisted of approximately 30 acres and was the only part of the township with a majority of African American and Hispanic residents, many of whom had lived in their modest housing for some time. The neighborhood was crowded, short of parking, and had drainage issues. Some structures were in disrepair and boarded up. The neighborhood also had a disproportionately high crime rate.

After various efforts to improve the area, a township-commissioned study found that the area could benefit from redevelopment. Proposed plans were presented but over the years the township governing body became less concerned with the plight of existing residents and focused less on rehabilitation than on replacement of the existing housing with more expensive homes. Area residents became concerned over these changes. When the township began to acquire existing housing for between \$32,000 and \$49,000 per structure and proposed an average cost of new homes between \$200,000 and \$275,000, they became even more concerned.

Renters under the program received up to \$7,500 for relocation costs, which was insufficient to relocate to the new housing in the neighborhood. The demolition of many structures left the neighborhood in shambles and exposed the remaining 70 (out of 329 original) housing units to construction and other hazards, making rehabilitation impracticable.

A challenge to the project in state court resulted in affirmance. The instant case deals with plaintiffs’ anti-discrimination claims that were filed in federal court and were not ripe in the state court proceedings, including violation of the Civil Rights Acts, the federal Fair Housing Act, and the Equal Protection clause of the Federal Constitution. The plaintiffs combined these claims with a demand for declaratory and injunctive relief plus damages and attorney’s fees. The request for a preliminary injunction was denied and the trial court granted summary judgment to defendants. However, the Third Circuit granted a stay pending appeal.

The Third Circuit commenced its analysis with the words of the Fair Housing Act, which makes it unlawful to refuse to sell or rent or otherwise make unavailable a dwelling because of race, color, religion, sex, familial status or national origin. 42 U.S.C. § 3604 (A). The court noted that such a violation could be based on intentional discrimination or on actions that limit the availability of affordable housing, either directly or by a practice that has disparate impact on a protected class.

Disparate impact claims need not demonstrate an intent to discriminate but can arise from conduct that has the natural and foreseeable consequence of perpetuating segregation. Under case law, if a plaintiff can make a *prima facie* case of discrimination, the defendant then must show that no alternative course of conduct could have been adopted that would be able to meet its interests with less discriminatory impacts. If the defendant succeeds in this showing, the plaintiffs assume the burden of demonstrating that there is a means of serving those interests with a less discriminatory impact.

In reviewing the record in this case, the court determined that plaintiffs had established a *prima facie* case in their showing of disproportionate impact through gross statistical disparities. Plaintiffs demonstrated that 22.54% of African Americans and 32.31% of Hispanic households would be affected by the redevelopment plans, as opposed to 2.73% of white households. The evidence further shows that only 21% of African American and Hispanic residents could afford market rate housing in the county, as opposed to 79% of the white population. The Third Circuit also faulted the trial court for rejecting and, alternatively, drawing inappropriate inferences from these statistics to ignore the disproportionate impacts of the redevelopment plan.

Moreover, by assuming all citizens would be treated equally in the allocation of housing, the lower court conflated discriminatory intent and disproportionate impact by ignoring the latter. The two are not identical, according to the Third Circuit. That court rejected defendants' contention that a *prima facie* case of discrimination can be made in most *de facto* segregated situations where there is a lack of affordable housing. The court stated that this situation is common under the Fair Housing Act, a broad remedial statute, rather than an anomaly. The Act requires a search into the motives and effect of housing policy to prevent invidious discrimination based on race.

Finally, the Third Circuit found the trial court's decision was based on a distorted analysis that a finding of discrimination in this case would make it impossible to remedy blight. Instead, all the *prima facie* case does is trigger an analysis of whether there was a less discriminatory method of dealing with that blight.

While all parties agreed that alleviating blight is a legitimate interest, the case comes down to the use of the burden-shifting analysis; i.e., whether there is a less discriminatory method available to deal with blight. The court likened that analysis to that of "reasonable accommodation" under the Fair Housing Act, i.e. whether the alternatives were reasonable or impose an "undue hardship . . ." 658 F.3d at 386. The court noted that defendant township aggressively acquired housing units that it subsequently left vacant and then destroyed.

The residents' expert identified alternatives with a less discriminatory impact. One alternative would have allowed residents to move into other housing in the area while a plan for rehabilitation or replacement was in progress and then, once the housing was provided or refurbished, to move back. The court noted no alternative costs or plans were considered, including those using available public funding sources. The township presented testimony to the contrary that the Third Circuit found created a question of fact that could not be resolved on summary judgment.

The court found no intentional discrimination in adopting the redevelopment plan and affirmed the trial court on that point; however, it concluded that with regard to the disparate impact claim that the case must be remanded, stating:

The Township has broad discretion to implement the policies it believes will improve its residents' quality of life. But that discretion is bounded by laws like the FHA and by the Constitution, which prevent policies that discriminate on the basis of race. For this reason, the federal courts must stand prepared to provide such remedies as are necessary to make effective the congressional purpose. A more developed factual record will assist the District Court in crafting appropriate remedies, if necessary. For all of the foregoing reasons, the District Court's order granting summary judgment is vacated and the case is remanded for further proceedings.

Id. at 387-88.

This case deals with the disparate impact analysis under the Fair Housing Act and probably points to its use on a much larger scale than at present.

Edward J. Sullivan

Mt. Holly Gardens Citizens in Action v. Township of Mt. Holly, 658 F.3d 375 (3rd Cir. 2011)

Land Use Board of Appeals

■ GOAL 18

LUBA's decision in *Rudell v. City of Bandon*, ___ Or. LUBA ___, LUBA No. 2011-032 (Oct. 25, 2011), is a recent decision that addresses Statewide Planning Goal 18 (Beaches and Dunes). The goal generally prohibits development on beaches, active foredunes, some kinds of conditionally stable foredunes, and interdune areas. In *Rudell*, the city denied petitioners' conditional use application for a single-family dwelling, concluding the proposed dwelling would be located on a foredune where development is prohibited by the city's development code. On appeal to LUBA, petitioners argued the city's decision violates the needed housing statutes, ORS 197.303 and 197.307(6), because the city applied a definition of "foredune" that is not clear and objective, and misinterprets Goal 18's definitions of dune forms and features. LUBA rejected both arguments and affirmed the city's decision.

Under state law, local government approval standards for locally defined "needed housing" must be clear and objective. ORS 197.307(6). The city's code defines a "foredune" as including the "lee or reverse slope" and prohibits development within this area. Absent a code definition of "slope," the city considered the dictionary definition of this term and determined it meant an upward or downward slant that deviated from the horizontal or perpendicular. Reading these definitions together, the city interpreted the term "foredune" to mean the entire lee or reverse slope extending "easterly from the top surface of the dune to the point where the slope reaches its lowest elevation and the ground becomes relatively flat or horizontal." The city council explained it used the modifier "relatively" to recognize the fact that ground elevation is never absolutely level. Applying this definition of "foredune," the city determined that topographic maps showed petitioners' proposed dwelling would be located entirely within a foredune in violation of the city's code and denied petitioners' conditional use application.

LUBA rejected petitioners' argument that the modifier "relatively" is inherently subjective and gives the city too much discretion in determining where a foredune ends for purposes of approving petitioners' conditional use application. The city understood the term "slope" to mean "essentially 'not flat,'" and as something that could be objectively determined through the use of basic topography and elevations. Applying this definition, LUBA concluded: "Under the city's interpretation, the foredune ends where the slope leading down from the top of the foredune ceases to incline downward, at the point where there is no longer any measureable downward slope. That is about as clear and objective as a non-numeric standard can get." LUBA No. 2011-032, slip op. at 8.

LUBA also rejected petitioners' argument that the city's code interpretation is inconsistent with Goal 18's definition of various landforms, such as "Dune" and "Foredune, Active." Petitioners focused on the goal's general description of a dune as a "hill or ridge of sand built up by the wind" and an active foredune as an "unstable barrier ridge of sand paralleling the beach." Under the goal, petitioners argued a foredune is characterized by the upper elevation or ridge of sand, not the whole landform rising beyond a base elevation, and the city's more expansive definition of a foredune is contrary to the goal. Agreeing with DLCD, LUBA observed there is no inherent inconsistency between the city's interpretation and the goal's description of a foredune. Additionally, LUBA noted the goal does not prohibit the city from regulating development on dunes or foredunes more restrictively than the state, as it appears to have done here. Finding no error in the city's interpretation, LUBA affirmed the city's decision.

■ LOCAL PROCEDURE

In *Families for a Quarry Free Neighborhood v. Lane County*, ___ Or. LUBA ___, LUBA No. 2011-051 (Nov. 22, 2011), LUBA wrestled with the extent to which local codes may limit participation in local appeals without violating the quasi-judicial procedures contained in ORS 197.763 and ORS 215.422. Petitioner in *Families* appealed the county's approval of intervenors' application for site review approval for a rock quarry. Following a protracted evidentiary proceeding, the county planning director approved the application with seventeen conditions of approval. Intervenors appealed this decision to the county hearings officer and challenged many of the conditions of approval. Petitioner submitted a letter to the hearings officer asking to participate in the appeal hearing, requesting a *de novo* hearing, and defending the conditions the planning director imposed. The hearings officer denied the petitioner's request for a *de novo* hearing and did not allow petitioner to participate in the appeal proceeding. Following an on-the-record appeal hearing, petitioner also submitted a letter objecting to the director's recommendation to eliminate certain conditions and modify others. Petitioner appealed the hearings officer's decision upholding the planning director to the county board, which denied review, and petitioner subsequently appealed the board's decision to LUBA.

Before LUBA, the county argued petitioner failed to appeal the planning director's decision to the hearings officer and failed to exhaust its local administrative remedies, a necessary jurisdictional prerequisite under ORS 197.825(2)(a). LUBA rejected this suggestion, noting that petitioner *agreed* with the director's decision and nothing in the statutory scheme requires petitioner to file a local appeal of a decision it supports in order to preserve its right to appeal to LUBA. That is particularly true where, as here, intervenors' local appeal to the hearings officer yielded the decision that petitioner disagrees with. Since petitioner appealed the hearings officer's decision to the county board, LUBA concluded petitioner complied with the exhaustion requirement and it had jurisdiction to hear petitioner's appeal.

The more important question LUBA addressed was whether the county erred by failing to allow petitioner to participate in the on-the-record appeal hearing before the hearings officer, particularly since petitioner participated in the evidentiary hearing the planning director conducted. Although the two letters the petitioner submitted to the hearings officer were included in the local record the county filed with LUBA, the hearings officer did not acknowledge them in his decision. As a result, LUBA concluded the hearings officer effectively precluded petitioner from participating in the local appeal hearing. Although some sections of the county's code appear to limit participation in local appeals to the appellant and the planning director, LUBA noted that other code sections suggest no intent to exclude parties who participated in the initial evidentiary hearing, like petitioner, from participating in an on-the-record appeal. Even if they did, LUBA concluded that ORS 197.763 cannot be construed to

authorize an applicant that does not prevail in . . . the quasi-judicial evidentiary hearing a second chance to present legal argument to another local decision maker in an on-the-record appeal, with all other parties forced to the sidelines and denied any right to present written or oral legal argument to the second decision maker.

LUBA No. 2011-051, slip op. at 10. LUBA remanded the county's decision and instructed the hearings officer to allow petitioner to participate in intervenors' on-the-record appeal.

■ LUBA JURISDICTION

Untimely Motion to Transfer

In *Devereux v. Douglas County*, ___ Or. LUBA ___, LUBA No. 2011-059 (Order on Motion to Transfer, Oct. 27, 2011), LUBA reaffirmed that it lacks jurisdiction to grant a motion to transfer filed after LUBA issues its final opinion and order dismissing an appeal. Under LUBA's rules, a motion to transfer must be filed within fourteen days from the date a party challenges LUBA's jurisdiction. In *Devereux*, intervenor-respondents disputed LUBA's jurisdiction in their brief filed on September 6th, LUBA issued its final opinion and order on September 29th, and petitioners filed their motion to transfer the appeal to circuit court on October 3rd. In response to intervenors' argument their motion was untimely, petitioners contended any failure to comply with LUBA's rules was technical in nature, did not prejudice intervenors' substantial rights, and their motion should be granted.

LUBA disagreed, citing numerous decisions that hold LUBA lacks authority to modify a final decision once issued and, more specifically, lacks jurisdiction to transfer an appeal to circuit court after it has issued a final opinion and order. Since petitioners' motion to transfer this appeal was untimely, LUBA denied it.

Partition of land under Measure 49

Petitioner in *Maguire v. Clackamas County*, ___ Or. LUBA ___, LUBA No. 2011-040 (Nov. 14, 2011), sought to appeal to LUBA a county decision approving a partition of land pursuant to Section 11, chapter 424, Oregon Laws 2007, Oregon's real property compensation legislation known as Measure 49. Section 16 of the measure is codified at ORS 195.318(1). It states that a determination "by a public entity under . . . sections 5 to 11, chapter 424, Oregon Laws 2007 . . . is not a land use decision" and gives the circuit authority to review the determination.

In *Maguire*, petitioner appealed the county's approval of a partition to create one additional two-acre parcel from a 23.35-acre parcel for purposes of building an additional dwelling on high-value soils. This decision was made pursuant to Section 11 of Measure 49 and implemented the county's prior approval of a Measure 49 claim authorizing the owner to apply for the partition. Section 11 contains requirements and substantive standards the county must apply to subdivisions, partitions, and development applications approved for property subject to an approved Measure 49 claim. LUBA concluded the county's partition decision was clearly made under Section 11 and the plain language of ORS 195.318(1) states the decision is not a land use decision subject to LUBA's jurisdiction. Since neither the petitioner nor the county filed a motion to transfer the appeal to circuit court, LUBA dismissed the appeal.

Local Procedure

LUBA's decision in *Poe v. City of Warrenton*, ___ Or. LUBA ___, LUBA No. 2011-069 (Order, Oct. 28, 2011), illustrates the unique circumstances in which LUBA will accept an oral agreement to extend the time for filing a petition for review in place of a written stipulation. Three days before the petition for review was due, petitioner's attorney lost an initial draft of the petition as a result of a computer malfunction. Following a series of telephone conversations two days before the petition due date, intervenor-respondent's attorney agreed to a seven-day extension of time. Petitioner's attorney filed a motion requesting the seven-day extension on the date before the petition for review was due and indicated the parties had agreed on the new due date. LUBA granted the extension. On the original due date for the petition, intervenor's attorney notified petitioner's attorney that he could not honor the agreement for the time extension because his client objected. Petitioner's attorney filed an amended motion for extension of time on the same date that described the changed circumstances and ultimately filed the petition with LUBA on the extended due date. Intervenor's attorney subsequently filed a motion to dismiss the appeal because petitioner failed to file a timely petition for review.

Under the circumstances, LUBA declined to dismiss the appeal and stood by its order extending the petition due date for an additional seven days. LUBA acknowledged that failure to comply with the time limit for filing a petition for review is not a technical rule violation that can be excused. The Board also cited several cases in which it had allowed key due dates to be extended because of circumstances in which one party reasonably relied on agreements or changed circumstances in a way that did not prejudice other parties. Here, LUBA concluded that petitioner reasonably relied on intervenor's verbal agreement to delay filing its petition for review. Intervenor revoked this agreement at a time when it was impossible for petitioner to retype its petition and file it on the original due date. Under these circumstances, LUBA concluded it "will not enforce a violation of OAR 661-010-0067(2) where the violation was induced by a party's agreement to sign the extension request." LUBA No. 2011-069, order at 7.

Kathryn S. Beaumont
