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OREGON REAL ESTATE AND LAND USE DIGEST

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Contents

Among Us

■ ED SULLIVAN LAUDED BY ABA

Premiere land use lawyer Ed Sullivan has received the Jefferson B. Fordham Lifetime Achievement Award for 2014. The Fordham Award, the highest honor of the American Bar Association State and Local Government Section, recognizes lawyers' outstanding contributions to the practice of state and local government law. Ed's notable and frequently cited cases include *Fasano v. Washington County Board of County Commissioners* and *Baker v. City of Milwaukie*. In addition to his litigation expertise, he also is a celebrated teacher, a mentor to generations of land use practitioners, and a keen writer with an eye to local and national legal trends and jurisprudence. He is a regular contributor to the *RELU Digest* and we are particularly proud of his accomplishments. Congratulations for this well deserved honor, Ed Sullivan!

Appellate Cases

■ TIED EN BANC DECISION IN CONDEMNATION CASE

In *ODOT v. Alderwoods (Oregon)* the Oregon Court of Appeals, sitting en banc, affirmed by an equally divided court the decision of the trial court to grant ODOT's motion ***in limine*** to exclude evidence of the diminution in the value of property as a result of its loss of direct access to Highway 99W.

The property, owned by defendant Alderwoods, abuts Highway 99W in Tigard, Oregon. The property had direct access to the highway by means of two driveways and indirect access from adjacent Warner Avenue. ODOT filed a condemnation action to acquire a temporary easement across the property for a construction work area to improve Highway 99W, as well as "[all] abutter's rights of access, if any," to the highway. ODOT advised Alderwoods that the department had no record of a permit for the two driveways and that they would be eliminated with reconstruction of the sidewalk along Highway 99W, but that Alderwoods could submit an application for a permit for an approach to Highway 99W, or proof that the existing driveways had been established before 1949. Alderwoods did not respond to the notice, so ODOT constructed the sidewalk abutting the property without curb cuts or driveways that would allow direct access from the property to Highway 99W.

In the condemnation action, ODOT filed a motion ***in limine*** that sought to exclude ***any*** evidence of the diminished value of the property due to loss of direct access to Highway 99W. ODOT argued that elimination of the curb cuts "constituted a denial of access to promote the efficient and safe use of the highway," ***as*** a highway, and was thus not a compensable taking under Article I, Section 18 of the Oregon Constitution. Therefore, evidence relating to the loss of value was irrelevant. The trial court agreed and granted ODOT's motion. The en banc court issued three separate opinions.

In his concurring opinion, Judge Armstrong held that although the property had a common law right of access, that right was eliminated by ODOT's regulatory action to promote safe use of Highway 99W. The loss of access was not compensable because the property ***had*** no lawful access to condemn. Judge Armstrong agreed that evidence addressed to a measure of damages based on the loss of access was irrelevant.

In a second concurring opinion, joined by four other judges, Judge Sercombe held that the owner had no real property interest in the particular driveways or other specific "rights of access" to Highway 99W, but only a common law "general, unfixed right" to access, either directly or indirectly through a public or private street. Because ODOT did not propose to acquire Alderwoods' general right of access that might exist at common law or under state statutes, no compensation was due other than payment for the temporary construction easement. As a result, the trial court did not err in refusing to admit evidence of diminution in property value.

In the dissenting opinion, joined by five other judges, Judge Wollheim made a distinction between eminent domain and regulatory authority. ODOT had sought to condemn "an abutter's right of access"; thus Alderwoods had a statutory right to compensation (or possible compensation) as the result of ODOT's elimination of the right to direct access. ORS 374.035, the basis for ODOT's condemnation authority in this case, is similar to ORS 374.420, and the Oregon Supreme Court in ***Douglas County*** v. ***Briggs***, 286 Or. 151, 593 P.2d 1115 (1979), held that the legislative history for ORS 374.420 expresses an intention for a property owner to be compensated for loss of direct access to a highway that is subsequently converted to a throughway, with limited access. Therefore, evidence of the diminished value of defendant's property was relevant.

The court being evenly divided, the trial court decision was affirmed.

Rich Bailey

ODOT v. Alderwoods (Oregon), Inc., 265 Or. App. 572 (2014).

■ *STATUTE OF LIMITATIONS IN CONSTRUCTION DEFECT CASE*

A recent Oregon case illustrates the importance of analyzing the statute of limitations for construction defects. In ***Riverview Condominium Ass'n v. Cypress Ventures, Inc.***, an association of unit owners sought damages from multiple defendants for water intrusion problems, based on alleged negligent construction, concealment of defects, mismanagement of the Association and its finances prior to turnover, and nuisance. The defendants filed motions for summary judgment, asserting the claims were time-barred.

Construction took place more than ten years before commencement of the action, and the trial court granted summary judgment against the Association, dismissing the construction claims However, the court denied summary judgment as to claims arising from activities after construction, including claims for misrepresentation and mismanagement.

The Oregon Court of Appeals reviewed the motions for summary judgment, decided which statutes of ultimate repose and statutes of limitations should apply, and determined whether there were genuine issues of material fact.

The court of cppeals determined that the applicable statute of repose was ORS 12.135, and not ORS 12.115. ORS 112.115 would have barred the claims ten years after the date the construction took place, whereas ORS 12.135 runs from "substantial completion of construction," defined as "the date of acceptance of the completed construction." ORS 12.135(4)(b). In the absence of written acceptance, acceptance occurs on the date the contractee takes from the contractor responsibility for the maintenance, alteration, and repair of the project. The affidavits in this case were insufficient to establish acceptance on a date more than ten years prior, so ORS 12.135 did not provide a basis for summary dismissal.

The court of appeals also reviewed the construction claims in light of the statutes of limitations. The court applied the six-year statute of limitations for an injury "to the interest of another in real property" (ORS 12.080(3)), rather than the two-year statute (ORS 12.110(1)). The statute of limitations includes a discovery rule, and since there was an issue as to the date of discovery, the matter could not be resolved on summary judgment. The nuisance claim, also subject to ORS 12.080, likewise could not be dismissed on summary judgment because of the failure to establish the date of discovery.

The court found that the usual two-year statute of limitations (ORS 12.110(1)) applied to the claims based on misrepresentation, as well as those based on breach of fiduciary duty and violation of the Oregon Condominium Act. (ORS 12.110(1) includes a discovery rule, but the record showed discovery occurred more than two years prior to commencement of the action.)

As this Digest went to press, the court of appeals published another limitations-related case: ***Goodwin v. Kingsmen Plastering, Inc.*** likewise applies ORS 12.080(3), with discovery rule, to a construction claim involving a single family residence. ***Goodwin*** does not involve a statute of ultimate repose but applies the same statute of limitations as ***Riverview*** and comes to the conclusion that a discovery rule applies.

One interesting point in both cases is that the court of appeals chose to ignore a footnoted comment by the Oregon Supreme Court, rejecting it as *dictum* (which would have changed the result if followed). The *Goodwin* case sparked interest in that footnote, however, indicating that the supreme court may yet chime in on these cases.

Chris Minor

Riverview Condominium Association v. Cypress Ventures, Inc., 266 Or. App. 574 (2014).

■ *HB 4029 HELD UNCONSTITUTIONAL*

House Bill 4029, passed by the 2014 Legislative Assembly, allows property owners with land on the Damascus city boundary to withdraw their property from the city's jurisdiction. In *City of Damascus v. Brown* the Oregon Court of Appeals held HB 4029 an unconstitutional delegation of legislative authority. ORS 222.460 gives municipalities procedures to withdraw tracts of real property from their boundaries upon a determination that such withdrawal is in the public's best interest. HB 4029 provides an exception to the statute's procedural requirements and an exception to the public interest requirement.

HB 4029 became effective on March 19, 2014. The law obligated the Damascus legislative body to provide notice of a public hearing on the application for withdrawal of certain tracts of land from its boundaries, within 30 days after receipt of a written statement by the Department of Land Conservation and Development that the city's comprehensive plan and land use regulations were not acknowledged. HB 4029 further mandated that the city approve the property owners' applications for withdrawal so that such properties could be annexed to the adjoining city of Apple Valley. April 2014 saw the first applications for withdrawal, but Damascus denied all applications, finding HB 4029 unconstitutional and refusing to adopt the withdrawal order. Damascus and its city manager filed petitions for review of 23 withdrawal orders. De Young, a private citizen who does not have an ownership interest in the properties to be withdrawn, separately filed for review of two withdrawal orders.

The court's decision includes a detailed analysis of the justiciability of the various petitions for judicial review. The court first defined the nature of the order subject to judicial review as those orders authorizing the withdrawal of the properties by operation of law under HB 4029. The court then acknowledged the parties' standing to the petitions for review is defined by statue. Because HB 4029 grants standing only to members of the public who actually participate in the public hearing, the court concluded that neither the city nor the city manager acting in his official capacity had standing. However, the court held that De Young had standing as a "long-time resident of Damascus who has an interest in

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preserving the city as a functioning city," and that her interests were sufficiently adverse to the interests of the property owners to be justiciable.

The court sustained De Young's first substantive assignment of error that HB 4029 constitutes an unconstitutional delegation of legislative powers, citing ***State v. Self*** as the appropriate standard of review: "The test [. . .] is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application." 75 Or. App. 230, 236-37, 706 P.2d 975 (1985).

The court concluded that HB 4029 was an unconstitutional delegation of legislative authority:

> The legislature's decision to delegate that legislative authority to certain landowners, without any expression of policy to guide their decision, is an unconstitutional delegation in its purest form because it is a delegation of the legislature's power to make the law—a law that alters the location of the city's boundary.

Because the court ruled HB 4029 unconstitutional, it did not reach De Young's argument that HB 4029 also violates the home-rule authority provisions of the Oregon Constitution; however, ***dicta*** suggests the legislature may be limited in its ability to unilaterally redefine a city's boundaries.

Alan Sorem

City of Damascus v. Brown, et al., 266 Or. App. 416, ___ P.3d ___ (2014).

■ MAYOR'S REPUTATION NOT A MAJOR CONCERN

Housing Authority of Jackson County v. City of Medford concerned the city's denial of a Housing Authority application to construct a multifamily complex in downtown Medford. The city sought review as to only one issue: whether Medford's mayor violated ORS 277.180 by failing to disclose certain ***ex parte*** contacts and whether that failure necessitated a remand.

After Medford filed its petition for review, the parties moved to hold the case in abeyance while they pursued settlement. They ultimately reached an agreement that contemplated an exchange of real property between Medford and the Housing Authority. The agreement further provided that the parties would keep the appeal in abeyance until after they had closed the transaction, then reactivate the appeal for the sole purpose of resolving the assignment of error as to the Mayor's ***ex parte*** communications. Under the agreement, neither party would assign any other error to LUBA's decision.

One year after entering into the settlement agreement, the parties moved to reactive the appeal. The court of appeals issued Medford an order to show cause why, in light of the parties' settlement agreement, a justiciable controversy remained. In response, Medford filed a memorandum arguing that reversing LUBA would correct the "injustice that the Board has meted Medford officials and citizens who engaged in alleged ***ex parte*** contracts having a practical effect on those parties rights."

The court has an independent obligation to resolve questions of their own jurisdiction, which includes determining whether a case presents a justiciable controversy or whether that controversy is moot. To avoid mootness, the parties in a given dispute must have "adverse interests" and the court's resolution of the matter "must have some practical effect on the rights of the parties in the controversy." Thus, to avoid dismissal, Medford needed to identify how the court's decision would have a "real, nonspeculative effect" on a party's rights.

The court found that the city had failed to identify any practical harm to any party, but rather had identified only what the court considered to be "a perceived slight to the mayor's reputation." Thus, the court held that the case was moot because resolution of the merits would not affect the rights of the parties. The Housing Authority had already agreed to withdraw the application giving rise to the dispute if two conditions were met: (1) the Housing Authority obtained final approval of its land use applications for the development contemplated in the settlement agreement, and (2) Medford's appeal resulted in a remand. By the agreement's terms, the satisfaction of the first condition was required before the ***ex parte*** communication issue could reach the court of appeals on review. As to the second condition, given that LUBA's initial remand was based on five assignments of error, only one of which was on review, any decision on the one assignment of error on review would have the same practical effect as before—remand of the application to Medford and, ultimately, withdrawal of the application by the Housing Authority. In other words, no decision by the court of appeals could affect any party's rights in a meaningful way. Accordingly, the court dismissed the petition for review as moot.

Lauren King

Housing Authority of Jackson County v. City of Medford, 265 Or. App. 648 (2014).

WASHINGTON COURT TO CONSIDER STATUTE OF LIMITATIONS QUESTIONS

Washington attorneys, be on the lookout for ***Alexander v. Sanford***. The Washington Supreme Court granted review to consider whether, because of alleged construction defects, unit owners can sue a prior condominium's HOA board members many years after they resigned. The outcome could effectively extend the WCA and construction defect statutes of limitation.

Dustin Klinger

Alexander v. Sanford, Washington S. Ct. review granted, Case 90642-2 (2014).

SUPREME COURT TO DETERMINE FATE OF UNDERWATER JUNIOR LIENS

The U.S. Supreme Court agreed to resolve a bankruptcy issue that grew out of the collapse of the housing market. At issue is whether a valueless junior lien on a home that has lost its value can be completely wiped out by Chapter 7 debtors under 11 U.S.C. § 506(d). The consolidated case arises out of Florida, where Bank of America held second mortgages on houses where the first mortgages were held by other lenders and the value of the houses was less than the amount owed on the first mortgage. In each case, the U.S. Court of Appeals for the Eleventh Circuit permitted the debtor to avoid—to "strip off"—the second mortgage liens although the first mortgage liens remained.

Courts of appeals in other circuits have held that lien "strip offs" were permitted only in Chapter 13. The Supreme Court has long held that Chapter 7 debtors could not "strip down" a creditor's partially secured claim to the value of the collateral securing it. ***Dewsnup v. Timm***, 502 U.S. 410 (1992). In ***Dewsnup***, the Supreme Court rejected the homeowner's request to value his home at less than the full amount owed on the mortgage and void the lien to the extent that the lender's claim exceeded that court-determined value. The homeowner could then have paid that reduced amount and extinguished the lien. Then, if the property later appreciated in value, the homeowner, not the lender, benefited from the additional value.

Tod Northman

Bank of America, N.A. v. Caulkett (No. 14-10803 (11th Cir. 2014)); consolidated with *Bank of America, N.A. v. Toledo-Cardona* (No. 13-1421 (11th Cir. 2013)).

DLCD PENDING RULES ON TDCs

In 2007, Oregon voters approved Measure 49, authorizing certain property owners to develop additional home sites on land that many thought would not see new development. Now, the Department of Land Conservation and Development is trying to breathe new life into the home approval authorizations through a transferrable development credit, or "TDC," program authorized under subsection 11(9) of Chapter 424, Oregon Laws 2007 (Measure 49) and ORS 94.531. The new rules may enable landowners to realize the value of their Measure 49 authorizations without developing the property from which the claim arose. On a voluntary basis, landowners may opt to transfer their development interest under Measure 49 from one property (sending) to another property (receiving) at a more suitable location. According to DLCD, these programs will "reduce the adverse impact of scattered residential development on farm and forest and other resource land."

Under the proposed regulations, DLCD will provide a model ordinance and each county may establish its own program, amending its comprehensive plan to designate sending and receiving areas for the TDCs. The regulation will allow some form of third party enforcement, likely by the county or DLCD.

TDCs will be measured as one credit per each new dwelling authorized under the Measure 49 "final order and home authorization." Density bonuses (what TDC program would be complete without a bonus provision?) may be available for sending properties that agree to some form of protection—a conservation easement for areas larger than 20 acres or a deed restriction for smaller areas. A conservation easement would still allow for agricultural, forest, public park, and conservation uses, as well as the undefined "low intensity use." TDC bonuses may also be available if the sending land is designated as resource land, such as high value farmland, high value forestland, natural areas, and historic sites.

The draft regulations identify a few areas that county ordinances can designate to receive TDCs, including rural residential areas zoned with 5- and 10-acre minimums. These would be allowed densities with minimum lots sizes of 2.5 or 5 acres,

respectively. Substantially developed subdivisions in resource zones could also benefit from increased density. In EFU zones, TDCs could be used to partition a lot or parcel with two dwellings, subject to some limitations. Receiving areas must be selected to minimize conflicts with agriculture and forest operations. The draft rules also contemplate some regional TDC transfers within Metro, the Willamette Valley, the coast, southern Oregon, and eastern counties of the state.

DLCD must sign off on an Amended Measure 49 Final Order for property owners entering into a TDC arrangement. But a Measure 49 authorization carries limitations. Some Measure 49 properties might not be eligible for designation as sending properties if they are unbuildable. TDCs will be fully transferrable but subject to a ten-year development clock, measured from issuance of DLCD's Amended Final Order.

Based on DLCD's efforts with these draft regulations, the Measure 49 debate is being rekindled and those who thought they had some certainty will again be thrown into a planning process with a variety of possible outcomes. Perhaps resource lands will be protected, but those in rural residential areas might not be too excited to be receiving this gift. Moreover, the bonus TDCs are certainly an enticement, and those who worked so hard to limit Measure 49 rewards may not be inclined to support additional development rights to holders of approvals and related TDCs. DLCD staff tentatively plans to bring a recommendation for the new rules to the Land Conservation and Development Commission at its January 2015 meeting in Portland.

Jennifer Bragar

LCDC Proposed Draft Rules.

Cases From Other Jurisdictions

■ REVISED SIGN CODE VALID UNDER INTERMEDIATE SCRUTINY

Neighborhood Enterprises, Inc. v. City of St. Louis is a case on remand from the Eighth Circuit, which had concluded that portions of the St. Louis sign code were unconstitutional. The remand ordered the trial court to determine whether the invalid provisions were severable. The city repealed and replaced the relevant sections, rendering the severability issue moot. The court began its analysis by stating that signs are a form of speech subject to constitutional protection. However, because they occupy space, signs may be regulated as to time, place, and manner. The Eighth Circuit's decision was based on impermissible content differentiation among signs. *Neighborhood Enterprises, Inc. v. City of St. Louis,* 644 F.3d 728 (8th Cir., 2011).

On remand, the district court found the revised ordinance burdened speech by limiting the size and placement of signs for various reasons, including traffic safety, aesthetics, and property values, unrelated to the content of the signs. The court used an intermediate level of scrutiny; that is, if the regulations were narrowly tailored to serve a significant governmental interest and left open ample alternative channels for communication, they would pass constitutional muster. In this case, the city's goals of traffic safety and aesthetics were sufficient for constitutional purposes and there was a "reasonable fit" between those goals and the means of achieving them. The court concluded that the city's regulations were not perfect, but reasonable, and thus constitutionally sufficient under a "narrowly tailored" standard.

As to leaving open ample alternative communication channels, the court found that signs were not barred altogether under the revised ordinance but limited as to dimensions and location, and that there are other means of conveying messages, such as by phone, door-to-door canvassing, and the like. The court rejected the plaintiff's vested rights and equitable estoppel theories because the existing signs did not meet the city's dimensional requirements when they were erected. The court concluded that the revised ordinance was a valid time, place, and manner regulation and thus constitutional, that the former invalid regulations were severable, and that the city's Motion for Entry of Judgment should be granted.

This case illustrates that plaintiffs who successfully challenge local sign regulations on constitutional grounds are not entirely out of the woods—if there are valid and severable alternative grounds for the refusal to issue a sign permit, and if the local government replaces invalid regulations with valid ones.

Ed Sullivan

Neighborhood Enterprises, Inc. v. City of St. Louis, 2014 WL 1648842 (E.D. Mo. 2014).

■ *UTAH COURT UPHOLDS CONTRACT THAT VIOLATES ZONING*

RELU listserv members recently discussed the enforceability of contracts that violate zoning ordinances. The Utah Court of Appeals addressed a similar issue in ***Martin v. Rasmussen***. The Utah court upheld a settlement that violated zoning laws, based on the parties' ability to seek a variance. The decision, which concerned a boundary line dispute, potentially affects the validity of any agreement that requires a variance to zoning laws, including lot line adjustments and adverse possession cases.

The Martins sued their neighbors, the Rasmussens, over whether a fence separating the properties marked the true boundary line. During the litigation, the Rasmussens made a Rule 68 offer of judgment to settle the dispute by transferring four feet of the disputed five-foot strip of land to the Martins. The Rasmussens attempted to revoke the offer two days prior to its expiration and replace it with an offer to convey a two-foot strip of land. The Martins, however, accepted the original offer before its original expiration date and filed a motion to enforce the agreement.

The Rasmussens opposed the motion, claiming they had revoked the original offer and that even if it had been accepted it was illegal and therefore invalid. The Rasmussens argued that the agreement was illegal since it violated the city's minimum-lot-size zoning ordinance. In return, the Martins produced an affidavit indicating the city's intent to grant a variance and the city attorney's promise not to enforce the zoning requirement. The court held that the offer was irrevocable and that the Rasmussens' ability to seek a variance made the agreement enforceable.

In affirming the trial court's decision, the court of appeals explained that parties are expected to avail themselves of variance procedures if necessary to comply with the law, citing binding and persuasive case law. The Rasmussens argued that the cases cited were distinguishable since those contracts required the parties to seek the necessary variances, whereas the settlement in question expressly stated that neither party was required to act on behalf of the other party. The court of appeals disagreed that the offer's failure to expressly assign those duties affected the validity of the agreement and explained that the variance procedures acted as a "safety-valve." The court of appeals also noted that while the offer of judgment specified that one party could not be ***forced*** to act for the other, it did not prevent a party from performing its own implied duties.

While the ruling upheld the offer of judgment based on the parties' ability to seek a variance, the court of appeals did not address what would happen if the variance were denied. Utah's Office of the Property Rights Ombudsmen (an office established by the Utah Department of Commerce to aid citizens and agencies in understanding the law) criticized the ruling, saying that a variance would be improper given the self-imposed hardship and lack of special circumstances. If the Rasmussen variance is denied (neither party has applied for a variance yet), the Rasmussens will likely have to argue impossibility, frustration of purpose, or some other defense, challenging the agreement's enforceability rather than its validity.

Paul Barton

Martin v. Rasmussen, 334 P.3d 507 (Utah Ct. App. 2014).

■ EX PARTE *CONTACT VOIDS LAND USE DECISION*

Villages, LLC v. Enfield Planning and Zoning Commission concerned applications for a special use permit and open space subdivision on 64 acres in Enfield, Connecticut. The planning commission denied both applications, and the plaintiff, Villages, LLC, challenged the denials in the trial court, alleging bias, personal animus, and an unlawful ***ex parte*** contact on the part of one commission member, Lori Longhi.

Villages first argued that Longhi's decision was biased because she had once been a friend of Patrick Tallarita, one of Villages' principals and a former Enfield mayor. Tallarita and Longhi had had a falling out. The trial court rejected the bias claim because Villages did not raise it before the commission (having hoped not to anger its members), and thus had waived the claim. However, unbeknownst to Villages or Tallarita, Longhi had also stated that she wanted Tallarita to suffer in the same fashion as she had when Tallarita had allowed the town to "screw her over." The trial court decided, despite Longhi's denials, that the comment attributed to her "rang true" and demonstrated personal animus.

Longhi had also contacted a water utility representative and had argued during a commission hearing that water pressure to the proposed subdivision would be inadequate for fire protection. The trial court placed the burden on the commission to show that Longhi's contact was harmless, and found that it was not. The trial court also reviewed the hearing transcript, found it replete with negative comments by Longhi, and concluded that Longhi "dominated" the proceedings and intended to have a major effect on the deliberations and outcome. Accordingly, the trial court remanded the commission decision.

On review, the appellate court upheld the lower court's ruling on the bias issue, concluding that Villages had waived the issue by failing to raise it in a timely way. However, the "screwed over" statement was unknown to Villages or its members during the proceedings. Under Connecticut law, the court said, bias must be actual, rather than potential, and Longhi's statement showed actual bias. Longhi's comments were also harmful to Villages as a matter of "natural justice"—the right to a fundamentally fair hearing where facts are presented and can be rebutted. The ***ex parte*** communication raised a rebuttable presumption of prejudice, requiring the commission to show that the comment was harmless. The court found that the commission had not borne that burden and that a review of the commission transcript demonstrated that Longhi's statements were both extensive and influential.

This case deals with a troubling issue for both strategy and jurisprudence. A practitioner must be concerned with possible bias but experienced attorneys realize that one doesn't shoot at the king unless there is a good chance of hitting him. On the other hand, a court has the duty to respond to allegations of bias manifested in statements by hearing body members. In this case, the statements were found both to be true and significant in the decision rendered. In any event, such statements, when known, cannot be ignored.

Ed Sullivan

Villages, LLC v. Enfield Planning and Zoning Comm'n, 89 A.3d 405 (Conn. App. Ct. 2014).

LUBA Cases

■ *LUBA AFFIRMS COUNTY APPROVAL OF REST AREA PROJECT*

Foland v. Jackson County involves the fourth appeal to the Land Use Board of Appeals related to a proposed Oregon Department of Transportation highway rest area project. The project was originally approved by Jackson County in 2009. The petitioners in this and the previous three appeals own nearby agricultural land. The underlying proposal involved applications for exceptions to Statewide Planning Goals 3 (Agricultural Lands), 11 (Public Facilities), and 14 (Urban Development) to allow the subject property to be developed with a highway rest area and ancillary facilities.

Pertinent to this appeal, the county's 2009 approval included a condition of approval that required ODOT to obtain approval from the Ashland City Council to connect to city water and sewer. Following the initial appeal of the county's decision, however, ODOT proposed that city water be used only for potable or domestic uses, and that irrigation for landscaping be obtained elsewhere. The county approved an amendment to the condition of approval, and petitioners appealed the county's decision on the amendment.

Petitioners challenged the county's decision on several grounds. First, petitioners alleged that the modification constituted a change in the "types or intensities of uses" and therefore a new Goal 11 "reasons" exception was required. The Board rejected petitioners' argument, concluding that the amendment did not constitute a change in the "type" of public facility within the meaning of OAR 660-004-0018(4)(b) and did not constitute a change in the "intensity" of the water system.

Second, petitioners argued that the county lacked authority to commence proceedings to modify the condition of approval while the county's decision at issue in petitioners' third appeal was pending before the Board. The Board disagreed, noting that the county had not rendered a decision until three months after resolution of the third LUBA appeal.

Third, petitioners contended that the county erred in approving the amendment without also requiring ODOT to obtain county approval of a final landscaping plan. The Board rejected the argument. According to the Board, petitioners failed to establish that the county was required to evaluate a final landscaping plan as part of the proceeding to modify the condition of approval.

Last, petitioners argued that the findings related to fire suppression and reliability of the alternative source of water for landscaping were insufficient. The Board denied the assignment of error, reasoning that petitioners had failed to demonstrate that the evidence the county relied upon regarding fire risk and the reliability of the alternate water source were not substantial evidence.

The Board affirmed the county's decision.

Sarah Stauffer Curtiss

Foland v. Jackson County, LUBA No. 2014-050 (Sept. 30, 2014).

Local Procedure

Sometimes local decision-makers adopt findings that consist of a main document and other attachments, all of which the local government describes as its final decision. LUBA's decision in ***Hess v. City of Corvallis*** highlights the risky nature of this practice.

In ***Hess***, the city council approved five different land use requests in one written decision that consisted of 121 pages of single-spaced findings, various staff reports and documents that included "any attachments or exhibits" to those documents (the Incorporated Findings), and additional findings that addressed issues the opponents raised and further explained the Incorporated Findings (the Supplemental Findings). Together these documents totaled more than a thousand pages. The council's decision included a statement that explained the Supplemental Findings control in the event they conflict with the Incorporated Findings.

According to the petitioners, the city's findings were inadequate because the sheer number of documents incorporated as part of the decision made it difficult to understand whether all of the approval criteria were satisfied. Additionally, they argued there were inconsistencies between the documents that comprise the Incorporated Findings. LUBA agreed in significant part. While it is permissible for a local government to incorporate other documents as part of its decision, clarity in doing so is critical. If the decision fails to adequately identify the documents that are incorporated into the findings or attempts to incorporate documents that are not really findings, the local government may not rely on them as part of its decision. Here, LUBA concluded the Incorporated Findings had both flaws. In particular, the decision did not specifically describe or identify many of the "attachments or exhibits" to the incorporated documents and LUBA ruled they could not be considered part of the city's decision. LUBA rejected the Supplemental Findings for the same reason—neither the decision nor the record adequately described these incorporated documents by date, title, or subject matter. As a consequence, disregarding the Supplemental Findings meant the findings failed to explain why the city relied on the applicant's traffic expert rather than the opponent's expert, which LUBA found to be a deficiency that required remand of the city's decision.

Hess v. City of Corvallis, LUBA No. 2014-040/2014-042 (Oct. 28, 2014).

Forest Template Dwellings

The issue before LUBA in ***West v. Multnomah County*** was whether the county correctly determined that one of five dwellings failed to satisfy the county's forest template dwelling requirements because it was not a "dwelling." Under Statewide Planning Goal 4 (Forest Lands) and its implementing administrative rule, a new single-family dwelling may be built on a tract of qualifying forest land if at least three dwellings existed as of January 1, 1993, and continue to exist, on a 160-acre template area centered on the tract and if the tract is composed of at least part of 11 other lots or parcels. State law authorizes counties to regulate forest lands more stringently for purpose of implementing this "forest template dwelling" provision. Multnomah County exercised this authority by increasing the number of dwellings necessary to qualify for a new forest template dwelling from three to five and by explicitly requiring that the dwellings must "continue to exist."

The county hearings officer denied petitioner's application for a forest template dwelling after concluding one of the structures on the property was not a "dwelling" within the meaning of the county's code. The disputed structure was built in 1906 as a residence and is in a derelict condition. The county code defines a single family dwelling as "[a] detached building designed for one dwelling unit[.]" Petitioner focused on the word "designed" in this definition and argued the structure's design as a single family residence was enough and that its current deteriorated condition is irrelevant. The county planning staff disagreed, relying on the county's definitions of both "dwelling" and "habitable dwelling" to conclude its forest template dwelling regulations require the 1906 structure to be functional as a residence in order to qualify. While acknowledging the county's forest template dwelling regulations do not expressly incorporate the definition of "habitable dwelling," LUBA agreed with the hearings officer that the structure must be useable as a residence to qualify as a dwelling and that design alone is not enough. Even if the structure could be considered a dwelling and a nonconforming residential use, the hearings officer concluded there was no evidence to show this use had been maintained over time. LUBA agreed, noting evidence in the record strongly suggested use of the structure lapsed for a significant period of time and could not be resumed. Based on this evidence, the hearings officer concluded correctly that the structure did not "continue to exist" as the county code required. LUBA affirmed the county's decision.

West v. Multnomah County, LUBA No. 2014-048 (Sept. 30, 2014).

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