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Appellate Cases -- Real Estate

■ *APPELLATE COURT UPHOLDS ADVERSE POSSESSION CLAIM*

In *Tieu v. Morgan*, 246 Or. App. 364, 265 P.3d 98 (2011), Tieu brought suit against adjoining property owners the Morgans, seeking a declaration that Tieu owned a strip of land that runs parallel to the Morgans' driveway and an injunction prohibiting them from using such property. The Morgans counterclaimed, asserting they acquired the property through adverse possession. The Circuit Court for Multnomah County entered summary judgment in favor of the Morgans. Tieu appealed, and the Court of Appeals affirmed the trial court's summary judgment.

Tieu owns a rectangular residential parcel and is the record owner of the disputed strip of land. The Morgans own a flaglot located north of Tieu's property with the "pole" running along Tieu's eastern boundary.

In 1984, Robert Stevens owned the two parcels. He installed a fence located on Tieu's property running parallel to the Morgans' property, which consists of the "pole" portion of the flaglot and is improved with a driveway. The fence runs perpendicular to the public road until in nears the southern boundary of Tieu's property. The disputed three-foot-wide strip lies between the Morgans' driveway and the fence.

In 1994, James Stevens, Robert's son, acquired the Morgans' property believing he had acquired all the property on the east side of the north-south line defined by that portion of the fence. During his ownership, James installed a sewer line along the disputed strip. He sold the flag lot in 1998 to the Morgans, advertising it as a "fully fenced yard" based on his belief his property contained the disputed strip. Neither party completed a survey in conjunction with the sale.

The Morgans run a daycare business from their home. Parents regularly use the strip of land when dropping off their children. In 1999, the Morgans extended the fence parallel to the disputed strip approximately 40 feet north toward the right-of-way. The Morgans did not extend the fence entirely to the right-of-way at the request of Robert to allow wide vehicles an additional area to enter and exit the driveway. The Morgans have maintained the area with gravel and bark mulch.

Tieu purchased the rectangular tax lot from Robert in 2006. Tieu surveyed the property prior to the purchase, and the surveyor placed a pin on the record property line. Tieu claims he notified the Morgans soon after the survey of the record property line and of his intention to move the fence within two years. The Morgans deny Tieu made such statements. In 2008, Tieu attempted to remove the north-south portion of the fence.

On appeal, Tieu argued the Morgans failed to prove by clear and convincing evidence the elements of adverse possession. Relying on the court's prior analysis in *Stiles v. Godsey*, 233 Or. App. 119, 126, 225 P.3d 81 (2009), the court held the Morgans or their predecessor-in-interest maintained an actual, open, notorious, exclusive, hostile, and continuous possession of the property for ten years as required by ORS 105.620.

The court found that the Morgans and their predecessor-in-interest used the strip of land to accommodate wide vehicles and the loading of passengers, which is consistent with ownership. The use was "open," "notorious," and continuous from 1994 to at least 2006, when the Tieu purchased the rectangular tax lot. The court found the fence clearly delineated the disputed strip from the remainder of Tieu's property, notwithstanding the fact that the fence did not extend the full length of the properties.

The court rejected Tieu's argument that the Morgans' use was not exclusive because Tieu's predecessor-in-interest occasionally and permissibly used the Morgans' driveway to access the rear portion of his property. The granting of occasional permissive use is consistent with ownership.

The court also rejected Tieu's argument that the Morgans' use was not "hostile" because the Morgans had a conscious doubt regarding the property line. Under ORS 105.620(2)(a), a claimant "maintains 'a hostile possession' of property if the possession is under claim of right or with color of title..." that may be established through an honest, but mistaken, belief of ownership with no conscious doubt concerning the true boundary. ***Stiles v. Godsey***, 233 Or. App. at 127; ***Faulconer v. Williams,*** 327 Or. 381, 390-91, 964 P.2d 246, 252 (1998). The claimant or claimant's predecessor-in-interest's honest belief of ownership must be maintained throughout the vesting period, upon an objective basis, and reasonable under the circumstances. ORS 105.620(1)(b).

The court found there was no evidence that the Morgans or their predecessor-in-interest had any doubt as to the boundary line during the vesting period and such a belief was reasonable. James believed the property included the disputed strip, which was evidenced by his installing a sewer line. He then stated to the Morgans that the property was "fully fenced" when they acquired it. The Morgans expanded the fence. All of these improvements and subsequent use of the disputed area occurred with the knowledge of Tieu's predecessor-in-interest, who never objected.

The court summarily rejected Tieu's assertion that the doctrine of equitable estoppel precluded a judgment in favor of the claimants. It held the claimants' failure to assert an ownership right when Tieu acquired his property in 2006, after the vesting period, had no relevance to the adverse possession claim.

Alan M. Sorem

Tieu v. Morgan, 246 Or. App. 364, 265 P.3d 98 (2011)

■ WHEN CONVEYING REAL PROPERTY, CHOOSE YOUR WORDS CAREFULLY

In *Hammond v. Hammond*, 246 Or. App. 775, 268 P.3d 691 (2011), the Oregon Court of Appeals grappled with the language of a 1985 deed that purported to convey property from one family member to another "as a survivor." These three words created a legacy of confusion and debate that lasted more than a quarter-century.

In 1985, Acy Dean Hammond conveyed certain real property by deed to one of her three sons, respondent Sherman Hammond. The deed used the following language: "Acy Dean Hammond Grantor, conveys to [respondent], as a survivor" the real property. Sherman claimed that, after this deed was recorded, he began to pay one-third of the property taxes and perform maintenance work on the property. Sherman did not, however, live on the subject property. Acy continued to live on the property until her death in October 2001.

In apparent conflict with the deed, Acy signed a will in May 2000 directing that all of her real property be divided among her three sons, with various interests apportioned to each son. Another of Acy's sons, Michael, was awarded a one-half interest in the subject property. Toward the end of Acy's life, Michael moved into Acy's home and cared for her. As of the court of appeals decision in 2011, Michael still lived in that home.

In 2009, Michael filed a petition seeking to probate Acy's will and to be appointed as her personal representative. Shortly thereafter, Michael sought a declaration that the 1985 deed was invalid and that Michael owned an interest in the subject property. In response, Sherman argued that he owned the property in fee simple under the language of the deed and under Oregon law. Sherman also argued that Michael's arguments were barred under the doctrine of laches.

The trial court held that the 1985 deed was valid and that Sherman took title to the property at the time of Acy's death. The court relied on ORS 93.180(2), which reads "[a] declaration of a right to survivorship creates a tenancy in common in the life estate with cross-contingent remainders in the fee simple." Michael appealed the trial court's decision.

The court of appeals noted that when reviewing deeds that convey real property, the court's goal is to determine the intent of the parties, subject to the ordinary rules for construing contracts. Here, the language "as a survivor" was ambiguous, and nowhere did the deed refer to any interest held in common by Acy and Sherman. Thus, the language "as a survivor," by itself, did not unambiguously create cross-contingent remainders in the property.

The court of appeals also considered the text of ORS 93.180 at the time the deed was executed and recorded. In 1985, ORS 93.180 defined a tenancy in common in pertinent part as a conveyance of lands "made to two or more persons." Here, the 1985 deed purported to convey the property to only ***one*** person (Sherman) "as a survivor." The deed did not describe survivorship rights of anyone other than Sherman. Thus, the 1985 deed on its face did not comply with the 1985 statutory requirements for creating a tenancy in common.

The court concluded that because the language "as a survivor" was ambiguous, there were several different ways to interpret it. One possibility was that the deed was intended as a de facto will, under which Acy would have retained ownership of the property during her lifetime, and upon her death the property would transfer to Sherman. Another possibility was that the deed was intended to convey the property as an *inter vivos* gift, giving Sherman a present interest in the property during Acy's lifetime, but delaying Sherman's right of enjoyment until after Acy's death. The court held that it was impossible to discern Acy's intent from the text of deed, and remanded to the trial court to review extrinsic evidence to discern her intent.

Finally, the court of appeals addressed Sherman's laches defense. Sherman raised several arguments, all involving the lengthy time period that had passed before Michael sought a declaration of ownership in the property. The court of appeals noted that these arguments all involved fact-intensive inquiries that the trial court had not engaged in, given its ruling in favor of Sherman under ORS 93.180(2). The court of appeals concluded that, on remand, the trial court could decide whether to first address Acy's intent or Sherman's laches defense, and whether the resolution of either of these issues would make it unnecessary to resolve the other.

Nathan Baker

Hammond v. Hammond, 246 Or. App. 775, 268 P.3d 691 (2011)

Appellate Cases – Land Use

■ *COURT HONES CLACKAMAS COUNTY CONDITIONAL USE CRITERION*

Tonquin Holdings v. Clackamas County, 247 Or. App. 719, 270 P.3d 397 (2012), resolved relatively narrow issues in application of the Clackamas County Zoning and Development Ordinance ("ZDO") as they relate to a proposed aggregate mining and processing operation. The county's hearings officer approved, subject to numerous conditions, a conditional use permit authorizing the operation. Both applicant and opponents appealed the approval to LUBA, which remanded only on the opponents' issue. The applicant then appealed both issues.

Under the primary approval criterion subject to dispute, a proposal may not "alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes use of surrounding properties for the primary uses allowed in the underlying zoning district." ZDO 1203.01(d). Applying this standard, the hearings officer disallowed excavation of some wetlands on the site because of the impacts that activity would have on adjacent wetlands.

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The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

On appeal, the applicant cited *Gordon v. Clackamas County*, 10 Or. LUBA 240 (1984). There, the county approved a proposed airport expansion that would cause the loss of ten adjacent rural dwellings. As such, the applicant argued, impacts on adjacent properties alone may not trigger denial under ZDO 1203.01(d).

LUBA distinguished *Gordon*, as did the court. In so doing, it noted that the surrounding area in *Gordon* could accommodate the housing units that the proposed use would take out. In the present case, however, the impact would be destruction of wetland, "a finite and unique resource that is rare and exists only in a very limited geographic area." *Tonquin Holdings*, 247 Or. App. at 727. (The court did not observe whether the surrounding area included land on which the applicant could create new wetlands.)

The second disputed issue was whether the proposal constituted an "industrial project," as that term is used at ZDO 1001.02(A). If so, then additional criteria would be brought into play. The hearings officer had ruled "no" on this question, but LUBA disagreed. As it had below, the applicant stressed to the court that the code does not list "surface mining" as an industrial use. The court upheld LUBA's thinking that the term "industrial project" is not necessarily limited to those uses listed as industrial. *Tonquin Holdings*, 247 Or. App. at 723.

Though the issues resolved here were fairly narrow interpretations of a single county code, the applicant did reserve a big issue. Specifically, it asked the court to reconsider *Gage v. City of Portland*, 319 Or. 308, 877 P.2d 1187 (1994). *Gage* ruled the highly deferential standard of review of a local code interpretation set forth in ORS 197.829 was inapplicable to an interpretation not rendered by a local governing body. The applicant asked the court to reconsider this rule in light of "the increased number of local governments that have delegated final decision-making authority to hearings officers." The court demurred. *Id.*, at 723.

Ty K. Wyman

Tonquin Holdings v. Clackamas County, 247 Or. App. 719, 270 P.3d 397 (2012)

■ *METRO DID NOT EXCEED ITS STATUTORY AUTHORITY WHEN IT APPROVED A LAND USE ORDER ON THE BASIS OF POLITICAL NECESSITY*

In *Weber Coastal Bells v. Metro,* 351 Or. 548, 273 P.3d 95 (2012), the Oregon Supreme Court upheld LUBA's decision affirming a land use final order by the Metro council, which approved new highway bridges and associated highway improvements, including a portion of the light rail line, as part of the Columbia River Crossing Project between Oregon and Washington.

In 1996, Oregon passed Chapter 12, Oregon Laws 1996 ("the Act"), to facilitate the South North MAX Light Rail Project as part of the "transportation system planned for the Portland metropolitan area." The Act established decision-making procedures intended to maximize federal funding for the project and ensure construction in a timely and cost-effective manner. It resulted in a land use final order ("LUFO") deciding: (a) the light rail route for the project including location; (b) stations, lots and maintenance facilities for the project including locations; and (c) highway improvements for the project including locations. Under the Act, the Land Conservation and Development Commission ("LCDC") established criteria, Metro applied the criteria, and Metro issued a LUFO appealable to LUBA and subject to review by the Oregon Supreme Court. At issue in this case was the fifth LUFO approving one segment of the South North MAX Light Rail Project, known as the Columbia River Crossing Project. It was the extent of the highway improvements in that segment that formed the basis of petitioners' objections to the LUFO.

Petitioners asserted that Metro exceeded its statutory authority by adopting a final order primarily devoted to highway improvements not sufficiently connected to the light rail project because they were not needed to mitigate adverse traffic impacts associated with the light rail route, stations, lots or maintenance facilities. LUBA rejected petitioners' argument that the proportion of cost attributable to highway improvements meant it was primarily a highway project rather than a light-rail project, holding that the appropriate cost comparison was between the cost of highway improvements for the whole project and the cost of the light rail improvements for the whole project, not the Columbia River Crossing segment in isolation.

LUBA also rejected petitioners' argument that the Act permits only those highway improvements that are necessary to the light rail siting in terms of engineering necessity. LUBA read the Act to impose very few limits on what highway improvements could be made part of the project, requiring only that it have been described in the environmental impact statement. Metro made findings that there would be no light rail project without the freeway bridge being replaced and the highway improvements were needed as a political compromise between Oregon interests, requiring a multi-modal solution, and Washington interests, requiring a highway element. Petitioners did not attempt to refute those findings, and there is nothing in the Act that expressly or impliedly limits highway improvements to those necessary for engineering reasons

only. LUBA affirmed Metro's final order in part and remanded in part (also holding that Metro exceeded its authority by including in its order parts of the project that lay outside Portland's UGB, which no party appealed).

> The Oregon Supreme Court affirmed LUBA, concluding:
>
> In summary, . . . Metro did not exceed its statutory authority when it approved the land use final order containing these highway improvements. Even if the 1996 act limits highway improvements to those made necessary by the light rail siting, we conclude that the authority granted by the 1996 act is not limited to engineering necessity. The statutory authority granted to Metro included authority to approve highway improvements that political realities made necessary to the light rail project, at least when those political realities are not within Metro's control.

351 Or. 548, 561.

The Court also determined the record contained substantial evidence to show the political necessity for the highway improvements included in the challenged LUFO amendment.

John C. Pinkstaff

Weber Coastal Bells v. Metro, 351 Or. 548, 273 P.3d 95 (2012)

■ GRAND ISLAND QUARRY DISPUTE: "THE AGGREGATE LAYER" INCLUDES ALL COMMERCIALLY MINEABLE MATERIAL

Grand Island is an area of high-quality alluvial farmland located between two branches of the Willamette River in Yamhill County south of Dayton, Oregon. Protect Grand Island Farms ("PGIF"), a non-profit organization established in 2010, seeks to protect and restore that farmland, most of which is categorized as Class II soils.

Baker Rock Resources ("Baker Rock") is a third-generation family-owned Oregon company specializing in the procurement, delivery, and installation of construction materials, including mined aggregate materials (e.g., gravel) used for road construction and other development projects. Baker Rock wanted to mine aggregate material from part of a 224.5-acre site on Grand Island currently zoned as Exclusive Farm Use. To achieve the necessary rezoning, the company sought an amendment to Yamhill County's comprehensive plan adding the site to the county's inventory of mineral and aggregate resources.

In order to avoid destruction of wide swaths of valuable farmland, the Land Conservation and Development Commission ("LCDC") developed a system limiting mining of aggregate material to areas where the resource is found in sufficiently thick deposits to warrant the removal of topsoil and other non-aggregate "overburden." Implementation of this system is achieved by the administrative rules implementing Statewide Planning Goal 5. OAR 660-023-0180 requires local governments to determine that an aggregate resource site is "significant" in order to add it to the resource inventory and, in effect, open the site to mining. The standard promulgated by the rule as applied to Grand Island requires that "the average thickness of ***the aggregate layer*** . . ." exceed 25 feet. OAR 660-023-0180(3)(d)(B)(ii) (emphasis added).

In support of its application for a comprehensive plan amendment, Baker Rock submitted a geology report to Yamhill County officials showing that the proposed mining site is dominated by two distinct subsurface layers of sand and gravel separated by nine feet of clay. The upper layer of aggregate material, according to the report, averages 23 feet in thickness, and the lower layer averages 21 feet. Taken together, the two layers add up to a significant resource, clearly exceeding the minimum average thickness requirement set out by the applicable rule. Baker Rock intended to mine both layers.

PGIF objected to the mine and argued before the Yamhill County Board of Commissioners that, in light of the rule's singularly plain language (viz., "***the*** aggregate ***layer***"), the average thicknesses of multiple discontinuous layers separated by non-aggregate material should not be added together in making the determination of significance. In essence, PGIF's argument was that only the topmost layer of aggregate counts, and it must exceed 25 feet in average thickness all by itself in order to qualify for the resource inventory. Baker Rock countered, by way of expert testimony, that the layers constitute a single deposit of essentially the same rock, having been deposited by the same river, during the same geological period (the Holocene Epoch), and by the same hydrological processes. The presence of the clay stratum, Baker Rock's expert opined, represented a period of "quiescent deposition" rather than a geologically meaningful boundary between the sands and gravels above and below it.

Yamhill County sided with Baker Rock, the commissioners voting two to one to add the site to the county's resource inventory, and PGIF appealed to the Land Use Board of Appeals ("LUBA"). ***See*** "Quarry, part 2 around the corner – an update!" at http://protectgrandisland.com/updates/ (last visited June 11, 2012). LUBA affirmed the county's decision, agreeing that the farmland-preservation purpose of the rule is not violated by finding that the intervening layer of clay

constitutes an additional layer of overburden, and noting that mining the aggregate below the clay will not result in greater loss of high value soils than will already be removed in order to mine the aggregate above the clay. PGIF petitioned the Oregon Court of Appeals for review of LUBA's order, making generally the same argument as they did before LUBA. On April 4, 2012, the Court of Appeals issued its decision affirming LUBA in ***Protect Grand Island Farms v. Yamhill County and Baker Rock Resources***, 249 Or. App. 223, 275 P.3d 201 (2012).

To resolve the dispute, the court sought to determine the intent of the rulemakers by examining the text of the rule in context. Looking to Webster's for definitions of the key terms "deposit" and "overburden," the court identified the crux of the case as whether the rule's use of the term "aggregate layer" encompasses discontinuous layers or is limited to a single discrete layer.

The court then noted that PGIF's argument is persuasive in many cases, but found "[n]onetheless, that is not the only plausible construction." ***Protect Grand Island Farms***, 249 Or. App. at 232 (citing ***State v. Rowland***, 245 Or. App. 240, 245, 262 P.3d 1158 (2011), ***rev. den.***, 351 Or 675 (2012)). (Of potential interest to court watchers: the opinions in both ***Protect Grand Island Farms*** and ***Rowland*** were authored by Justice Sercombe.)

The proper analysis, the court wrote, requires going beyond the text of the rule to determine whether its singular language in fact refers only to a single, continuous deposit or whether it includes all deposits at a given site. Relying on the principle that courts may resort to maxims of construction when a rule's ambiguity remains unresolved after analysis of its text and context, the court next engaged in a discussion of the rule's purpose.

Both parties agree, the court stated, that the purpose of the rule in this case is to balance the protection of farmland against the need for local sources of aggregate.

> [W]here a farmland mining site contains an aggregate resource that runs miles wide but only 10 feet deep, mining would be precluded although the overall yield of aggregate would be great. That is because it would result in the destruction of significant amounts of farmland. Instead, mining operators must find sites that yield similar overall quantities of aggregate but that result in less destruction of farmland; that is, they must find vertically deep resources of aggregate.

Id. Where there is enough aggregate material to justify the destruction of farmland, "it makes no sense . . . to prevent the mining of a deep deposit of aggregate merely because it also contains areas of nonaggregate (assuming all of the aggregate is in fact commercially mineable)." ***Id.*** At 233.

The court's parenthetical comment at the conclusion of the quote immediately above suggests that the advance of resource extraction technology in combination with market forces can potentially alter the balancing analysis in favor of one or another competing interests. If the market price of the aggregate is high enough, and the mining company can feasibly extract it at a profit, presumably it is consistent with OAR 660-023-0180 to mine any given area of prime farmland under which discontinuous deposits of commercially mineable material can be found to add up to a significant resource. Where an insignificant top level of aggregate is separated from a significant deeper layer by a thick layer of overburden, so long as the deeper layer can be mined for a profit it passes the test laid out in OAR 660-023-0180. This appears to be true without regard to the geologic era of deposition. Other regulations undoubtedly come into play given the circumstances of each application for a plan amendment, including mining's negative impacts on surrounding properties and environmental issues, but with its parenthetical comment on commercial mineability, the Court of Appeals exposes a soft spot in the farmland preservation goal of the current laws.

In any event, the battle over the fate of the proposed Grand Island mining site is not yet over. In May, the Yamhill County Board of Commissioners voted two-to-one to allow the plan amendment in spite of impacts upon the neighboring properties—a decision that PGIF has vowed to appeal to LUBA. Moreover, PGIF has petitioned the Oregon Supreme Court for review of the Court of Appeals' decision.

Nick Merrill

Protect Grand Island Farms v. Yamhill County, 249 Or. App. 223, 275 P.3d 201 (2012)

Kressel Scholarship

Larry Kressel was the editor of this Digest for about seventeen years and served both as a LUBA referee and Multnomah County Counsel. His untimely passing in December, 1996 saddened all who knew him. Larry's memory is preserved in a scholarship fund, the Larry Kressel Memorial Scholarship at Lewis and Clark Law School. That scholarship serves students with a modest supplement that reduces their tuition obligations. The fund would benefit from your tax-deductible contribution. Information about the scholarship and fund can be found at http://law.lclark.edu/giving/larry_kressel/ or you may call Ed Sullivan at 503-553-3106.

■ SUPREME COURT APPLIES COMMON LAW ANALYSIS TO VESTED RIGHTS DETERMINATION UNDER MEASURE 49

In *Friends of Yamhill County, Inc., v. Board of Commissioners of Yamhill County*, 351 Or. 291, 264 P.3d 1265 (2011), the Oregon Supreme Court clarified the standard for determining when a right to complete development with a Measure 37 waiver "vests" under Measure 49. The issue in the case was whether the developer's efforts to develop the property were sufficient to create a common-law vested right to complete and continue a residential subdivision. The lengthy opinion begins with an historical outline of statutory and local land use law and zoning control in Oregon, setting the stage for voter adoption of Ballot Measure 37 and, later, Ballot Measure 49. In affirming the Court of Appeals, the court discusses in detail the six-factor test for vesting a nonconforming use that the Court established in ***Clackamas County v. Holmes***, 265 Or. 193, 508 P.2d 190 (1973).

As background, in 2006 Oregon voters approved Measure 37 to allow landowners to seek just compensation for land use regulations that were enacted after they acquired their property and that restricted the use and therefore diminished its value. Local governments could choose to pay a claim and enforce its regulation, or waive the regulation and permit the owner to develop a use allowed at the time the owner acquired the property.

After Measure 37 became effective, Gordon Cook, who owned approximately 40 acres of agricultural land in Yamhill County, filed a demand with the state and county claiming county land use regulations adopted after he acquired the property in 1970 prevented him from developing a 10-lot subdivision and diminished the fair market value by $1.6 million. In lieu of paying compensation, the Department of Land Conservation and Development ("DLCD") and the county issued waivers of land use regulations in 2006, allowing Cook to divide the property into nine 2.69-acre parcels and one 12.4-acre parcel and allowing development of a dwelling on each of the 2.69-acre parcels.

Cook applied for preliminary subdivision approval, which was reviewed under the requirements of County Ordinance 29, which classified the property as subject to the county's former A-1 agricultural zone but did not identify minimum lot sizes. The zone authorized a permitted use of a dwelling related to farm use, and a single-family dwelling as a conditional use developed in accordance with the county's R-S suburban zone. In April 2007 the county interpreted the ordinance to allow for a land division under Measure 37 of five acres for dwellings allowed as a permitted use and 2.5 acres for dwellings allowed as a conditional use. Subsequently the county granted preliminary subdivision approval and conditional use approval to develop a 10-lot subdivision with conditions. No appeal was filed. Cook cleared, excavated and graded the property, and took steps to meet the conditions of final subdivision approval related to planning on-site sewage disposal for nine lots and arranging for water and electrical service. On December 5, 2007, the day before Ballot Measure 49 became effective, Cook obtained the county's approval of his final subdivision plat and recorded it. No party appealed the final plat.

Although Measure 49 extinguished rights under Measure 37, it also provided three options for those with Measure 37 waivers to proceed, including the "vested rights" pathway. Cook elected that path and applied for a county determination that he had a common law vested right to complete the development under the Measure 37 waiver. In the county's adjudication of the vested rights application, Cook provided evidence of costs incurred in obtaining the subdivision approval and developing the property, including legal costs and costs related to surveying, engineering, excavating, grading, and utilities. Cook also included the total cost of developing nine buildable lots. He provided three calculations of expenditures. As of June 2007, shortly after Measure 49 was referred to the voters, he had expended a total of $120,495. On November 6, 2007, the day the voters approved Measure 49, Cook's expenses were $143,765. When Measure 49 became effective December 6, 2007, Cook's costs totaled $155,160.

Cook also included the total cost of the proposed development. Originally he had planned to develop nine finished lots to sell to developers or individuals, at a total estimated cost of $204,660. In his application he also included the cost of placing dwellings on the lots, although he disagreed that Measure 37 required the "project" to include the cost of constructing homes. He added the cost of purchasing and installing small manufactured homes and utility services, for an estimated completion cost of $871,158. Friends of Yamhill County ("Friends") filed a memorandum opposing Cook's vested rights application, including exhibits of online real estate listings advertising several of the lots for sale between $325,000 and $329,000 and another listing of a proposed new home to be built and available for purchase for $1.29 million.

The county concluded that because Cook had obtained preliminary and final plat approval, Cook had acquired a vested right to develop and/or sell every lot before Measure 49 became effective. Alternatively, the county concluded Cook had a vested right to complete his subdivision based on the six-factor test set out in *Holmes*.

Three of the six factors were disputed. One factor required the county to examine the ratio of Cook's expenses to the cost of completing the development. Another factor required a determination whether Cook had begun developing his property after he received notice Measure 49 had been referred. The third factor required the county to assess Cook's good faith in proceeding with development. The county found that Cook's expenses were "substantial" but did not determine

the total cost of completing the project because it decided it would be speculative. The county also found that Cook had begun developing before the legislature referred Measure 49.

Friends filed a petition for a writ of review in Yamhill County Circuit Court. The circuit court upheld the county's ruling and agreed Cook had established a vested right to complete construction, reasoning that in 1970 a residential subdivision was a permissible conditional use of the land, and concluding the use complied with the waivers. However, the circuit court rejected the county's basis for finding a vested right in assuming Measure 37 rights were transferrable, recognizing that the ability to transfer a lot does not mean the new owner has a vested right to use the lot in a nonconforming way.

Friends appealed the circuit court decision to the Court of Appeals, which agreed with them on two issues in reversing and remanding the case to the county. The court determined the county erred by failing to determine: (1) whether a residential subdivision was a permissible use when Cook obtained the property, and (2) "the extent and general cost of the project to be vested," giving "proper weight to the expenditure ratio factor . . ." in finding a vested right. ***Friends,*** 351 Or. 219, 233.

The Oregon Supreme Court accepted Cook's petition for review to clarify the standard for determining, in the context of Measure 49, a common law vested right to complete a development. The issues raised were (1) whether the determination of a common law vested right presents a question of fact and whether substantial evidence supported the county's finding; (2) whether "the Court of Appeals erred in concluding that, as used in Measure 49, the statutory phrase 'common law vested right' depends particularly on one of the ***Holmes*** factors—the ratio between a landowner's expenditures and the development's projected cost . . . ," ***id.*** at 234; and (3) whether the Court of Appeals erred in remanding the case to Yamhill County to determine whether zoning ordinances in 1970 would have permitted development of a residential subdivision on land zoned for agricultural use.

Beginning with the second issue, the court first agreed with the parties that the phrase "common law vested right," as used in Measure 49, refers to the common law of Oregon rather than the majority rule, which requires issuance of a building permit by the municipality and substantial construction and/or substantial expenditures. The term "vested right" in common law describes a conclusion that a landowner is entitled either to continue a preexisting use or to complete a partially finished one. ***Id.*** at 235. The question is how much a landowner must do before the right to complete the use vests. The ***Holmes*** court answered the question by stating either "the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred." ***Id.*** at 236 (quoting ***Holmes***, 265 Or. 193, 197).

The Supreme Court faulted the Court of Appeals' analysis, which found only some of the ***Holmes*** factors to be material. The Court of Appeals assumed that three of the factors necessarily will have been satisfied, including the good faith of the landowner, whether the landowner had notice of any proposed zoning before starting improvements, and the type of expenditures, i.e., whether they relate to the completed project or could apply to other uses. ***Id.*** at 238. The Supreme Court found that compliance with Measure 49 does not necessarily mean that the expenditures incurred relate to the proposed use. "Even if the proposed use complies with the waiver, it does not follow that all the expenditures either will relate to the use or could not be adapted to other uses." ***Id.*** at 239.

On the issue of "good faith," the Court of Appeals inferred that since section 5(3) identifies the effective date of Measure 49 as the cut-off date for determining the existence of a vested right, the voters "intended to give landowners a 'green light' to incur as many costs as they could before that date and that all costs incurred before then necessarily would be incurred in good faith." The Supreme Court found another plausible interpretation of the text, deciding that the phrase "on the effective date of this 2007 Act" merely identifies "the cut-off date after which further expenditures will not be considered (rather than as a substantive judgment that all expenditures incurred before then will always count a vested rights analysis) . . . ." ***Id.*** at 240.

The court found that its interpretation would give effect to all the terms of Measure 49 section 5(3) and not eliminate consideration of any of the common-law factors. The trier of fact cannot presume expenditures are made in good faith and would necessarily determine the good or bad faith of the landowner in making expenditures both before and after the adoption of Measure 49. The Supreme Court then concluded the Court of Appeals erred in holding that only some of the ***Holmes*** factors apply in a Measure 49 vested rights determination. ***Id.*** at 242.

The Supreme Court agreed with Friends that if the trier of fact applies the wrong legal standard in making determinations of fact, then the decision must be reversed and remanded. Friends argued that the county improperly construed the law when it found it unnecessary to decide the ratio of expenditures incurred to the cost of the project. The county's decision focused on the right to sell buildable lots, stating the expenditure ratio was "speculative" and that all the expenses incurred were in good faith and substantial. ***Id.*** at 240. The Supreme Court agreed with the Court of Appeals that the county misapplied the law. The county should have found the costs incurred to construct the planned development and the estimated cost of the development, including what type of homes Cook planned to build. The county found there was "'substantial evidence' to support a range of ratios . . . ," but as the court explained, a court reviews a county's findings

under a substantial-evidence standard. *Id.* at 246. The county should have decided by a preponderance of the evidence the estimated cost of constructing the planned homes. In addition, "the county's statement that the amount spent and steps taken were substantial, even assuming that each house would cost $450,000 to build, is not a sufficient substitute." *Id.* at 247.

The presence or absence of findings on the expenditure ratio is not the sole factor, however, in determining whether costs incurred were substantial enough to establish a vested right. "We recognize, as *Holmes* did," the court wrote, "that there is no bright line for determining when an expenditure will be substantial enough to establish a vested right. . . . However, we agree with the Court of Appeals that, in making that determination, the county needed to find the 'ultimate cost' of completing construction and also the ratio between the costs that Cook had incurred and the cost of the project. Without those findings, the county was in no position to determine whether Cook's expenditures, in light of all the *Holmes* factors, were substantial." *Id.* at 248.

Finally, the court turned to the issue of whether the county needed to adopt findings that the proposed use complied with the Measure 37 waivers. The county reasoned that prior approvals of the preliminary and final subdivision plats constituted substantial evidence that a residential subdivision was a permissible use when Cook acquired the land in 1970. Alternatively, it reasoned that Friends could not collaterally attack those decisions in this proceeding. The court noted that both the county and the circuit court treated the issues as questions of fact, when the interpretation of a county ordinance presents a question of law for the court. *Id.* at 250. However, the court lacked any historical evidence on the meaning of the ordinance, as well as any argument from the parties whether the proposed development would have been lawful under the ordinance. Cook relied on a LUBA decision to support his position but the court only accepted the decision for its persuasive value. In addition, "Cook, as the party seeking to establish that his use complies with the waiver, must establish that the zoning ordinances in place when he acquired the property affirmatively permitted a residential subdivision in an A-1 zone, not merely that *former* ORS 215.213(1971) did not preclude such a use." *Id.* at 252.

This case is noteworthy for its discussion of the six factors in *Holmes v. Clackamas County* for determining a vested right to continue a development. While the court noted "almost 40 years have passed since this court decided *Holmes* and . . . , during that period, the amount of upfront costs that landowners must incur to build some projects has increased. . . ," *id.* at 237-38, the court did not explicitly address how that change might affect the calculation of expenditures and the ratio of expenditures to total project cost. Procedurally, the decision clarifies the standard of review for a vested rights determination both at the county level and by the circuit court via writ of review.

In related cases, on December 29, 2011 the Court of Appeals reversed and remanded a Measure 49 vested-rights determination to complete a residential subdivision, citing to and relying on the *Friends* decision. *Campbell v. Clackamas County,* 247 Or. App. 467, 270 P.3d 299 (2011) (summarized in the March 2012 issue of the *Digest*). In February 2012 the Ninth Circuit Court of Appeals determined in *Bowers v. Whitman* (consolidated cases) that the property owners' Measure 37 interest in their properties had not vested and that Measure 49 did not violate substantive due process or equal protection under the 5th and 14th amendments to the U.S. Constitution. 671 F.3d 905 (9th Cir. 2012). The Ninth Circuit specifically noted in dismissing the claims that the property owners' claims to vested use were not ripe since Measure 49 established an available remedy in the vested rights determination procedure, which relied on *Holmes*. The court affirmed the district court's decision granting summary judgment against the property owners. More recently, after its decision in *Friends*, the Supreme Court reversed and remanded a Court of Appeals decision that concluded the circuit court should have remanded the decision to the county to determine the total project cost. *DLCD v. Crook County*, 351 Or. 318, 267 P.3d 158 (2011). On March 14, 2012, the Court of Appeals again reversed and remanded its decision to Crook County, citing facts similar to those in *Friends*. *DLCD v. Crook County*, 248 Or. App. 602, 274 P.3d 260 (2012).

Joan S. Kelsey

Friends of Yamhill County, Inc., v. Bd. of Comm'rs of Yamhill County, 351 Or. 219, 264 P.3d 1265 (2011)

■ "NO NOTICE=NO TOLLING OF TIME LIMIT TO APPEAL" STATUTE MEETS ITS MAKER

In *Jones v. Douglas County,* 247 Or. App. 56, 270 P.3d 264 (2011), the Court of Appeals applied a newly enacted, expressly retroactive, 10-year statute of repose (HB 3166 of 2011) to its review of a LUBA decision made before the new statute was enacted. The new law had taken effect as the parties prepared their appellate briefs. A neighborhood group had appealed the county's 15-year-old approval of an "owner of record" dwelling (ORS 215.075(1)) on the grounds that the county gave no notice of the application or the decision. The lot owners had not acted to improve the subject property until sometime in 2010, having received a number of county-granted permit extensions in the interim. (Appeals of those permit extensions were dismissed, and the dismissals affirmed on further appeal, on the basis that they did not constitute "land use decisions." *See Jones v. Douglas County,* 247 Or. App. 81, 270 P.3d 278 (2011).)

LUBA relied on *former* ORS 197.830 to find that the lack of statutorily-required notice had suspended the 21-day time limit for appeal until the appellant(s) had actual notice of that 1995 decision. LUBA thus remanded with an order that the county start over, with notice.

The court first considered whether the new statute terminated its own jurisdiction to hear the appeal—as the neighbors argued—and, if so, whether the proper outcome would be to leave LUBA's decision below intact. The new statute (ORS 197.830, as amended) provides that the 21-day appeal periods to LUBA may not exceed 10 years after the date of the decision (for which notice was required but not given). It expressly applies to "a judicial or quasi-judicial review of land use decisions or limited land use decisions that has not been reduced to a final judgment subject to no further appeal." The court looked to ORS 197.850, which grants the appellate court jurisdiction for judicial review of proceedings under 197.830, to find that it retained jurisdiction to review LUBA's decision below and to reverse that decision if "unlawful in substance."

On the question of whether the amended statute applied retroactively to an appeal filed with LUBA before the statute was enacted, the court found the text to be unambiguous, and for good measure it looked to the text and context "in light of any legislative history that appears useful to our analysis." 247 Or. App. at 70 n.14 (citing ***State v. Gaines,*** 346 Or. 160, 206 P.3d 1042 (2009)). In this case the legislative history relied on the testimony of the respondent's counsel, among others, to the effect that the HB 3166 would end the judicial review of this very case.

The neighbors next argued that the legislative branch had improperly "adjudicated" this case, violating the separation of powers principle. The court found instead that HB 3166 was a law of general application notwithstanding the legislature's awareness of the facts of this particular appeal (see above). It also rejected the neighbors' assertion that a "sudden death" termination of their appeal denied them a remedy guaranteed by Article 1, Section 10 of the state constitution: a right to notice of a local land use decision did not exist when the constitution was adopted.

The court then considered what it characterized as the neighbors' "substantive due process challenge"—that is to say, that the legislature's objective behind HB 3166 was beyond its power to achieve, regardless of procedural safeguards. After an extended discussion of the evolution of federal and state decisional law on due process challenges to state "economic" regulations, the Court of Appeals held, first, that the legislature here had balanced the financial implications of allowing belated appeals versus depriving landowners of the rights granted by a land use approval; that HB 3166 thus constituted "economic" regulation that was subject only to "rational basis" review; and, that the state legislature in HB had rationally responded to a legitimate government concern.

Conclusion: The appeal to LUBA was not timely; LUBA lacked jurisdiction to consider the appeal and to order a remand to Douglas County; and LUBA must vacate its order and dismiss the appeal.

Bill Scheiderich

Jones v. Douglas County, 247 Or. App. 56, 270 P.3d 264 (2011)

Appellate Cases – Landlord-Tenant

■ *RLTA FED PS AND QS*

In *Johnson Mobile Estates v. Oliver*, 249 Or. App. 383, 277 P.3d 598 (2012), the Court of Appeals affirmed the trial court's decision to permit the tenant in a manufactured home park to remain even though the trial court concluded that the tenant had not complied with the terms of an earlier stipulated forcible entry and detainer ("FED") order. Although the application of law is straightforward, the decision illustrates several practice points for each side of the bar.

In early 2010, an unspecified dispute caused the landlord to file an action for forcible entry and detainer against the tenant. The parties resolved the action by stipulated agreement reached during mediation. Among other obligations, the tenant agreed to replace a metal storage shed near his manufactured home with a new shed by July 18, 2010.

In late July 2010, the landlord filed an affidavit of noncompliance. The landlord asserted that the tenant had not completed the installation of the new shed by July 18, since the shed did not have a roof and the roofing for the shed was not completed. The landlord sought immediate restitution of the premises. Although the court awarded the landlord restitution the same day, pursuant to ORS 105.146(5)(a), the tenant asserted that the shed was completed by July 17 and requested a hearing.

Following the hearing, the trial court found that the tenant had not completed the shed by July 18, in violation of the stipulated order, but that the failure did not constitute "good cause for eviction" because timeliness was not a material element of the parties' agreement. Consequently, the court issued an order in favor of the tenant, although the court—and not the tenant—raised the issue of the landlord's failure to demonstrate good cause for terminating the tenancy.

The Court of Appeals considered two of the landlord's arguments. It rejected the landlord's contention that the trial court should not have considered the materiality/good cause issue because the tenant had not raised the issue in his hearing-request form. (ORS 105.149(2)(c) prohibits a defendant from raising defenses or claims other than the issues described in paragraphs (a) and (b) of the subsection.) The appellate court concluded that ORS 105.149(2)(b) permits a trial court to consider whether the "noncompliance constitutes good cause for purposes of an applicable law or contract that requires the plaintiff to have good cause for terminating the tenancy."

The Court of Appeals also rejected the landlord's argument that the landlord was not required to establish good cause for restitution because no law or contract required such a showing. The appellate court concluded that the landlord had not preserved the issue for review, since the landlord had argued only that it had established good cause for eviction at the hearing (which the trial court rejected) and the landlord had not argued that the landlord was not required to demonstrate good cause at all.

The decision contains several points for attorneys on either side of the bar to consider in a residential FED. First, an attorney for a landlord should consider including a statement in a stipulated FED order that "timeliness is a material part of this agreement." Second, careful review of the FED statute before briefing and oral argument is advisable; although the landlord here may have been correct that demonstrating "good cause" was not necessary under the FED statute, the landlord wasn't able to raise the issue with the trial court after the closing argument.

From the tenant's perspective, the decision illustrates the possible benefit of exhausting the legal process. Recall that the tenant lost its contention that the tenant had complied with the stipulated order, yet the trial court determined that restitution was not appropriate. The decision also suggests that tenants might benefit from asserting defenses that are not in the statutory hearing-request form. The decision turned on the trial court's raising the determinative legal issue itself; other trial courts may not recognize or raise issues on their own.

Tod Northman

Johnson Mobile Estates v. Oliver, 249 Or. App. 383, 277 P.3d 598 (2012)

■ *A TENANT CANNOT RELY SOLELY ON CHRONOLOGY TO ESTABLISH A PRESUMPTION OF RETALIATION UNDER ORS 90.385*

In ***Elk Creek Management Company v. Gilbert***, 247 Or. App. 572, 270 P.3d 362 (2011) [hereinafter ***Elk Creek II***], the plaintiff, a property management company, brought suit against defendants, two tenants of a rental property managed by plaintiff, for forcible entry and detainer ("FED"). The Malheur County Circuit Court found for plaintiff. On appeal, defendants assigned error to the trial court's interpretation of ORS 90.385, the anti-retaliation statute. The Court of Appeals concluded that the trial court correctly interpreted the statute and affirmed the trial court's decision. ***Elk Creek Mgmt. Co. v. Gilbert***, 244 Or. App. 382, 260 P.3d 686 (2011) [hereinafter ***Elk Creek I***]. On defendants' motion for reconsideration, defendants argued that (1) the Court of Appeals imported an "intent to harm" requirement into ORS 90.385, and (2) the opinion contains ***dicta*** that will have dangerous and unintended consequences for tenants.

In May 2009, one of the defendants called the landlord to complain about the electrical system on the property. On May 19, 2009, the landlord and an employee of plaintiff did a walk-through of the house. During this walk-though, the other defendant complained about the electrical system. A month later, the owner and plaintiff's employee did a follow-up walk-through with a licensed electrician. The electrician told the owner that the electrical wiring needed extensive work.

That same afternoon, defendants received a phone call from plaintiff's employee to let defendants know that the owner had decided to end the month-to-month lease. The following day, defendants received a 30-day "no cause" eviction notice. The defendants did not leave the premises after the 30 days had expired, so plaintiff filed an eviction action.

In response to the plaintiff's complaint, defendants alleged that the 30-day no cause notice was given because of their complaints regarding the electrical system, and was, therefore, retaliatory under ORS 90.385 and thus, unlawful. The trial court disagreed. Specifically, that court concluded:

> The concept of ***retaliation*** (***Lex Talionis***) has ancient foundations and in common language is easily understood in metaphors such as "an eye for an eye" or "a tooth for a tooth." The essence of the concept is that when one suffers a real or perceived wrong, a like injury will be inflicted upon the one who did the initial real or perceived harm. [Defendants] inflicted no wrong upon [the owner] when they noted some problems involving the electrical system. Nor did [the owner] attempt to respond in a wrongful manner by attempting to harm

> [defendants] by terminating their tenancy when such complaint(s) were made. In fact, it appears that during the tenancy [the owner] has spent considerable sums attempting to maintain the premises in a habitable condition during the tenancy, and took no action against [defendants] when they were previously in default on their rent. In fact, the conduct and circumstances involved in the case on the part of both the defendants and plaintiff are rather innocuous in this court's opinion. The facts of the case do not in this court's opinion establish that the tenancy termination constituted ***retaliation*** by [the owner] and [defendants] because they expressed at some point prior to the termination [of the lease] that they had some electrical concerns regarding the premises.

Elk Creek II, *supra*, at 575 (emphasis in original; footnotes omitted).

At issue in *Elk Creek Management Company v. Gilbert* is the meaning of ORS 90.385. This statute provides, in part:

> (1) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services, by serving a notice to terminate the tenancy or by bringing or threatening to bring an action for possession after . . . .
>
> > (b) The tenant has made any complaint to the landlord that is in good faith and related to the tenancy; . . . .
>
> (3) If the landlord acts in violation of subsection (1) of this section, the tenant is entitled to the remedies provided in ORS 90.375 and has a defense in any retaliatory action against the tenant for possession.

As noted above, in defendants' motion for reconsideration, they argued (1) the court incorrectly imported an "intent to harm" requirement into ORS 90.385, and (2) the opinion contains *dicta* that will have dangerous and presumably unintended consequences for tenants. In regards to its interpretation of ORS 90.385(3), the court elected not to rehash the same issue regarding statutory construction on reconsideration as it had done in *Elk Creek I*. The court nonetheless noted, as it had held in *Elk Creek I*, that the term "retaliation" should be given its "plain and ordinary meaning." Thus, according to the court, "to 'retaliate' means to 'repay or requite in-kind (as an injury)' or 'to put or inflict in return.'" *Id.* at 578 (quoting *Webster's Third New Int'l Dictionary* 1938 (unabridged ed. 2002)). "The concept of retaliation," then, "as the term is used in ORS 90.385, involves an intention on the part of the landlord to cause some sort of disadvantage to the tenant, motivated by an injury (or perceived injury) that the tenant has caused the landlord." *Elk Creek I*, *supra*, at 390. Thus, a tenant cannot rely on the chronology of a tenant's complaint followed by a landlord's notice of eviction to establish a presumption of retaliation that a landlord must rebut. Instead, a tenant must affirmatively establish that the landlord acted in retaliation and carries the burden of showing an improper intent by the landlord.

Also on reconsideration, the defendants contended that *Elk Creek I* contained *dicta* that may seriously harm tenants. The defendants were specifically concerned with two passages from that decision. The first passage states, in explaining the 1979 legislative history, that "under the current version of ORS 90.385, ***a tenant cannot rely on chronology***—a complaint soon followed by a notice of eviction—to establish a presumption of retaliation that the landlord must then rebut." *Elk Creek II*, *supra*, at 578 (quoting *Elk Creek I*, *supra*, at 389) (emphasis in original). The defendants' specific concern was that a tenant could ***never*** use chronology to establish retaliation. The court stood by its discussion of the applicable legislative history, but clarified "that a tenant cannot rely solely on chronology to establish a presumption of retaliation." *Id.* at 581.

The defendants were also concerned that the following language in *Elk Creek I* created an excuse for landlords to engage in otherwise unlawful evictions:

> We agree that requiring a retaliatory motive might decrease a tenant's confidence that his or her complaint will not lead to eviction. A tenant may realize that an opportunistic landlord could, with no intent to inflict a retributory injury whatsoever, evict the tenant because the landlord could not afford to make the repairs or decided to take the property off the market completely. Such a landlord has not violated ORS 90.385 simply because the eviction follows on the heels of a tenant's complaint, at least as the statute is now written—the product, as the legislative history cited above demonstrates, of political compromise between interests representing landlords and tenants.

Elk Creek I, *supra*, at 390. Although the court felt this passage merely underscored its holding that a tenant alleging retaliation by a landlord under ORS 90.385 has the burden to show an improper intent by the landlord, the court nonetheless retracted the paragraph for clarity.

In sum, then, the Court of Appeals adhered to its original opinion, but in the process restated the definition of "retaliation" and reemphasized that it is the tenant's burden to affirmatively show that the landlord acted with improper intent. Additionally, the court clarified that a tenant cannot rely solely on the chronology of events to establish a presumption of retaliation. Lastly, the court also retracted a paragraph to eliminate any confusion that its prior holding created an excuse for landlords to engage in unlawful evictions.

William A. Van Vactor

Elk Creek Mgmt. Co. v. Gilbert, 247 Or. App. 572, 270 P.3d 362 (2011)

■ DOES REFUSAL TO ACCEPT PAYMENT OF RENT DURING TERMINATION DISPUTE CONSTITUTE WAIVER OF RIGHT TO TIMELY PAYMENT OF RENT AFTER DISPUTE IS CONCLUDED?

In *Reach Community Development v. Stanley*, 248 Or. App. 495, 274 P.3d 211 (2012), the Oregon Court of Appeals affirmed a trial court's decision that plaintiff-landlord Reach Community Development ("Reach") had not waived its right to demand timely payment of rent from defendant-tenant Stanley when Reach previously refused to accept payment during the pendency of a Bureau of Labor & Industries ("BOLI") investigation of Reach's 10-day "for cause" termination notice.

On August 17 2009, Reach sent Stanley the termination notice. In response, Stanley complained to BOLI, which opened an investigation. Fearful that its acceptance of Stanley's rent payments might be construed as a waiver of its right to terminate for cause, Reach returned Stanley's partial payment of rent on August 17, 2009 and included a letter that stated Reach would not accept rent past the date of the 10-day "for cause" termination notice. Importantly, Stanley acknowledged at trial that he would still owe rent during his occupancy although Reach would not accept his rental payments until the conclusion of the "for cause" termination dispute.

Between August and early December, Reach did not demand payment of rent or provide notice that it would accept payment of rent from Stanley. At some point in December, the BOLI investigation concluded and the dispute concerning the 10-day termination "for cause" issue was resolved. On December 7, 2009, Stanley tendered $500 to Reach. On December 10, Reach sent Stanley a 72-hour notice of termination for failure to timely pay rent. Reach returned Stanley's $500 payment on December 14. At some point, Reach withdrew its 72-hour notice and, on December 16, Reach issued a new 72-hour notice, which demanded payment of all accrued rent from August through December. Stanley did not pay the rent demanded by Reach in its December 16 notice.

Stanley argued that he was entitled to more time to pay the accrued rent and, consequently, his rental agreement was not properly terminated. Stanley did not dispute that he owed Reach rent for August through December. Instead, he argued that Reach was not entitled to ***timely*** payment of the accrued rent because Reach did not provide notice of its intent to accept rent before Reach issued the December 16th, 72-hour notice. Accordingly, Stanley argued that Reach waived its right to terminate the rental agreement pursuant to ORS 90.394.

The court noted that, to be effective, a waiver of any contractual right must be intentional and unequivocal. The court concluded that, although Reach had waived its right to timely payment while the previous 10-day "for cause" cancellation remained unresolved, Reach did not waive its right to demand payment of all accrued rent following the resolution of the 10-day termination issue. The court stated that no evidence supported Stanley's assertion that Reach intentionally waived its right to demand timely payment of all rent due following the conclusion of the prior 10-day "for cause" termination dispute. Consequently, the court affirmed the trial court's holding that Reach was entitled to timely payment of rent with 72-hours' notice pursuant to ORS 90.394.

Glenn Fullilove

Reach Comty. Dev. v. Stanley, 248 Or. App. 495, 274 P.3d 211 (2012)

Appellate Cases -- Washington

■ POTENTIAL IMPACT TO WATER RIGHTS HELD SUFFICIENT TO SUPPORT STANDING IN WASHINGTON LAND USE DISPUTE

In *Knight v. City of Yelm*, 173 Wash.2d 325, 267 P.3d 973 (2011), the Supreme Court of Washington granted standing to a land use opponent based on allegations of possible prejudice to her water rights from the preliminary approval of a nearby subdivision. The controversy began when a developer sought approval from the City of Yelm, Washington ("the City") to develop 32 acres of vacant land into residential lots. JZ Knight ("Knight"), the opponent, is a nearby property owner with senior ground water rights. At a public hearing on the development, Knight's attorney claimed that the City had overcommitted its water supply and lacked sufficient water provisions to support the development. Knight requested that the preliminary plat application be denied or at least delayed until the City confirmed access to water rights sufficient to serve the proposed development. Through post-hearing submissions, the City provided evidence that it had obtained sufficient water rights, but the Department of Ecology ("DOE") had not yet approved transfer of those rights.

The Washington Subdivision Act requires the City to determine prior to plat approval whether "appropriate provisions are made for . . . public health, safety, and general welfare . . . [and] potable water supplies . . . ." RCW 58.17.110(1). However, the hearing examiner granted the preliminary plat approval subject to a condition that the City demonstrate

sufficient water provisions at the time of occupancy. The examiner concluded that the preliminary plat stage requires only that the developer show a reasonable expectation of sufficient potable water, and that the "City had met its burden to show a reasonable plan to provide water service." 173 Wash.2d at 330. On Knight's request for reconsideration, the hearing examiner added new findings stating that, although state and local law require an applicant to show sufficient water supplies at the final plat approval stage ***and*** the building permit stage, the applicant could delay this showing until the building permit stage.

Knight's appeal to the city council was dismissed based on a finding that Knight lacked standing to seek review of the hearing examiner's decision. However, the city council ruled on the merits and upheld the preliminary plat approval. The resolution contained no explicit requirement that the City show sufficient water supplies at the final plat approval stage. It stated that the City's demonstration of water availability met appropriate standards, given the stage of the process.

Knight challenged the City's preliminary plat approval under the Land Use Petitions Act ("LUPA") in superior court. Although Knight's petition contained a section alleging facts showing that she had standing to seek review, it failed to follow LUPA's requirement that a petitioner provide a "separate and concise statement of each error alleged to have been committed." RCW 36.70C.070(7). The developer and the City moved for dismissal, arguing that this failure divested the superior court of jurisdiction. The superior court denied the motion and found that Knight had standing. Moreover, the superior court concluded that the City's evidence of water provisions was "insufficient to support final plat approval," *id.* at 345 n.12, and that the City must make actual findings of sufficient potable water supplies prior to "final plat approval and cannot delay the showing until the building permit stage," *id.* at 333. The court found that the question of whether the City had made an adequate demonstration of water availability was not ripe because "circumstances could change before the final plat approval stage." *Id.* at 333. The Court of Appeals reversed the superior court decision, affirmed the preliminary plat approval, and dismissed Knight's LUPA petition on the basis that Knight lacked standing because her injuries were "too remote." *Id.* at 334. The Supreme Court granted Knight's petition for review.

First, the developer and the City reasserted their claim that Knight failed to comply with LUPA's procedural requirements—a mistake they claimed divested the superior court of jurisdiction. The Supreme Court rejected the argument, holding that only those provisions in LUPA that further its express goal of expediting appeals procedures and providing timely judicial review (those of timing and service requirements) require strict compliance. The court seeks only substantial compliance with form and content provisions. The court also stated that, in any event, the developer and the City were not substantially prejudiced by Knight's alleged failure to assign error to the City's standing determination because they were provided adequate notice of her intent to contest standing in a separate section of the petition which alleged facts supporting her standing under LUPA.

Second, the developer and the City reasserted their claim that Knight lacked standing sufficient to challenge the city's action. In order to establish standing under LUPA, a petitioner must demonstrate that she is "aggrieved or adversely affected . . ." by a land use decision. RCW 36.70C.060(2). This requires a petitioner to show that:

> (a) The land use decision has prejudiced or is likely to prejudice that person;
>
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
>
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be cause by the land use decision; and (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060(1)-(2).

The Supreme Court found that Knight met LUPA's standing requirements and could seek judicial review. It stated that LUPA's prejudice requirement is met when a person demonstrates a concrete and specific injury or, in the case of a future harm, that "the injury will be immediate, concrete and specific . . . ." 173 Wash.2d at 314 (quoting Suquamish Indian Tribe v. Kitsap County, 92 Wash.App. 816, 829, 965 P.2d 636 (1998)). Here, Knight was a property owner in the immediate area of the development property. She has claimed senior water rights from the same aquifer that would serve the proposed development under the proposal. Knight presented evidence to support her contention that the City lacked sufficient water supplies to serve the proposed development and that the City was already "overdrawing its water rights . . . ." *Id.* at 342. The City's evidence of acquired but not yet DOE-approved water rights was insufficient to render Knight's claims abstract or conjectural. Under these circumstances, the court found the injury to be immediate and specific, particularly because by the city council's decision the developer would not be required to address the water supply question at a meaningful time, effectively denying Knight the opportunity to challenge the potential threat to her water rights.

The court stated that Knight also met the rest of LUPA's standing requirements. Knight's claim met the redressability requirement because the superior court's decision in favor of Knight "substantially redressed the prejudice caused by the City Council's decision to approve the preliminary plat" by giving her "an opportunity to challenge the City's showing of

adequate water provisions." *Id.* at 345 n.13. The court pointed out that Knight's interests in her water rights were among those that the city council was required to consider when it granted preliminary plat approval to the developer. Moreover, the court concluded that Knight exhausted all administrative remedies by following its appeals procedures.

The Supreme Court of Washington concluded that Knight had standing to challenge the preliminary plat approval, reversed the Court of Appeals' decision, and reinstated the superior court judgment requiring proof of sufficient water availability prior to final plat approval. In so doing, the Supreme Court of Washington signaled its support for greater integration of local land use planning and natural resources.

Brian Zucco

Knight v. City of Yelm, 173 Wash.2d 325, 267 P.3d 973 (2011)

Cases From Other Jurisdictions

■ NINTH CIRCUIT AFFIRMS CITY ORDINANCE PROHIBITING CONVERSION OF SENIOR HOUSING IN MOBILE HOME PARK TO "ALL AGE" HOUSING

Putnam Family Partnership v. City of Yucaipa, California, 673 F.3d 920 (9th Cir. 2012), involved the appeal of four mobile home park owners challenging a city ordinance that prohibited them and others from converting existing age-restricted senior housing in mobile home parks to all-age housing. Defendant city had adopted an amendment to its general (comprehensive) plan creating a "Senior Mobilehome Park Overlay District," which was placed on the 22 existing senior parks in the city. The amendment required the parks to continue to be operated as senior housing (meaning (1) 80% of a park's spaces were intended for persons 55 or older or (2) all inhabitants were 62 or older) and prohibited conversion to all-age housing. The ordinance also required signage, advertising, rental agreements, and the like to state that the housing is restricted to seniors.

Plaintiffs challenged the ordinance, alleging that it required them to discriminate on the basis of age and familial status and to take action that otherwise violated the Federal Fair Housing Act Amendments ("FHAA") of 1988, a challenge that was ultimately rejected. Plaintiffs also alleged the ordinance violated California fair housing laws, to which the city responded that the ordinance "fell within the FHAA's senior exemption, which allows communities that provide 'housing for older persons' to exclude families with children." 673 F.3d at 924 (quoting 42 U.S.C. § 3607(b)(1)). Plaintiffs argued that the exemption did not apply because the City lacked the necessary intent to operate housing for seniors. The trial court dismissed the suit, finding that the intent requirement was not limited to the landowner and could be that of the city in adopting its ordinance. Plaintiffs appealed.

The court began its analysis with the Fair Housing Act, which originally prohibited discrimination in the sale or rental of housing on the basis of race, color, religion, sex, or national origin. That act was amended by the Fair Housing Act Amendments in 1988 to prohibit discrimination on the basis of family status as well. However, the 1988 amendments also created an exemption for housing for older persons, framing the exemption as an affirmative defense if all the qualifications were met (i.e., that at least one person in the dwelling is over 55 or all persons are over 62) and the housing is "intended and operated" as senior housing. *Id.* at 925 (quoting 42 U.S.C. § 3607(b)(2)(C)). That legislation also required the U.S. Department of Housing and Urban Development (HUD) to adopt implementing regulations to meet certain legislative factors. Congress also enacted the Housing for Older Persons Act (HOPA) in 1995 to eliminate both a previous facilities requirement for senior housing as well as a requirement that the owner or manager have the intent to provide senior housing. While Congress did not provide legislative history for the latter change, HUD's subsequent regulations provided examples of intent and specifically allowed for zoning regulations that limit housing to seniors as evidence of intent. With this legislative history in mind, the court examined the challenged ordinance.

The court stressed that "discrimination on the basis of familial status does not violate the FHAA if the federal senior exemption applies because the FHAA's ban on such discrimination does not apply to 'housing for older persons.'" *Id.* at 927 (quoting 42 U.S.C. § 3607(b)(1)). The city also argued that its ordinance supplied the necessary intent under federal law.

This was a question of first impression in the federal courts. The Ninth Circuit said it would defer to HUD's rules, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). In this case, intent is required but the statute is silent as to whose intent must be involved. The HUD regulations suggest it is the facility or "community" that may supply that intent and that community could be a city. Because the statute is silent and the court defers to HUD under *Chevron*, the court found the zoning scheme sufficient to supply the

necessary intent, especially in the light of the expressed congressional intent in passing HOPA "to preserve housing for older persons." *Id.* at 927 (quoting S.Rep. No. 104–172, at 2, 6, 1995 U.S.C.C.A.N. 778, 783).

In light of this intent, or even in the absence of it, the court deferred to HUD's rules and found the requisite intent. The court rejected plaintiffs' contention that there were no provisions for federally required age verification in this housing development under the City ordinance as this issue was not raised below. The court also found unpersuasive the plaintiffs' argument that the FHA preempted the City's ordinance and affirmed the trial court's dismissal of this case.

This case found there to be an intentional senior community because the City's zoning requirements so provided, even if the owners did not. Nevertheless, that result appears to follow HUD's regulations in the absence of contrary statutory direction.

Edward J. Sullivan

Putnam Family Partnership v. City of Yucaipa, California, 673 F.3d 920 (9th Cir. 2012)

■ CALIFORNIA APPELLATE COURT ENFORCES "ANTI-NIMBY" LAW

Honchariw v. County of Stanislaus, 200 Cal. App. 4th 1066, 132 Cal. Rptr. 3d 874 (2011), involved Cal. Govt. Code § 65589.5, part of the "Housing Accountability Act" (the "Act"), known to others as the "Anti-NIMBY Law," which limited the ability of local governments to "reject or make unfeasible" housing developments without a thorough analysis of the economic, social and environmental effects of those actions. If such a development were rejected or rendered unfeasible, written findings, supported by substantial evidence, must explain why the project would have a "specific adverse impact upon the public health or safety unless the project is disapproved" and there is no feasible mitigation to avoid that adverse impact, short of denial.

The county denied developer Honchariw's 8-parcel land division and housing project without making the necessary findings under the Act and Honchariw sought an administrative mandamus to challenge that action. The trial court upheld the denial because the project allegedly did not comply with particular plan and zoning standards, including design review requirements. The county pointed out that four of the eight lots did not have water service "available," which was normally required under its code, and thus justified the denial, also claiming that the Act applied only to affordable housing projects.

The local water service district issued a "will not serve" letter for four of the proposed lots, so plaintiffs applied for an exception to the general requirement of the code for water service from a public agency "if available," proposing to use wells. The County Planning Commission and Board of Supervisors ("the Board") denied both the exception and the subdivision. Honchariw claimed his project complied with objective plan and zoning standards and criteria and the County's decision failed to comply with the Act's findings and evidentiary requirements.

The trial court affirmed the county's action and the plaintiffs appealed to the Court of Appeals. The first question the court addressed was whether the Act applied to plaintiffs' proposed development or only to affordable housing applications. The court concluded that the statute was not so limited and, even though affordable housing is mentioned elsewhere in the same section, the plain wording of the term "housing development project" is broader than the later, more specific mentions of "affordable housing." While the amendments to the statute involved different kinds of housing, it was clear to the court, after an examination of the legislative history of the statute and its application through previous case law, that the Act applied to all housing projects.

The court then turned to the question of whether the proposed project failed to comply with "applicable, objective general plan and zoning standards and criteria including design review standards" At the Board of Supervisors hearing, the county counsel advised the Board that the Act was not applicable if the Board could find the project did not meet planning and zoning standards, and that, in that event, no findings under the Act were necessary. The Board denied the project, finding the site "not physically suitable" for the land division and declined to make findings under the Act. It wasn't until the administrative mandamus proceedings were brought that the county claimed the issue of water-availability was a design review requirement. However, the connection requirement applied only if water service was "available." The court concluded that no finding on water service was required because the availability requirement was not a design review standard. In the alternative, the court ruled the county's denial of plaintiffs' request for an exception from this requirement lacked evidentiary support. Moreover the court noted that the water availability standard was not applicable until the building permit stage.

Finding the requirements of the Act were not met because the respondent did not bear its burden by entering the necessary findings, supported by substantial evidence, the appellate court reversed the trial court judgment and ordered that respondent's decision be vacated and that any denial be justified in accordance with the terms of the Act.

This case involves legislation that places the burden on a local government to support denial of a proposed housing project with findings based on substantial evidence. The wording of the necessary findings required under the Act is meant to be burdensome and to limit denials (or approvals with conditions that make the project unfeasible). Given the frequency with which California legislation is introduced in Oregon, it would not be surprising to see a version of the Housing Accountability Act proposed in this state.

Edward J. Sullivan

Honchariw v. County of Stanislaus, 200 Cal. App. 4th 1066, 132 Cal. Rptr. 3d, 874 (2011).

Land Use Board of Appeals

■ LUBA JURISDICTION

LUBA's decision in *Mingo v. Morrow County*, ___Or LUBA___ LUBA No. 2011-100 (3/19/2012) (*Mingo II*) explores the dividing line between circuit court and LUBA jurisdiction when a local government enforces or—as here--declines to enforce a land use decision's conditions of approval.

The county initially granted Invenergy LLC and Willow Creek Energy LLC's conditional use application for a 48-turbine wind energy facility and imposed a condition requiring compliance with DEQ's noise standards in OAR Chapter 340, Division 35, and the county's noise ordinance (Condition 1). In response to noise complaints filed after the facility was built and operational, the county held hearings and adopted a decision concluding the facility violated the noise standards at one residence but not at three others, prescribing a time period and method for complying with the standards, and establishing that total noise may not exceed 36 dBA. On appeal, LUBA remanded the county's decision, finding it lacked adequate findings and evidentiary support and concluding the county misconstrued DEQ's noise standards and the compliance options specified in these standards. *Mingo v. Morrow County*,___Or LUBA___, LUBA Nos. 2011-14/2011-16/2011-17 (6/1/2011) (*Mingo I*). After a hearing on remand based on the existing record, the county issued a new decision concluding: (1) the wind facility violated noise standards at three residences (Eaton, Mingo and Wallace), but not at a fourth residence (Wade); (2) the evidence submitted by the operators' expert was credible; and (3) based on the expert evidence, the noise violations were not serious enough to merit revoking the conditional use permit or requiring further corrective action.

In this second appeal, LUBA raised on its own initiative the question of whether it had jurisdiction to review the county's decision and ruled that it did given the manner in which the county addressed the noise complaints. ORS 197.825(1) gives LUBA exclusive jurisdiction to review land use decisions while the circuit courts retain jurisdiction to resolve actions to enforce local comprehensive plans or land use regulations under ORS 197.825(3). Noting the sometimes problematic nature of applying these jurisdictional grants, LUBA observed that they do not overlap. As applied here, petitioners in *Mingo II* had two routes for seeking enforcement of the noise standards: they could have gone directly to circuit court or filed complaints with the county as they did here. Petitioners' choice of the second route framed the jurisdictional question LUBA addressed: "[W]hether that county***decision is a final decision that concerns the application of county land use regulations, so that the decision is a land use decision as defined by ORS 197.015(10)(a) and subject to LUBA's review jurisdiction." (Slip op. at 9)

Had the county simply decided it would not enforce Condition 1 without adopting any written decision, the county's decision would not be a land use decision and LUBA would have dismissed the appeal. However, the county held hearings and made a decision in response to the noise complaints that applied DEQ's noise standards. Additionally, the county did not dispute petitioners' contention that it had adopted these noise standards as part of the county's land use regulations. Under these circumstances, LUBA concluded the appealed decision was a land use decision that it had jurisdiction to review.

■ LOCAL PROCEDURE

One clear message from LUBA's decision in *Oregon Natural Desert Association v. Harney County,* ___Or LUBA___, LUBA No. 2011-097 (5/3/2012) is that a decision maker who asserts bias as a basis for recusing himself from participating in a land use matter must refrain from ***all*** participation in the matter, regardless of how innocuous any incidental participation may seem.

Petitioner Association appealed the county's approval of dwelling in conjunction with farm use on a 480-acre parcel

located on the western slope of Steens Mountain. The planning director approved the farm dwelling application and the Association appealed it first to the planning commission and, following the commission's approval, to the county court. While the appeal was pending before the planning commission, a newly elected member of the county court (Runnel) published an opinion piece in a local newspaper that referred to the Association as "an 'extreme environmental organization' and a 'silent killer' engaged in 'terrorism'." (Slip op. at 3) At the county court's hearing on the appeal, Runnel recused himself on the grounds of bias and stated he would vote only if necessary to break a tie. He sat through the hearing and deliberations, during which the two other county court members indicated they supported denying the Association's appeal and approving the application. Before voting, the presiding county court member asked Runnel if he wanted to say anything. Runnel responded that he agreed with the presiding court member's analysis and thought the Association was "grasping at straws." (Slip op. at 3) The county court voted 2-0 to approve the farm dwelling application and all county court members, including Runnel, signed the county's final decision.

On appeal to LUBA, the Association argued Runnel should not have participated in the decision because he was biased toward the Association. LUBA agreed that Runnels's previously published opinion piece reflected "a strong emotional bias" against the Association and he was obligated to recuse himself from participating in the county court's proceedings on the Association's appeal. The closer question for LUBA was whether his recusal and subsequent limited participation during deliberations was an error that warranted a remand. Given the 2-0 vote to deny the Association's appeal and approve the farm dwelling application, LUBA acknowledged that Runnel's participation may not have tainted or affected the outcome of the county court's appeal hearing. Since LUBA ultimately sustained one of the Association's substantive assignments of error and concluded a remand was necessary, LUBA declined to decide whether Runnel's actions offered an independent basis for remanding the county's decision. Nevertheless, LUBA instructed the county on remand to "conduct new deliberations and a new vote on the merits of the appeal and application without any participation from Commissioner Runnel." (Slip op. at 6)

■ *VESTED RIGHTS*

Crosley v. Columbia County, ___Or LUBA___, LUBA No. 2011-093 (4/11/2012) is one of the few recent decisions that addresses vested rights issues outside of the Measure 49 context. In 2011, petitioner applied for county approval to complete construction of his partially built dwelling. He had constructed a septic system in 1978 and a foundation for a single family dwelling in 1979, but had not undertaken any other activity to complete the building until 2009. During the interim, the county adopted a comprehensive plan and zoning regulations, which ultimately included petitioner's property in a Primary Forest zone, a flood hazard overlay that required a flood hazard permit before construction, and a riparian corridor requiring setbacks from the banks of a creek that flows through petitioner's property. In 2009, petitioner resumed building a dwelling on the property, including framing walls and constructing a roof and decks. He did not apply for permits from the county at that time. In response to petitioner's 2011 application to complete construction, the county approved his request with conditions requiring him to relocate the dwelling to comply with the riparian corridor setback and apply for a floodplain development permit.

LUBA framed the question presented in the petitioner's appeal as "whetehr during the 30-year period between 1979 and 2009 petitioner lost any vested right he had in 1979 by discontinuing construction of the dwelling for a period of more than one year." Slip op. at 3. Petitioner based his vested right claim on work he had performed to maintain the foundation, pest control, riparian maintenance and enhancement, and "additional incidental work intended to further the use of the Property for a single family dwelling." *Id.* LUBA noted the county's code, like ORS 215.130, allows a property owner with a nonconforming use to perform normal maintenance and repair, but restricts rebuilding or expansion of the nonconforming use. It also specifies that discontinuation of the use for more than one year results in the loss of nonconforming use rights.

Relying on the Court of Appeals' decision in ***Fountain Village Dev. Co. v. Multnomah County***, 176 Or App 213, 31 P3d 458 (2001), LUBA distinguished between permissible maintenance activities for an existing nonconforming use and the kind of activities that are sufficient to create a vested right. A vested right is the right to finish construction of a proposed use, which, on completion, is converted to a nonconforming use. It is "an inchoate nonconforming use, ***i.e.***, a use that does not yet exist." As a result, LUBA agreed with the county that maintenance activities are not a sufficient basis for a vested right since there is not yet any nonconforming use to maintain. The county's findings were sufficient to explain why the county concluded that petitioner's maintenance activities were not substantial activities directed toward completing the dwelling and, therefore, why petitioner's nonconforming use rights were lost through discontinuance for more than one year. Finding no error in the county's findings or application of its code, LUBA affirmed the county's decision.

Kathryn S. Beaumont