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# *Appellate Cases – Oregon*

## ■ *LOCAL ORDINANCE REQUIRING CONDITIONAL USE PERMIT FOR SHOOTING RANGE NOT PREEMPTED BY STATE LAW*

*Conrady v. Lincoln County,* 260 Or. App. 115, 316 P.3d 413 (2013), arose out of a dispute between property owners and Lincoln County regarding whether a conditional use permit was required to operate a shooting range on land zoned for timber use. To resolve the parties' dispute, the property owners filed an action in circuit court. They sought a declaration that state law preempts a county code provision requiring a property owner to obtain a conditional use permit to operate a shooting range.

The property owners relied on three statutory provisions: (1) ORS 166.170, which sets forth a general rule that state, not local, government is authorized to regulate the sale, acquisition, transfer, ownership, possession, storage, transportation, or use of firearms, unless authorized by the legislature; (2) ORS 166.171, which authorizes counties to regulate the discharge of firearms, but precludes counties from applying their ordinances to persons discharging firearms at public or private shooting ranges; and (3) ORS 166.176, which allows counties to enforce certain ordinances adopted before the aforementioned statutes went into effect but includes an exception relating to ordinances regulating, restricting, or prohibiting the discharge of firearms at a shooting range. According to the property owners, the listed statutes demonstrated clear legislative intent to exempt shooting ranges from county regulation.

In response, the county argued that those statutes limited the county's ability to regulate what happens on an established shooting range but that the county retained the authority to require property owners to secure a permit to site a shooting range in the first instance. The circuit court agreed with the county's understanding of the preemption statute, finding that the local code requirement was not preempted by state law.

The Oregon Court of Appeals affirmed the judgment of the circuit court. Applying the statutory construction methodology set forth in *State v. Gaines*, 346 Or. 160, 171-72, 206 P.3d 1042 (2009), the court found support for both the property owners' and the county's positions, so the court turned to the legislative history. Although the court found that the legislative history better supported the county's position, the court reasoned that the legislative history did not conclusively resolve the ambiguity in the text of the statutes. Ultimately, the court based its decision on the general maxim of construction that the legislature "did not intend an unreasonable result." 260 Or. App. 115, 132. The court reasoned:

> Under [the property owners'] proposed construction . . . the legislature preempted all local ordinances concerning the siting of shooting ranges and did not replace those local ordinances with any statewide standards. That interpretation . . . would mean that a local government could not enact or enforce an ordinance intended to prevent a business from opening a commercial shooting range next to a home, or a school, or a hospital.

*Id.* at 133. Accordingly, the court concluded that the local ordinance requiring a conditional use permit to operate a shooting range was not an ordinance regulating, restricting, or prohibiting the discharge of firearms on a shooting range and therefore was not preempted by state law. *Id.* at 133-34.

**Sarah Stauffer Curtiss**

*Conrady v. Lincoln County,* 260 Or. App. 115, 316 P.3d 413 (2013)

## WAITING FOR A MEANINGFUL EXPLANATION OF THE WOODBURN URBAN GROWTH BOUNDARY EXPANSION

In *1000 Friends of Oregon v. Land Conservation and Development Commission*, 260 Or. App. 444, 317 P.3d 927 (2014), the Oregon Court of Appeals reviewed a second order of the Land Conservation and Development Commission (LCDC) approving the City of Woodburn's urban growth boundary (UGB) amendment to include an additional 409 acres for industrial use. *See 1000 Friends of Oregon v. LCDC*, 237 Or. App. 213, 239 P.3d 272 (2010) (***Woodburn I***). In ***Woodburn I***, having held that LCDC's order approving the city's UGB expansion was inadequate for judicial review, the court of appeals reversed and remanded the case to LCDC for reconsideration. LCDC then completed its reconsideration and issued a revised order and again approved the city's UGB expansion. On review, the court held that LCDC's revised order on remand was "not supported by substantial reason" because it did not provide a meaningful explanation of LCDC's conclusion that steps taken by the city satisfied the legal standards for expansion of the UGB. 260 Or. App. 444, 452-55. The court again reversed and remanded LCDC's revised order for another reconsideration.

The petitioners in this case challenged two aspects of LCDC's order: (1) its approval of the amount of industrial land in the UGB amendment, 409 gross acres; and (2) its approval of the inclusion of particular high-value farmland within the UGB as industrial land. Because the court concluded that LCDC again did not adequately explain why the city's expansion of its UGB to include additional land for industrial use is consistent with the applicable law, the court reversed and remanded without even considering the second issue—the inclusion of high-value farmland within the city's UGB.

The legal framework for these appeals are Oregon's land use statutes governing the periodic review of local comprehensive land use plans. *See* ORS 197.628 to 197.636. Pursuant to these statutes, the city of Woodburn began periodic review to update its comprehensive plan in the late 1990s and in 2005 decided to expand its UGB to include 409 gross acres for industrial uses. To support its need for expansion, the city performed an economic-opportunities analysis (as required by OAR 660-009-0015), an economic development strategy (as required by OAR 660-009-0020), and a site requirements analysis. The city used a "target-industries" approach to justify the number of acres of industrial land that it added to its UGB. The "target-industries" approach employed by the city differs from the formulaic and more common "employees-per-acre" approach in that the target-industries approach considers a local government's employment-growth projections and goals and establishes a framework for attracting the kind of employers that could support the kind and amount of growth sought by the local government.

In this case, the target-industries approach developed by the city aimed to promote growth by pursuing development that would create higher-paying jobs to attract new residents to live and work in Woodburn. Simply put, the city concluded that in order to achieve the desired growth it would need to develop about 370 acres, but it would also need to provide choice among an adequate inventory of suitable sites. The city therefore sought to expand its UGB by 409 acres.

The petitioners objected to the UGB amendment by contending that the city included more industrial land within its amended boundary than was necessary, in violation of Goal 9, the land-use planning goal that addresses economic development. ***Woodburn I***, 237 Or. App. at 222, 239 P.3d 272. The petitioners also argued that the city's target-industries approach inflated the number of acres necessary to accommodate industrial job growth and did not demonstrate the need for any additional industrial land to be included in the proposed UGB expansion as required by Goal 14, the land use planning goal that addresses urbanization. *Id*. In ***Woodburn I***, the court stated:

> [B]ecause LCDC did not adequately explain the reasons that the UGB amendment—which included more industrial land than will be developed during the planning period so that the city could provide for market choice among sites—was consistent with Goals 9 and 14, its order failed to respond to petitioners' objections and [was] inadequate for judicial review . . . concerning the propriety of the UGB amendment.

*Id*. at 226-227, 239 P.3d 272.

On remand, LCDC issued a revised order and attempted to address the court's holding from ***Woodburn I*** by incorporating analyses of: (1) what it characterized as a "close correlation" between the need for industrial land calculated using the employees-per-acre approach versus the target-industries approach employed by the city, and (2) the city's population, employment, target industries and site requirements, which LCDC concluded provided a factual and analytical base for the city's decision that was consistent with Goal 9, Goal 14, and ORS 197.712 (setting forth comprehensive plan requirements). On this second review, the court held that the analysis in LCDC's revised order, while notably more lengthy than the discussion in LCDC's original order, was not supported by substantial reason. Upon carefully reviewing LCDC's revised order, the court determined that it was filled with findings of fact, statements of law and policy, and conclusions that the facts in this case satisfy the law, but was devoid of any reasoning to connect the facts to LCDC's conclusion and thereby lacked a meaningful explanation of why the steps taken by the city were satisfactory under the law. For example, LCDC provided no explanation for its conclusion that a close correlation between projected land need based on an employee-per-acre ratio and projected land need based on a target-industries analysis "corroborates" the number projected by the city's target-industries approach. Nor was there any explanation of what constitutes a "close correlation." The court also explained that, to the extent LCDC found

that the city's actions complied with the law merely because the city had engaged in a particular process, that conclusion was insufficient on its own without examining the results of the process. In doing so, the court held that the substantial reason standard requires, at least, an explanation of why the process in which a local government engaged and the results that it reached are consistent with the law.

With additional guidance in hand, perhaps the third time will be the charm for LCDC to substantiate its approval of Woodburn's UGB expansion.

**Tyler Bellis**

*1000 Friends of Oregon v. Land Conservation and Dev. Comm'n*, 260 Or. App. 444, 317 P.3d 927 (2014)

## ■ EAT UP: NEW EFU CLARIFICATIONS

The Oregon Court of Appeals made several clarifications to the exclusive farm use ("EFU") statutes in ***Greenfield v. Multnomah County***, 259 Or. App. 687, 317 P.3d 274 (2013). The court concluded that outdoor "farm-to-plate" dinners are within the scope of the promotions clause, that food carts at farms are structures under the statute, and that small-scale gatherings can fit within the promotions clause. The court remanded the case to determine if the food carts meet the requirements for structures allowed at a farm stand.

Bella Organic, LLC ("Bella") owns a farm on EFU land on Sauvie Island. Pursuant to a Multnomah County permit, Bella operated a farm stand to sell farm products, "incidental" retail items, and "prepared food from the farm stand." 259 Or. App. 687, 692. In 2012, Bella applied to the county to modify its permit to allow it to conduct "[f]ee-based farm stand activities including . . . small-scale gatherings such as birthdays, picnics and similar activities . . ." and "[f]ee-based farm-to-plate dinner[s] . . . ," which were held outdoors. *Id.* at 693. The hearings officer substantially approved the request but denied Bella's application to use tents on the property in connection with events. Bella and its neighbor Greenfield both appealed to the Land Use Board of Appeals ("LUBA").

LUBA considered the statute and rule, ORS 215.283 and OAR 660-033-0130, and concluded that the farm-to-plate dinners were prohibited because "banquets" are prohibited in farm stand structures; that tents and the requested corn maze viewing platform were "structures" not solely for the "sale of incidental retail items or promotional activities," and were therefore also not allowable; and that the use of food carts at events was inconsistent with "incidental retail sales." It also found that the small-scale gatherings use was consistent with the farm stand rule. *Id.* at 694. The county, Bella, and Greenfield all sought review of the LUBA order.

> There were four issues before the court:
>
> (1) whether outdoor dinners to be conducted at Bella's farm, so-called "farm-to-plate" dinners, are "fee-based activit[ies] to promote the sale of farm crops . . . sold at the farm stand"; (2) whether the rule precludes structures that are used solely


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> for incidental retail sales or fee-based promotional activities, and not otherwise used for the sale of farm crops and livestock, and, if so, whether food carts, tents, and a corn maze public viewing platform are those types of prohibited structures; (3) whether the rule's allowance of the sale of "retail incidental items" implies a limit on the extent of any allowed food cart sales; and (4) whether the approved "small-scale gatherings such as birthdays, picnics, and similar activities" as conditioned by the permit are within the scope of the promotions clause.

*Id*. at 695.

Looking first at the "farm-to-plate" dinners and whether they were covered by the promotions clause, the court applied the statutory construction principles in ORS 174.020, *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), and *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009). Finding that the promotions clause in ORS 251.283(1)(o)(A)—which concerns "fee-based activity to promote the sale of farm crops or livestock sold at the farm stand"—was ambiguous, the court looked to the legislative history. The court determined that the original language in the statute only allowed farm stands for the sale of farm crops and livestock. *Id*. at 700. In 2001, when the legislature amended the statute to add the promotions clause, the revision was minor and did not change the limits on farm stand structures. The court therefore concluded that the intent of the bill was to "authorize promotional activities, outside of a farm stand structure, as part of a farm stand permit allowance, activities that were not otherwise accessory uses to the farm stand or authorized by other laws." *Id*. at 703.

Having concluded that the promotions clause authorizes promotional activities outside of a farm stand structure, the court then turned to whether the statute similarly authorizes outdoor promotional activities. Again looking to the legislative history, the court found that the legislature was primarily concerned with avoiding commercial structures on farmland, "such as restaurants, supermarkets, or stadiums." *Id*. at 704. Because ORS 215.283(1)(o)(B) limits activities inside farm stand structures and ORS 215.283(1)(o)(A) separately authorizes structures, the court concluded that the restrictions in subsection (B) do not apply to structures in subsection (A). "Had the legislature intended a broader effect of the statute's limitations on the use of structures, it would have written the restriction as a limit on any farm stand use rather than a limit on the use of structures." *Id*. Accordingly, the court held that LUBA erred in reasoning that farm-to-plate dinners were not allowed because "banquets" were not permitted in farm stand structures. *Id*.

The court next considered whether LUBA had correctly construed the statute as precluding farm stand structures solely "for the sale of retail items or for a fee-based promotional activity" as opposed to structures "for sale of farm crops and livestock." LUBA had concluded that structures specifically designed and used for retail sales and promotional activities were prohibited by the statute, therefore prohibiting Bella's tents and corn maze viewing structure. *Id.* Citing its conclusion regarding the promotions clause above, the court noted that the promotions clause is a stand-alone use allowance; the "statute's allowance of the use of a farm stand structure for 'the sale of farm crops or livestock' does not include the outright use of the structure for promotional activities, much less use of a structure only for those activities." *Id.* at 705 (emphasis in original).

Again relying on statutory interpretation and legislative history, the court determined the meaning of the word "structure." The court agreed with LUBA that "structure" was not limited to buildings or construction that were permanent in nature. Instead, the term included temporary ones. The term refers to both building and non-building structures, or "structures constructed or built for public occupancy or use that are not roofed or enclosed by walls." *Id.* at 708. Because Bella's food carts were structures, the court found that they were permissible only if they were "'designed and used for the sale of farm crops or livestock grown on the farm operation' and are not designed for activities other than the sale of farm crops or livestock." *Id.* at 709. The court remanded this question to LUBA to make the determination or to direct the county hearings officer to do so. *Id.*

Next, the court turned to the portion of the statute authorizing "the sale of retail incidental items." ORS 215.283(1)(o)(A). Using the plain meaning of the term "incidental," the court found that, in the context of the farm stand statute, the term "incidental" "limits the number of the types of nonfarm crops or livestock items sold at the farm stand." *Id.* at 711. The court therefore held that LUBA did not err in remanding the food cart allowance to the county for it to determine if the food items sold at the food carts would be more than incidental. *Id.*

The final question was whether LUBA correctly concluded that the county's allowance of "small-scale gatherings such as birthdays, picnics, and similar activities" was permissible as a farm stand use. The court differentiated these small-scale gatherings from gatherings prohibited at farm stands, such as weddings and corporate events, by focusing on the purpose of the event. In agreeing with LUBA, the court found that the small-scale gatherings primarily promote the sale of farm products at the farm stand and, in fact, the county expressly conditioned the activities upon the promotion of the "farm stand and contemporaneous crops sold in the farm stand . . . ." *Id.* at 714. The activities occurred only during the times that the farm stand was open for business, took place outdoors instead of in a structure, and, in Bella's case, often included "farm tours, educational presentations about farming, or farming or harvesting activities as a significant part of the event." *Id.*

**Shelby Rihala**

*Greenfield v. Multnomah County*, 259 Or. App. 687, 317 P.3d 274 (2013)

## ■ NINTH CIRCUIT REVERSES SUMMARY JUDGMENT FOR CALIFORNIA CITY IN HOUSING DISCRIMINATION CASE

*Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), involved amendments to defendant city's zoning ordinance at the behest of neighbors to limit or prohibit most group homes in residential zones. To avoid an actual discrimination claim against group homes, the city considered restrictions on other kinds of short-term rental housing or group housing in the vicinity so as to add a "veneer of neutrality," to the new regulations, 730 F.3d 1142, 1147. The district court granted the city's motion for summary judgment, finding that, although the city had acted with a discriminatory purpose, group homes were treated no worse than other living arrangements. On appeal, the issue for the Ninth Circuit was whether a facially neutral ordinance would pass muster under the federal Fair Housing Act ("FHA"), the Americans with Disabilities Act ("ADA"), and similar California state law provisions and whether such intent could be gleaned from direct or circumstantial evidence.

The city has about 80,000 people and is one of the wealthiest cities in California. In April 2007, the city had 73 group homes and 48 licensed treatment facilities, in addition to 25 unlicensed "sober" homes. The city also had 801 short-term housing units for vacation rental. In a series of public meetings, some residents referred to persons in recovery as "druggies" and "not true handicapped." 730 F.3d at 1163. Public agitation resulted in a moratorium while the city council appointed a task force to study and make recommendations on the matter. The moratorium also applied to short-term vacation rentals, but there was considerable opposition to that inclusion. A report was made that was based in part on a survey of people in the areas most affected by group homes. Ultimately the city lifted the moratorium only as to the short-term vacation rentals. The city council then formed a task force to investigate and bring enforcement proceedings against group homes. The council also hired outside counsel to draft tighter group home regulations. However, that counsel recommended that the regulations be applied to short-term rentals, which the city refused to do. Instead, the city adopted regulations written by a group opposed to group homes and replaced its outside special counsel. A special committee presented final ordinance recommendations, after meeting in secret, and stated four objectives for the city:

1. no new group homes in the city;
2. stronger regulation of existing group homes with an available penalty of license revocation;
3. strict enforcement of ordinances going forward; and
4. "to substantially relieve the over-concentration of group homes and their adverse impacts."

*Id.* at 1151.

The new regulations required each housekeeping unit for group housing to have a single written lease and to have the residents themselves decide who would be a member of that household. Both of these items were impossible requirements for traditional group home living. Group homes were allowed only in multi-family zones under a discretionary permit system, which included requirements to deal with "over-concentration." Existing group homes were required to apply for a discretionary permit within 90 days of the adoption of the ordinance in order to keep operating. In addition to over-concentration, the permit required a hearings officer to decide whether the use was "compatible" with the surrounding neighborhood. An applicant could ask for a waiver as a "reasonable accommodation" for the existing use by the hearings officer. However, the hearings officer would then be required to determine whether the grant of the permit would "alter the character of the neighborhood." After the 90-day grace period, the city could, and did, commence "abatement notifications" with respect to those group homes that did not apply for a new permit. No such notifications were sent to businesses other than group homes, even if covered by the ordinance. Most applications for continued operation were denied, but about a third of the group homes closed, while others reduced their numbers of residents and, consequently, revenues.

Plaintiffs, the owners of a group home and two of its residents, sued the city for discrimination under the FHA, the ADA, and the California Fair Employment and Housing Act ("the California FEHA"), in addition to the Equal Protection clause of the federal constitution. The trial court found evidence of discriminatory intent, yet dismissed most of the disparate treatment and selective enforcement claims as plaintiffs allegedly failed to show that they were treated differently from others under the ordinance. That court denied the city's motion for summary judgment on the revised moratorium, finding it facially discriminatory against group homes. Finally, the court also denied plaintiffs' claims for damages because plaintiffs failed to show the city's ordinance, rather than other factors including the economic recession, caused their financial harm. To obtain a final judgment, plaintiffs then voluntarily dismissed their remaining claims, which consisted of appeals of individual denials or modifications of applications under the new ordinance, and appealed to the Ninth Circuit.

On review of the denial of summary judgment, the court said that plaintiffs' intentional discrimination claims under the ADA, FHA, and California FEHA are cognizable and could go forward if the record contains any indication of discriminatory activity sufficient to avoid summary judgment. Under the FHA, it is unlawful to discriminate in the sale or rental of housing or otherwise to make unavailable or deny housing to a buyer or renter because of a handicap. Those receiving treatment for drug and alcohol abuse are "handicapped" within the meaning of the FHA and local zoning practices that discriminate against

handicapped individuals violate the FHA. The ADA provides that no qualified individual with a disability shall for that reason be excluded or denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by such entity. The ADA also applies to discriminatory zoning practices. The two acts are often interpreted in tandem. The city did not challenge these principles.

The court said that one who is allegedly the subject of statutory discrimination need not demonstrate that another entity was treated better—though that is one way to show discriminatory intent. All a plaintiff must show is direct or circumstantial evidence that a discriminatory reason is more likely than not the cause and that plaintiff was adversely affected.

The court said it would engage in a "sensitive" and multi-factor inquiry to determine whether the city's actions were motivated by discriminatory intent by examining several such factors from ***Arlington Heights v. Metropolitan Housing Corporation***, 429 U.S. 252, 266 (1977):

> (1) statistics demonstrating a "clear pattern unexplainable on grounds other than" discriminatory ones, (2) "[t]he historical background of the decision," (3) "[t]he specific sequence of events leading up to the challenged decision," (4) the substantive conclusions, and (5) relevant "legislative or administrative history."

*Id.* at 1158-59. The court called the factors "non-exhaustive" and the burden a light one, thus rejecting the trial court's apparent requirement that a plaintiff must establish a ***prima facie*** case that the plaintiff was treated worse than others. The court said such an approach would lead to unacceptable results. If a defendant openly admits its intent to discriminate and relies on a facially neutral law or policy that also "over discriminates" against others who are not part of a disfavored group, there is no immunization from anti-discrimination laws. This activity would underscore the depth of the discriminatory animus, such as a decision to close all public schools to avoid integration. Thus, if a facially neutral law were adopted for a discriminatory purpose, the court may find a violation of anti-discrimination laws.

In this case, it is clear that the challenged ordinance was adopted to reduce or eliminate group homes as shown by statistical evidence supplied by the city, along with the history of the adoption of the ordinance. Also, the ordinance replaced a short-term ban that originally imposed restrictions on short-term vacation rentals. A jury could find that the ordinance was designed to eliminate group homes rather than serve as a neutral amendment to the zoning ordinance. The court pointed out some procedural irregularities in the adoption of the challenged ordinance:

1. the creation of an ad hoc committee that met in private—something the city had never done before—to work with new counsel to draft the ordinance;
2. the use of a survey sent primarily to those opposed to group homes to justify the differential treatment of group homes from vacation rentals; and
3. the creation of a task force for strict enforcement of the new zoning code provisions against group homes.

*Id.* at 1165. The court concluded:

> In short, applying the Arlington Heights factors to the evidence in this record, it is clear that the Plaintiffs have met their burden to create a triable issue of fact as to whether the Ordinance was enacted with a discriminatory purpose of harming group homes and, therefore limiting the housing options available to disabled individuals recovering from addition.

*Id.* at 1163.

The court rejected the city's contentions that there were no adverse effects on plaintiffs, even if there was a discriminatory motive, because they had not filed appeals from the denial of permits or for those permits that had been granted for reduced numbers. The court said that the ordinance itself created an injury and that a plaintiff need not subject itself to the rigors of an administrative process to make a claim. Under the amendments, group homes must file a detailed application and attend public hearings to respond to public comment. The court concluded that subjecting an entity protected by anti-discrimination laws to a permit or regulatory process for a discriminatory purpose has obvious adverse impacts that establish an injury in a disparate treatment case. Thus, it is sufficient to show that substantial commitment of time, efforts and resources must be expended under the new process created by the revised ordinance which limits new group homes to multi-family zones and requires them to go through a discretionary process. It is also of note that one third of the existing homes closed and opportunities for the disabled were reduced. The court said it need not review the administrative actions itself and the voluntary dismissal of plaintiffs' various permit appeals only related to the injunctive relief claim.

The Ninth Circuit then turned to the trial court's dismissal because plaintiffs were allegedly unable to show the city's actions caused them injury. The cost of compliance resulted in a diversion of staff time and additional expenditures, which led to the reduction of beds, an increase in costs, and the impression that group homes were barred within the city. The court allowed an emotional distress claim by one plaintiff to proceed while finding that another claim by a different plaintiff lacked a sufficient basis.

The court concluded that there was sufficient evidence to preclude summary judgment in the city's favor on plaintiffs' disparate treatment claim. There was a triable issue of fact in that the ordinance was adopted to discriminate against plaintiffs on the basis of disability and its enactment and enforcement were also motivated by an animus against the disabled. The court

reversed the trial court's dismissal of most of plaintiffs' claims and remanded the matter for further action consistent with its opinion.

This case demonstrates that the Ninth Circuit's position on the burden used in disability discrimination cases requires little in the way of evidence and allegations to preclude summary judgment. Unless the United States Supreme Court takes a different view, this is the interpretation that will apply in Oregon.

**Edward J. Sullivan**

*Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013)

# Cases From Other Jurisdictions

## SEVENTH CIRCUIT AFFIRMS SUMMARY JUDGMENT UPHOLDING PROHIBITION OF BIBLE CAMP USE

*Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wisconsin*, 734 F.3d 673 (7th Cir. 2013), involved challenges to the rejection of two applications for a year-round bible camp under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"); the First and Fourteenth Amendments to the Federal Constitution; and Article I, Section 18 of the Wisconsin Constitution. Under Wisconsin law, defendant town had adopted a land use plan that encouraged low-density residential development around Squash Lake so as to preserve its rural and rustic character. Only 7 of the 77 parcels around the lake were zoned for nonresidential use and those parcels were already by business uses.

In 2001, the town voluntarily subjected itself to the Oneida County Zoning and Shoreland Protection Ordinance, under which religious uses were permitted on 43% of the lands within the county, and campgrounds (whether religious or secular) were permitted in 57% of the county. However, when plaintiffs sought rezoning of a lakeside parcel to accommodate its proposed bible camp, the town recommended denial for inconsistency with its superseded plan. The county denied the rezoning but, in responding to plaintiffs' RLUIPA contentions, said that a religious camp might be approvable under a conditional use permit. When plaintiff applied for that permit, the town again recommended denial and the county followed that recommendation as well. Plaintiff then brought these federal court proceedings, in addition to a Wisconsin state court certiorari proceeding. The federal trial court granted the town's motion for summary judgment and plaintiffs appealed to the Seventh Circuit.

The trial court found the county's ordinance contained no blanket exclusion of religious uses. Given the allowance of religious campgrounds in large portions of the county, there was no unreasonable limitation of those uses under RLUIPA. Turning to plaintiffs' substantial burden claim, the court decided that the fact that plaintiffs filed two different land use applications and failed did not, by itself, constitute a substantial burden under RLUIPA, citing ***Civil Liberties for Urban Believers v. City of Chicago***, 343 F.3d 752, 761 (7th Cir. 2003). The court also suggested that plaintiffs should have considered other parcels for their bible camp. Finally, the trial court found no violation of plaintiffs' free exercise rights under the federal or Wisconsin constitutions.

On review, the Seventh Circuit found that the town had given up its zoning power to the county, so that a review of only the town's residential and commercial designations around Squash Lake was insufficient for a RLUIPA analysis. The county's zoning regulations were the proper basis for that analysis. Moreover, consistency with the town's plan was not binding on the county, which made the final decision on rezoning, a process in which the town plays an advisory role. Since a religious camp may be constructed in 36% of the county, the court rejected the plaintiffs' claim that they were totally excluded from locating a bible camp in the county. 734 F.3d 673, 680.

As to the substantial burden claim, plaintiffs must show that the county regulation bears a direct, primary, and fundamental responsibility to render their religious exercise effectively impractical. That was not the case here—plaintiffs never looked at another site. Although there were other sites within the county that were feasible, the fact that a religious use was not allowed throughout the county did not create a substantial burden. The prohibition on campgrounds around Squash Lake occurred well before plaintiffs sought the proposed use. The court characterized the plaintiffs' claim as seeking an exception to existing zoning and regulations that were facially neutral through a request for special treatment.

The court also rejected plaintiffs' contentions that the town and county cost it considerable delay, uncertainty, and expense by misleading it to apply for uses that were ultimately denied. The court noted that expense and effort on various applications does not create a ***prima facia*** substantial burden nor entitle plaintiffs to relief by that fact. The town had a valid policy, which the county accepted, of quiet seclusion for families living around Squash Lake. Nor was there any hint of a denial of plaintiffs' free exercise rights. The court also noted that, in light of the amount of land available for religious camps, there was no unreasonable limitation on those uses in the county, even if it did not allow them along Squash Lake.

The court found the town and county did not violate the equal terms provisions of RLUIPA because religious and secular campgrounds were treated equally under the land use regulations. All were prohibited along Squash Lake.

Finally, the Seventh Circuit affirmed the dismissal of the Wisconsin constitutional claims. Under Article 1, section 18 of the Wisconsin Constitution, a claim may be made for denial of religious rights if a person or organization has a sincere religious belief that is burdened by a state or local law. If that is shown, the burden shifts to the public agency to show a compelling state interest that cannot be served by a less restrictive alternative. Assuming such a sincere belief in this case, the court found the defendant County has shown a compelling state interest in preserving the rural nature of land around Squash Lake by the least restrictive means possible, i.e. a facially neutral zoning ordinance. The Seventh Circuit affirmed the trial court decision. *Id.* at 683.

This case shows a now-familiar result of RLUIPA litigation in which no claim exists if there is a facially-neutral zoning ordinance that allows a religious use in some, but not all, of the area within the given jurisdiction.

**Edward J. Sullivan**

*Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro, Wis.*, 734 F.3d 673 (7th Cir. 2013)

# LUBA Summaries

## ■ LOCAL PROCEDURE

One of the typical formulas for determining whether a person has standing to appeal a local land use decision is whether the appellant can demonstrate that he/she is "adversely affected" or "aggrieved" by the decision. In ***Navickas v. Jackson County***, __ Or. LUBA __ (LUBA No. 2013-087, Jan. 21, 2014), LUBA explores what these terms mean in a local context. Petitioner in *Navickas* attempted to file a local appeal of a planning department site plan approval for a parking lot at the Mt. Ashland Ski Area. For a decision made without an evidentiary hearing, like the site plan approval, the county's code limited standing to appeal to persons entitled to notice or who were adversely affected or aggrieved by the decision regardless of whether or not they received notice. The code required written notice of the planning department's decision to be given to property owners within 750 feet of the property. Since petitioner lived 42 miles away from the proposed parking lot, there was no issue that the hearings officer properly concluded the petitioner was not entitled to notice.

Petitioner's appeal to LUBA focused on whether the hearings officer erred in dismissing the appeal because the petitioner was not adversely affected or aggrieved by the county's decision. As a preliminary matter, LUBA observed that the county's code appears to implement ORS 215.416(11), which describes the procedure and appeal rights where a county makes a decision without first providing a hearing. Turning to the legislative history of this statutory language and the case law interpreting it, LUBA noted that petitioner would have had to assert a position on the merits of the site plan review before he could appeal the planning staff's decision, citing ***Jefferson Landfill Committee v. Marion County***, 6 Or. LUBA 1 (1981), ***aff'd***, 65 Or. App. 319, 671 P.2d 763 (1983), ***rev'd and remanded***, 297 Or. 280, 686 P.2d 310 (1984). Since the petitioner did not do so, LUBA upheld the hearings officer's determination that petitioner was not aggrieved by the county's decision.

Noting that the test for whether a person is "adversely affected" is different, LUBA examined whether the hearings officer correctly concluded the county's decision does not impinge on "[petitioner's] use and enjoyment of his . . . property or otherwise detracts from interests personal to the petitioner" as the test was phrased in ***Jefferson Landfill***. The petitioner argued he uses the proposed parking lot area to snowshoe and lead hikes toward a geographic feature ("the knoll") and development of the parking lot would require him to use an alternate route to do so. He also asserted the proposed parking lot would have a negative effect on water quality. In LUBA's view, these statements were insufficient to establish the petitioner was adversely affected by the county's decision. In particular, LUBA relied on the fact that petitioner does not own property near the proposed parking lot, the petitioner's failure to explain how often he visited the area to gain access to the knoll, and his acknowledgment that there are alternative ways for him to reach the knoll. LUBA characterized as "speculative" the petitioner's assertions concerning the parking lot's effect on water quality. Accordingly, LUBA agreed with the hearings officer that petitioner was not adversely affected by the county's decision.

In a concurring opinion, Board Member Bassham elaborated on one problem the majority identified with the test for whether a person is "aggrieved" by a local decision for purposes of standing. LUBA's statute allows a person who was not entitled to notice to appeal a local decision to LUBA within 21 days of the date the local appeal period expires if the person was adversely affected or aggrieved by the decision (ORS 197.830(4)). In the circumstances where this statute might allow a LUBA appeal, however, there will have been no local appeal of a permit decision and no hearing or proceeding at which a petitioner could have appeared and presented a position on the merits. As a result, "the category of persons who has standing as aggrieved persons to file a local appeal or a direct appeal to LUBA is a very small, and perhaps empty, category." Slip op. at 16. He contrasted the understanding of the term "aggrieved" as articulated in ***Jefferson Landfill*** with the understanding of this term in cases arising under the Administrative Procedures Act, which is broader, and questioned whether the legislature intended "aggrieved" as used in the land use context to have a more restrictive meaning. Since this is an issue that was not briefed or argued in this appeal, he observed that the resolution of this question will be determined in a future appeal.

**Kathryn S. Beaumont**