Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

Published by the Section on Real Estate and Land Use, Oregon State Bar

Vol. 36, No. 3
August/September 2014

Also available online

Contents

Good-bye, Thank You, and Welcome

It has been an honor to serve as editor of the Real Estate and Land Use Digest for the past 17 years. As I conclude my time as editor, I'd like to offer my thanks to those of you who have supported the Digest in so many ways. Associate Editors Ed Sullivan and Alan Brickley have provided valuable guidance and wise counsel over the years, as well as many thoughtful articles. Many law students (now lawyers) and new lawyers have served as the Digest's Assistant Editor, keeping track of authors, articles, deadlines, and publication schedules. In particular, Eric Shaffner, the current and also retiring Assistant Editor, has been invaluable in helping to orchestrate and produce each issue for the past five years.

The contributing authors are the heart and soul of the Digest, making it truly a publication by section members for section members. My thanks go particularly to the many of you who have willingly and reliably written articles for the Digest over the years. Your contributions have earned the Digest its well-deserved reputation as an excellent publication and an important tool for keeping section members educated about developments in real estate and land use law. One author deserves special mention. Every issue of the Digest since its inception has included an article written by Ed Sullivan, making him the longest serving of the Digest's contributors.

Thank you for the opportunity to serve the section these many years. I am pleased to welcome the Digest's new Editor, Jennie Bricker, and new Assistant Editor, Judy Parker, and know I am leaving this publication in very good hands.

Kathryn S. Beaumont

Appellate Cases – Real Estate

■ ABSOLUTE STATUTORY COMPLIANCE REQUIRED FOR NONJUDICIAL FORECLOSURE

In *US Bank NA v. Eckert*, ___ Or. App. ____, ____ P.3d ____, 2014 WL _____ (2014), the Oregon Court of Appeals reversed a Clackamas County Circuit Court and held that the legislature meant precisely what it said in mandating that foreclosure by advertisement and sale is permissible only if "the trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the county in which the property described in the deed is situated." ORS 86.735(1) (2009).[1]

The homeowner executed a subsequently recorded trust deed in favor of Mortgage Electronic Registration Systems, Inc., in November 2004. The homeowner defaulted on his obligations. The bank purchased the property at a trustee's sale in January 2011 and received a trustee's deed in February, signed by LSI Title of Oregon, LLC, apparently as successor trustee. Six months later, the bank filed an FED action for possession of the property. The homeowner argued that no appointment of LSI as successor trustee had been properly recorded.

The court analyzed the statutory framework by which a trustee may nonjudicially foreclose a trust deed by advertisement and sale. First, enumerated assignments and appointments must be recorded. Second, the grantor or other person owing an obligation secured by trust deed must be in default. Third, proper notice of default and election to sell must be filed and served. After the sale, the trustee must give the purchaser a trustee's deed. When properly recorded, the recitals in the trustee's deed and in the affidavits required by ORS 86.774(3) and (4) are *prima facie* evidence of the truth of the matters set forth in those instruments. ORS 86.803.

[1] The 2013 Legislative Assembly revised and renumbered ORS Chapter 86. Citations in this summary are to the former, 2009 statutes, effective at the time of the dispute.

At trial, the bank conceded that it did not have certified copies of the successor trustee appointment, but argued that the recitals in the affidavits, notices, and trust deed constituted *prima facie* evidence that the bank had purchased the property at the trustee's sale, that the trustee's sale had been properly conducted, and that the bank was entitled to possession. The trial court awarded possession to the bank.

The court of appeals characterized the requirements in former ORS 86.735 as "mandatory prerequisites" that must be met prior to a nonjudicial foreclosure. The court cited ***Brandrup v. ReconTrust Co.***, 353 Or. 668, 677 303 P.3d 301 (2013), and ***Niday v. GMAC Mortgage, LLC***, 353 Or. 648, 651, 302 P.3d 444 (2013); both cases hold that a trustee may foreclose by advertisement and sale only after meeting the relevant statutory conditions.

The court examined in detail the documents the bank claimed constituted evidence that the appointment of LSI as successor trustee was properly recorded. The trustee's deed identified LSI as the trustee, and was signed by a representative of LSI. However, the recitals stated that a different person had been named as trustee at the time the deed was executed in 2004. The court found no evidence in the record that the appointment to LSI had been recorded. While the bank correctly argued that the recitals in the trustee's deed constitute *prima facie* evidence of their truth when the trustee's deed is properly recorded, the recitals in the documents at issue in this case failed to state that LSI was appointed as the successor trustee and that the appointment was recorded. Reversing the trial court, the court of appeals established yet again that strict statutory compliance is absolutely required prior to nonjudicial foreclosure.

Nick Merrill

US Bank NA v. Eckert, ___ Or. App. ____, ___ P.3d. _____, 2014 WL _____ (2014)

■ GARBAGE IN, GARBAGE OUT?

A recent Oregon Court of Appeals case illustrates the adverse consequences that can follow when a lender's administrative team misunderstands or reviews inadequately the paperwork it receives. *Yale Holdings, LLC v. Capital One Bank*, 263 Or. App. 71, 326 P.3d 1259 (2014). Concurrent with an extensive remodel and expansion of a mansion in Clackamas County, the property owner combined what were historically three adjoining tax lots into a single tax lot with a new street address. The property owner subsequently refinanced the real property and improvements, borrowing $5 million secured by a trust deed. The lender's underwriting department missed several facts that indicated that the proposed loan would not be secured by the entire parcel of real property or even the entire remodeled mansion.

The trust deed contained inconsistent descriptions of the encumbered property. One was a tax-parcel-number description covering all of the property and mansion. The other was a metes-and-bounds description that encompassed only the original first parcel ("Parcel One"); this second description encumbered only part of the mansion and part of the surrounding grounds. The loan application pointed to the preliminary title report, which used the metes-and-bounds description.

The property owner transferred title to Yale Holdings, LLC, in which he held a 99 percent membership interest. Thereafter, the entity filed suit to quiet title. Capital One, which acquired the original lender, Chevy Chase Bank, by merger and was therefore the successor beneficiary, filed a counterclaim for reformation to correct the metes-and-bounds description to include the entire tax lot, or, in the alternative, a declaratory judgment that the trust deed encumbered the entire tax parcel.

The parties filed cross motions for summary judgment, each side asserting that the trust deed was unambiguous as to the property encumbered. As a matter of law, a trust deed that contains inconsistent property descriptions is ambiguous. The ambiguity may nevertheless be resolved by the trier of fact where there is no competing extrinsic evidence that would permit the fact-finder to resolve the matter in favor of the non-moving party.

In support of the lender-beneficiary's motion for summary judgment, the lender-beneficiary established that the property owner had applied for the loan to refinance the entire mansion; the mansion was not located entirely on Parcel One; and the two appraisals conducted to support the loan evaluated the entire new tax lot (that is, all three parcels), including the entire mansion. In support of its motion, the property owner pointed out the preliminary title report issued to Chevy Chase Bank contained the metes-and-bounds description of Parcel One only, to which Chevy Chase Bank never objected; the title company only issued title insurance for Parcel One; and the trust deed was prepared by Chevy Chase Bank.

In reversing the trial court's grant of summary judgment in favor of Capital One, the appellate court acknowledged the weight of evidence was unquestionably in Capital One's favor. However, to satisfy the exception to the general rule that contractual ambiguity precludes the granting of summary judgment, the court held the record contained some extrinsic evidence that would permit a rational fact finder to find in Yale Holding's favor, although the court had "little

trouble" rejecting Yale Holding's motion for summary judgment. Thus, the court determined the trial court erred in granting summary judgment and remanded the case.

Tod Northman

Yale Holdings, LLC v. Capital One Bank, 263 Or. App. 71, 326 P.3d 1259 (2014)

■ *WHEN IT COMES TO SEVERANCE OF A PARCEL, TIMING IS EVERYTHING*

In *Manusos v. Skeels*, ___ Or. App. ____, ____ P.3d ____, 2014 WL 1881566 (June 25, 2014), the court of appeals affirmed a trial court's decision finding an implied easement across defendant's property to provide plaintiff access to a well. Both the trial court and the court of appeals relied on evidence in the record showing that a predecessor of both parties, who once owned both parcels (the common owner), intended to create the easement when he conveyed to plaintiff.

The original common owner of the property in this case, Foster, owned two adjoining parcels situated north and south of each other. During the time Foster was the common owner, he developed a koi pond on the southern parcel that relied on an irrigation well located on the northern parcel. Following Foster's death, his estate sold the southern parcel to plaintiff and, the next day, sold the northern parcel to plaintiff's daughter and son-in-law, the Cowleys. Plaintiff purchased the southern parcel in part because of the lush gardens on that property, which was advertised in a real estate brochure as having "Irrigation/ Koi Pond with Arbor." Upon plaintiff's inquiry about this advertised irrigation, the Foster estate confirmed that a well serviced the property.

When the Cowleys later sold the northern parcel to defendant, they communicated their desire that plaintiff would continue to have access to the irrigation well for the koi pond; they also expressed an intent to record an easement on their property for that purpose prior to close of the sale. The property disclosure for the sale of the northern parcel and the purchase and sale agreement with defendant each referred to the irrigation well; however, the easement to memorialize the arrangement was not recorded until after the close of defendant's purchase—when the Cowleys no longer held title. Approximately a year later, a dispute arose, defendant interrupted plaintiff's use of the irrigation well, and the lawsuit followed.

The trial court held that plaintiff's southern parcel benefited from an implied easement that burdened defendant's northern parcel and that plaintiff was entitled to use the irrigation well for the koi pond. The trial court also awarded damages to compensate for harm to plaintiff's fish, plants, and shrubs.

The court of appeals analyzed whether the trial court had used the correct "time of severance" of the two parcels to determine whether an implied easement existed. The court rejected defendant's argument that the relevant

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.
Subscription Price: free to Real Estate and Land Use Section Members, $25.00 per year for others.
To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

Editors
Kathryn S. Beaumont, *outgoing*
Jennie Bricker, *incoming*

Assistant Editors
Eric Shaffner, *outgoing*
Judy Parker, *incoming*

Associate Editors
Alan K. Brickley
Edward J. Sullivan

Nathan Baker
Richard S. Bailey
Tyler J. Bellis
Jennifer M. Bragar
Alan K. Brickley
Tommy A. Brooks
Robert A. Browning
Sarah Stauffer Curtiss
Lisa Knight Davies
David Doughman
Mark J. Fucile
Christopher A. Gilmore
Susan C. Glen
Peggy Hennessy
Keith Hirokawa
Jack D. Hoffman
Mary W. Johnson
Gary K. Kahn
Joan S. Kelsey
Jeff Litwak
Peter Livingston
Marisol R. McAllister
Nicholas P. Merrill
J. Christopher Minor
Steve Morasch
Tod Northman
John Pinkstaff
Carrie A. Richter
Shelby Rihala
Jacquilyn Saito-Moore
Bill Scheiderich
Robert S. Simon
Alan M. Sorem
Ed Trompke
William A. Van Vactor
A. Richard Vial
Noah W. Winchester
Ty K. Wyman

Contributors
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.

moment of severance occurred when Foster obtained a lot line adjustment, agreeing with the trial court that severance of the northern and southern parcels had occurred "when the Foster estate conveyed the parcel to plaintiff and retained the northern parcel to convey to defendant's predecessors." ___ Or. App. ____ at *6. In support of that conclusion, the court restated the black-letter law of implied easements, that "'severance of a parcel' refers to the division of *ownership* of land, not a division that occurs through a platting process or partition but does not change the ownership of the parcels." ___ Or. App. ___ at *5 (emphasis in original).

The court also noted that the Oregon Supreme Court has "repeatedly rejected" absolute necessity as a requirement for an implied easement. Quoting *Jack v. Hunt et ux.*, 200 Or. 263, 264 P.2d 461 (1953), the court noted that the "need" for an implied easement is determined by what reasonable parties would conclude is necessary for the "reasonable enjoyment" of the dominant estate at the time of conveyance. ___ Or. App. ____ at *7. Both plaintiff and Foster would have understood that continued use of the irrigation well was reasonably necessary for plaintiff's enjoyment of the southern parcel and its koi pond; thus there was a need for the implied easement.

The court's analysis in *Manusos* appears to be a straightforward application of the law of implied easements. The court's decision clarifies that courts should look at the circumstances that exist at the time of conveyance of one parcel by a common owner to a non-common owner to determine whether the common owner intended to convey an easement.

Tommy Brooks

Manusos v. Skeels, ___ Or. App. ____, ____ P.3d ____, 2014 WL 1881566 (June 25, 2014)

Appellate Cases – Land Use

■ CITY MISINTERPRETED FLOODPLAIN PROVISIONS OF ITS OWN COMPREHENSIVE PLAN

In *Friends of the Hood River Waterfront v. City of Hood River*, 263 Or. App. 80, 326 P.3d 1229 (2014), both LUBA and the Oregon Court of Appeals determined the City of Hood River's interpretation of its own comprehensive plan was not plausible. The case is an instructive example of a local government's interpretation of its own rules that failed to pass judicial muster.

The case involved a proposed waterfront hotel, office building, and parking lot in the City of Hood River, near the confluence of the Columbia and Hood Rivers. The majority of the site, including the proposed location of the office building, is within the 100-year floodplain. Although the site is not within the city's designated Floodplain ("FP") zone, the court noted the city had stopped updating its FP zone map around 1981 for reasons unclear in the record.

The dispute involved the city's comprehensive plan provisions for implementing statewide land use planning Goal 7, which requires local governments "[t]o protect people and property from natural hazards," including floods. The parties disputed how to interpret and apply the following implementation strategy in the city's plan: "No permanent structure shall be erected within a flood hazard area unless the structure or the area meets the criteria set forth in the 'FP' overlay zone." 263 Or. App. at 84. The primary question was whether this provision applied to lands located within a flood hazard area but not within a designated FP zone. The city decided that the provision did not apply to lands outside FP zones, concluding that to apply it in such a manner "'would effectively read the 'FP' Zone off the zoning map and give it no effect.'" *Id.* at 87. The city reiterated its interpretation on appeal.

Both LUBA and the court of appeals rejected the city's interpretation. The court determined the "city's interpretation rejects the most natural, ordinary reading of [the disputed provision], which is that any permanent structure in an area that is, in fact, a flood hazard area will need to meet the requirements of the 'FP' Zone." *Id.* at 90.

LUBA and the court of appeals also disagreed with the city that applying the disputed provision outside the FP zone would render that zone meaningless. According to the court,

> [t]he "FP" Zone is meaningful because it catalogs those areas subject to flooding that have been mapped and identified and makes clear that those areas must comply with the requirements of the "FP" Zone. The fact that there continue to be flood hazard areas that are not yet in the "FP" Zone—such as the area affected by [the proposed project]—does not render the "FP" Zone meaningless; it simply means that the city has not yet completed its charge . . . to identify and add all such areas to the "FP" Zone.

Id. at 91-92.

The court of appeals further concluded it was actually the *city's interpretation* that would render the disputed provision meaningless. The plain language of the provision applied the requirements of the FP zone to lands within flood hazard areas. Under the city's interpretation, this provision would serve no independent purpose and would be superfluous.

The court also concluded the city's interpretation would thwart the ultimate objectives of the comprehensive plan, which were to identify and map all flood hazard areas and to protect people and property from floods. The court decided the project site should not be exempt from these stated objectives simply because the city's mapping of flood hazard areas was not yet complete.

Ultimately, the city's interpretation of its own rules was not plausible. The court affirmed LUBA's remand to the city to apply the disputed provision to the proposed project.

The court of appeals did reverse one part of LUBA's decision. LUBA had concluded a specific implementation policy in the city's comprehensive plan required the applicant to map the 100-year floodplain on the property, because such mapping had never been done. The applicable provision required the applicant, in pertinent part, to submit a report that included "[a] diagram of the proposed structure and the relation to the floodplain." *Id.* at 85. The court agreed with LUBA that this provision required the applicant to identify the 100-year floodplain in relation to the project site, but concluded that neither the text nor the context of the provision required the applicant to present this identification in the form of a map.

Nathan Baker

Friends of the Hood River Waterfront v. City of Hood River, 263 Or. App. 80, 326 P.3d 1229 (2014)

■ *OREGON COURT OF APPEALS CONSIDERS MEANING OF "APPLICATION FOR A PERMIT" IN MANDAMUS PROCEEDING CONTEXT*

In *State ex rel. Schrodt v. Jackson County*, 262 Or. App, 437, 324 P.3d 615 (2014), two primary issues were raised to the Oregon Court of Appeals: (1) whether an application for an interpretative ruling is "an application for a permit" pursuant to ORS 215.429(1) allowing mandamus relief; and (2) if so, whether the trial court erred when it concluded that approval of the application did not violate any substantive provision of the Jackson County Land Development Ordinance ("JCLDO"). The court of appeals concluded the application was an "application for a permit" and did not address the second issue in detail because the appellant failed to provide a transcript of the trial court's evidentiary hearing.

Respondent owned 2.39 acres in Jackson County zoned Rural Residential-5 ("RR-5"). He had a conditional use permit ("CUP") that allowed him to manufacture and sell bird feeders. In 2005, respondent sold the bird feeder business, leaving him with an empty warehouse. He wanted to lease the warehouse for other commercial uses, so in 2006 he filed an "Application for Written Interpretation of Unlisted Uses LDO Sections 3.9, 6.2.3 and 6.3.3." Respondent's goal was to broaden the previous CUP approval to allow for other uses similar in scope to the bird feeder operation.

The Jackson County Planning Division issued a decision allowing some uses with impacts similar to those of the bird feeder business. Appellant, respondent's neighbor, appealed the planning division's decision. For reasons not clear to the court of appeals, the planning division did not forward the appeal to the Jackson County Board of Commissioners for four years. Shortly after the appeal was forwarded to the board of commissioners, respondent initiated mandamus proceedings in circuit court under ORS 215.429 to compel approval of his application. That statute allows:

> Except when an applicant requests an extension under ORS 215.427, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as appropriate, after the application is deemed complete, the applicant may file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval.

ORS 215.429(1).

The trial court granted mandamus relief. It concluded that respondent's application constituted a permit under ORS 215.429 and that appellant failed to meet his burden of showing that a substantive violation of the JCLDO would result from approval of respondent's application.

Appellant argued to the court of appeals that respondent's application for an interpretive ruling was not the type of application for which ORS 215.249 authorizes mandamus relief. The court of appeals disagreed. For purposes of ORS 215.429, the term "permit" is defined by ORS 215.402(4), which states:

> Unless the context requires otherwise: . . . "Permit" means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.

The court of appeals concluded that respondent's application for an interpretive ruling required the county to exercise "discretion" because the county had to evaluate the impact new uses would have on neighboring properties in comparison to the bird feeder operation. Moreover, the court of appeals ruled that respondent's application sought approval of a "proposed development of land" because it proposed a change in the use of the land. For these reasons, the court of appeals held the application was an "application for a permit."

The appellant also argued that the trial court erred when it concluded the application would not violate any substantive provision of the JCLDO. The court of appeals refused to address this argument because appellant failed to provide the court with an adequate record to determine whether the trial court had erred. At trial, the parties had presented expert testimony and corroborating evidence. Based on the testimony and evidence presented, the trial court found, as required by the applicable JCLDO sections, that the new commercial uses would not have a greater adverse impact on the surrounding neighborhood. The court of appeals did not review the merits of that decision.

William A. Van Vactor

State ex rel. Schrodt v. Jackson County, 262 Or. App. 437, 324 P.3d 615 (2014)

Cases From Other Jurisdictions

■ MASTER PLANNING AND RELIGIOUS USES

The United States District Court in Ohio recently considered religious land uses in *Tree of Life Christian Schools v. The City of Upper Arlington*, No. 2:11-cv-009, ___ F. Supp. 2d ___, 2014 WL 1576873 (S.D. Ohio, April 18, 2014). The City's adopted Master Plan recognizes that only 4.7 percent of its useable land area is zoned "Commercial" and states that one purpose of preserving the limited commercial land is to generate more revenue from commercial uses. As a result, the Master Plan specifically limits the uses permitted in commercial zones. School uses are forbidden.

In early 2009, City officials became aware the Tree of Life Christian School was considering purchasing a commercial office building within city limits for use as a school. The City's Economic Development Director directly advised the Tree of Life school superintendent that schools were not a permitted use. Nevertheless, Tree of Life applied for a conditional use permit to use the property for a "place of worship, church"—and residential use, "to the extent that residential includes a private school." 2014 WL 1576873, slip op. at 5. The City responded that a private school was neither a permitted nor conditional use in the commercial zone. The church countered that the primary purpose of the use was a church or place of worship, which could be considered a conditional use. The City disagreed with this characterization, found the primary use of the property as a private school did not constitute use as a "place of worship, church," and concluded rezoning would be necessary for the church to pursue a private school use.

Despite the City's denials of its applications, Tree of Life completed the purchase of the commercial office building, then filed suit for violations of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), among other claims. The district court determined the case was not ripe because Tree of Life had not petitioned the City to rezone the property. With an appeal pending in the Sixth Circuit Court of Appeals, Tree of Life filed the rezone application, which the City denied. The Sixth Circuit allowed Tree of Life to supplement the record on appeal with the City's denial; the Sixth Circuit then remanded to the district court.

Tree of Life's RLUIPA claim was made under the "equal terms" provision: "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). RLUIPA's equal terms provision is treated differently among the circuit courts of appeal; the district court recognized the Sixth Circuit had yet to frame its own interpretation.

The district court determined the Third and Seventh Circuits' equal terms analysis to be the most reasonable and pragmatic. Under the Third Circuit's "regulatory purpose" approach, a regulation will violate the equal terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions, when they are "similarly situated *as to the regulatory purpose*." The burden of proof is on the church to show that the equal terms provision has been violated. Applying the "regulatory purpose" test, the court found the City had carefully set forth its regulatory purpose for designating a commercial district that excluded schools, and therefore the City's decision to deny Tree of Life's proposal was proper.

The Seventh Circuit's test, which substitutes "accepted zoning criteria" for "regulatory purpose," did not provide Tree of Life with any better position because the Master Plan specified that generating municipal revenue was an important criterion for allowed uses in the commercial district.

Fundamentally, the district court held that Tree of Life's RLUIPA claim lacked merit because an "apples-to-apples" comparison of a secular and non-secular school use showed the City prohibited *all* schools in the commercial zone, regardless of religious affiliation.

The Ninth Circuit applies the Third Circuit's "regulatory purpose" test, along with the Seventh Circuit's refinement, but places the burden of proof on the government. In *Centro Familiar Cristiano Buenas Nevas v. City of Yuma*, that court held the "city may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in

nature." 651 F.3d 1163, 1172-1173 (9th Cir. 2011). As cases come forward, the circuit split may push the question to the U.S. Supreme Court for a determination of the correct analysis of the equal terms provision.

Jennifer Bragar

Tree of Life Christian Schools v. The City of Upper Arlington, No. 2:11-cv-009, ___ F. Supp. 2d ___, 2014 WL 1576873 (S.D. Ohio April 18, 2014)

■ NEW YORK APPELLATE COURT AFFIRMS SLAPP SUIT DISMISSAL AND ATTORNEY FEE AWARD

Southampton Day Camp Realty, LLC v. Gormon, 2014 WL 2871806 (N.Y. App. Div.) involved the appeal of a decision by the Town of Southampton's Chief Building Inspector that a nonconforming tennis and racquet club could be converted into a children's day camp without a variance. Defendants were neighbors who opposed the conversion and appealed the Chief Inspector's decision to the Board of Zoning Appeals. Defendants also distributed a flyer that suggested the plaintiffs did not care about the environmental effects of the conversion and had lied to town officials. Plaintiffs then sued defendants for defamation. Defendants moved to dismiss the suit, contending that the action constituted a Strategic Lawsuit Against Public Participation ("SLAPP") suit, and sought attorneys' fees and punitive damages. Before discovery, defendants moved for summary judgment on their complaint and the counterclaim. The trial court dismissed the complaint and awarded attorneys' fees, but denied defendants' request for punitive damages. Both parties appealed.

The appellate division noted that New York's SLAPP suit litigation entitles a qualified defendant to dismissal, as well as attorneys' fees and costs. To prevail, a plaintiff must demonstrate the lawsuit has a "substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law." In this case, however, defendants' communication was "materially related" to their efforts to report or comment upon, or oppose, plaintiffs' application and was part of an effort to garner support for their opposition.

The appellate division affirmed the dismissal, agreeing with the trial court that plaintiffs failed to demonstrate as a matter of fact and law that defendants' statements were known to be false or were made with reckless disregard for the truth.

The appellate division also agreed with the trial court that defendants demonstrated a *prima facie* right to attorneys' fees, especially since the trial court found that plaintiffs' suit had no basis in law and fact. Additionally, the appellate division agreed that punitive damages were properly denied because defendants failed to show the suit was commenced "solely to harass, intimidate, punish, or otherwise maliciously inhibit" defendants' rights of free speech, petition, or association.

The result in this case is straightforward and typical. Applicants cannot use their (tax deductible) resources to cow their opposition and may be subject to attorney fee awards for suits that are meant to require opponents to defend, as in this case, their meritless claims.

Edward Sullivan

Southampton Day Camp Realty, LLC v. Gormon, 2014 WL 2871806 (N.Y. App. Div.)

LUBA Summary

■ IMPARTIAL TRIBUNAL REQUIREMENT

LUBA's decision in *Oregon Pipeline Company, LLC v. Clatsop County*, Or. LUBA (LUBA No. 2013-106 June 27, 2014) is a comprehensive review of the impartial tribunal requirement in quasi-judicial proceedings and a must-read for practitioners advising public and private clients in local land use review proceedings. LUBA traces the evolution of this requirement from the Oregon Supreme Court's decision in *Fasano v. Washington County Commission*, 264 Or. 574, 588, 507 P.2d 23 (1973), to its current formulation in recent LUBA and appellate decisions. In particular, *Oregon Pipeline* addresses the issue of bias and the factual considerations likely to support a claim that a local decision maker is biased.

This appeal involved the county's approval of land use permits to build part of a pipeline necessary to connect a proposed liquefied natural gas ("LNG") terminal in Warrenton with an interstate pipeline. Two groups, Columbia Riverkeeper and NW Property Rights Coalition, appealed the county's original November 2010 approval of the permits to LUBA. At the county's request, LUBA extended the due date for filing the record by two months to January 13, 2011. One day before the record was due, three recently elected commissioners joined the county board of commissioners ("BOC") and the newly constituted board voted to withdraw the November 2010 decision for reconsideration. Despite opposition from the applicant, Oregon Pipeline Company ("OPC"), LUBA concluded it had no choice but to approve the county's motion to withdraw and issued an order granting the motion. The county board held a hearing in February

2011 and the following month adopted a preliminary decision to deny the permits. During the interim, OPC applied to the circuit court for a writ of mandamus, arguing the county failed to make a final decision within the statutory 150-day deadline. After a trip up and down the appellate court chain, OPC's efforts to obtain a writ were unsuccessful and the county board adopted a final decision denying OPC's permit applications in October 2013. OPC appealed the county's decision to LUBA, challenging both the timeliness of the county's decision and, as relevant here, the impartiality of three of the five county board members.

OPC argued the three newly elected county commissioners were biased and erred by participating in the January 2011 decision to withdraw the original permit approvals and in the final decision to deny OPC's permit application. Before addressing the merits of OPC's claim, LUBA recounted and analyzed the development of the impartial tribunal requirement. LUBA began with the Oregon Supreme Court's decision in the *Fasano* case, which identified the right to an impartial tribunal as one of the procedural rights to which parties in a quasi-judicial land use proceeding are entitled. Subsequent cases, like the court of appeals' decision in *Eastgate Theatre v. Board of County Commissioners*, 37 Or. App. 745, 754, 588 P.2d 640 (1978), refined the understanding of "impartiality" in a local government context. There the court acknowledged that local elected officials are community members and are elected because of their views on what is in their communities' best interests. While this kind of bias might disqualify a judge, it does not necessarily disqualify an elected official from participating in quasi-judicial land use decision making because it is "both unavoidable and expected." *Slip Op.* at 18. LUBA characterized the *Eastgate* decision as setting a high bar for disqualifying local decision makers.

LUBA turned next to its own decisions, particularly those in which it had found a decision maker's claim of impartiality was not credible. From these cases, LUBA distilled four themes:

1. *The biased decision maker's participation was unnecessary for a quorum or to count toward the number of votes required to make a final decision.* That is, the final local decision maker would have had a sufficient number of members or votes to make a final decision and there was no need for the biased decision maker to participate.

2. *At least some of the actions demonstrating bias were taken by the biased decision maker as part of the same matter he or she was being asked to decide.* In most of the cases reviewed, the biased decision maker had spoken at forums, written letters, participated in citizen groups, or taken other actions in which the decision maker expressed personal views about the matter he or she was being asked to decide.

3. *The biased decision maker expressed strong personal feelings toward an applicant or opponent.* In these cases, the decision maker's statements or actions revealed a strong hostility toward or support of one of the parties to the matter before the decision making body.

4. *The decision maker acted in a personal capacity, rather than as a member of or on behalf of an organization.*

Applying these themes to OPC's bias claim, LUBA concluded two of the challenged decision makers, Birkby and Lee, were not biased and their participation in denying OPC's application was not error. OPC's claim was based on statements Birkby and Lee made while campaigning in 2010 for county commissioner and the fact they voted to withdraw the county's decision for reconsideration immediately after joining the county board. LUBA concluded that both commissioners had voiced general concerns about the wisdom of LNG facilities and the county's original approval of OPC's pipeline, but these statements were the kind of statements expected from elected officials who fulfill executive, legislative, and quasi-judicial roles, as the *Eastgate* decision recognized. Additionally, prior to voting, both commissioners stated they believed they could make an impartial decision. Under these circumstances, LUBA reasoned that "isolated statements of concern or even opposition to the BOC November 8, 2010 decision" during their campaigns for county commissioner were insufficient to undermine their asserted ability to be impartial decision makers and "do not amount to actions that are per se disqualifying without more." *Id.* at 30.

LUBA reached a different conclusion in evaluating OPC's claim challenging the impartiality of the third newly elected commissioner, Huhtala. The evidence before LUBA focused on Huhtala's role in opposing land use approvals for LNG facilities in general and the proposed LNG pipeline in particular. Dating back to 2005, the evidence included anti-LNG statements he made as a candidate for a seat on the Port of Astoria commission; his participation as an individual petitioner in separate LUBA appeals challenging both a City of Warrenton LNG-related land use approval and a county decision approving a different LNG facility ; letters and newspaper articles reflecting his concerns about LNG facilities as executive director of the Columbia River Business Alliance; and anti-LNG statements he made in his campaign for the county board, including his description of building a LNG terminal in the county as "a 'breathtakingly' bad idea." *Id.* at 36. Additionally, Columbia Riverkeeper submitted testimony to the county opposing OPC's proposed pipeline at a time when Huhtala served as a board member of that organization. In weighing this evidence against Huhtala's assertion that he could participate as a county decision maker "without preconception," LUBA concluded the totality of the evidence demonstrated a sufficient level of disqualifying bias. *Id.* at 39.

At the time Huhtala joined the county board, the county had already made a final decision to approve OPC's application and that decision had been appealed to LUBA. If the county had not withdrawn its decision, LUBA would have ruled on

the substantive merits of the appeal. In that sense, withdrawal of the county's original decision for reconsideration wasn't necessary for the county to make a final decision. A final decision had already been made. LUBA concluded that Huhtala's participation in the board's quick vote to withdraw the original approval, without any discussion of the merits of that decision, "is most consistent with a view that Huhtala was driven more by his past opposition to LNG facilities and less by any concern he may have had regarding the legal merits of the withdrawn decision." *Id.* at 44.

LUBA summarized:

> Huhtala's activities over the years as a persistent opponent of LNG generally and the Oregon LNG terminal and OPC pipeline proposal in particular leading up to the original November 8, 2010 BOC decision set him apart from commissioners Birkby and Lee. But while coming reasonably close, those activities, by themselves, are likely not strong enough evidence of bias to require Huhtala's disqualification as a decision maker for OPC's application. However, because the November 8, 2010 decision and LUBA appeal made his participation unnecessary, Huhtala's action to take the additional step of pulling that decision back for reconsideration, when viewed with all the other evidence that he is not capable of being impartial in this matter, is collectively clear and unmistakable evidence that Huhtala acted in this matter with actual bias and should have refrained from voting to withdraw the decision and voting to deny it.

Id. at 44-45.

LUBA's decision includes a strongly worded dissent from Board Chair Ryan indicating her disagreement with the majority's conclusion that Huhtala was biased. In her view, the evidence presented in support of OPC's claim shows that Huhtala had only a predisposition to oppose LNG projects or an appearance of bias, neither of which would be sufficient to support a bias claim. She also faulted the majority for treating the Warrenton and county decisions as proceedings on the same matter and for considering Huhtala's actions concerning the Warrenton facility as evidence of bias in the county's decision making on OPC's pipeline. Finally, she found inexplicable the majority's conclusion that Birkby and Lee were not biased when they participated in the January 13, 2011, withdrawal decision, particularly since the evidence showed the two commissioners had voiced concerns about LNG facilities prior to being elected to the county board. Ryan concluded:

> In my view petitioner has not demonstrated in a clear and unmistakable manner that Huhtala was actually biased, any more than a candidate for city council who engages in "economic boosterism" or emphatically and repeatedly states that she supports "bringing industry" or "bringing jobs" to her city is actually biased if she wins the election and later votes to approve a development application that brings in industry and provides jobs. Disqualification of an elected official in the circumstances here is not warranted.

Id. at 65.

LUBA's discussion of the impartial tribunal requirement in this decision merits a close reading, particularly as potential candidates and local government decision makers increasingly use electronic tools to publicize their views on controversial topics or proposals on which they may be asked to make land use decisions.

Final Note—Timeliness of Decision Making: The county made its original decision approving OPC's pipeline within the 150-day time limit established by ORS 215.427(1). However, OPC argued the county's decision to extend the due date for filing the record with LUBA and to later withdraw the original decision for reconsideration were actions taken for the purpose of avoiding this time limit. As a result, OPC contended the county's decision to deny its pipeline application merited reversal under ORS 197.835(10)(e), which authorizes LUBA to reverse a denial and order a local government to approve an application if it finds the local government's "action" was for the purpose of circumventing the statutory time limit for final decision making. In essence, OPC argued the 150-day clock began to run again when the county withdrew its decision and expired before the county made its decision to deny OPC's application. To treat the 150-day time limit for local decision making and the 90-day time limit for making a decision on reconsideration as separate time periods would, in OPC's view, give the county 240 days to make a final decision, which is inconsistent with the legislature's intent.

LUBA acknowledged the "tension" between the short statutory time limit for final county decision making on a land use application and a local government's unqualified right to withdraw an appealed decision for reconsideration. *Id.* at 10. OPC had previously made the same timeliness argument to the court of appeals in the related mandamus proceeding. LUBA noted the appellate court "flatly rejected" this argument and concluded "the additional delay that was caused when the November 8, 2010 decision was appealed to LUBA and withdrawn for reconsideration was not subject to the 150-day deadline specified in ORS 215.427(1), which only applies to the November 8, 2010 decision that was appealed to LUBA." *Slip Op.* at 12. Consistent with the court's decision, LUBA rejected OPC's argument as well and concluded the county's exercise of its statutory right to withdraw the original decision is not an action taken purposefully to avoid the 150-day decision making time limit.

Kathryn S. Beaumont

Oregon Pipeline Company, LLC v. Clatsop County, Or. LUBA (LUBA No. 2013-106 June 27, 2014)