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Oregon Appellate Cases

Oregon High Court Reverses Prescriptive Easement Case

Editors' Note: *RELU Digest* readers will remember the controversial adverse possession case, *Wels v. Hippe*, summarized in our May 2015 issue. For a further recitation of the facts at issue, review Alan Brickley's excellent summary. Clay Patrick represented the Hippes in the trial and appellate courts.

Last year, the Oregon Court of Appeals issued an *en banc* decision in *Wels v. Hippe*, 269 Or. App. 785 (2015), which made major changes to the law affecting prescriptive easements over existing roadways. The Oregon Supreme Court accepted review and, on November 17, 2016, reversed that decision, effectively restoring the law to the way it had been for decades. The court of appeals decision was quite lengthy and complicated, with both concurring and dissenting opinions (the latter of which was 32 pages long).

The Oregon Supreme Court also reversed the trial court ruling that had granted a prescriptive easement to Wels over an existing roadway, which crosses the property of the Hippes. To establish that the use of an existing road is adverse, reasoned the high court, a plaintiff must show either that the use of the road interfered with the owners' use, or that the use of the road was undertaken under a claim of right of which the owners were aware.

As to the first element, the rule in Oregon for decades has been that "when a claimant uses a road that the landowner constructed or that is of unknown origin, the claimant's use of the road – no matter how obvious – does not give rise to a presumption that it is adverse to the owner." The *Wels* court then quoted *Woods v. Hart*, 254 Or. 434, 436 (1969), holding that in the case of the use of an existing roadway, "it is more reasonable to assume that

the use was pursuant to a friendly arrangement between neighbors rather than to assume that the user was making an adverse claim." This ruling effectively re-affirms these decades-old decisions about the use of an existing roadway.

The *Wels* court noted that the court of appeals majority opinion "did not address" this issue of interference with an owner's use of his own roadway as being necessary to create adversity. The court of appeals opinion had focused instead on "the question whether plaintiff's mistaken belief that he had the right to use [the road] was adequate to rebut that presumption [of permissive use]."

The Oregon Supreme Court held that merely believing you have a right to use an existing roadway over another's property is not sufficient to establish the element of adversity. The court, relying on earlier cases, reaffirmed that a use is "adverse" if inconsistent with the owner's use of the property or if it is undertaken not in subordination to the rights of the owner. The court also reaffirmed that although it "is often stated that open and notorious use for the prescribed period gives rise to a rebuttable presumption of adverse use," that rule does not apply in all cases. It does not apply, the court held, "when the nature of the land or the relationship between the parties is such that the use of the owner's property is not likely to put the owner on notice of the adverse nature of the use."

Thus, the Oregon Supreme Court concluded, when a "claimant uses a preexisting road, the claimant must affirmatively establish that his or her use of the road is adverse." Such adversity can be established by clear and convincing evidence that the claimant's use of the road interfered with the owner's own use of the road. (The trial court in this case had concluded that the claimant's use interfered because his use of the road raised dust and thus was an annoyance to the owner, but there was no interference with the owner's use of the road itself.) The *Wels* court said that adversity may also be established by evidence that the claimant used the road under a claim of right; however, "it is not sufficient . . . for a claimant merely to believe that he or she has the right to use a road. There must be evidence that the owner of the property knew or should have known of that belief."

In conclusion, this reversal of the lower appellate decision restores the law to the way it was before that decision, where the prescriptive claim is for use of an existing roadway. The decision also reverses the court of appeals' misplaced conclusion that adversity in such situations can be established merely by the claimant believing he or she has a right to use the road where the owner is unaware of that belief.

Wels v. Hippe, 360 Or. 569 (2016).
Clay Patrick

No Mulligans for Landowners Once Consent Is Given to a "Trespasser"

The issue in this appeal is whether the parties' mistaken belief as to the ownership of the disputed property negates a landowner's consent to trespass.

In 1998, Marlow purchased several tracts of land including the land at issue, the northern strip of Tract 9 in Sisters, Oregon. Around April 2010, the City of Sisters decided to construct sidewalk improvements to Main Avenue, which included the land at issue. The city and Marlow met, agreed, and made such improvements, both believing that the city owned the land or held a right of way. But soon thereafter, Marlow figured out that he still owned the land and sued the city for trespass. The city argued that Marlow's consent to construction of the improvements barred his claim for trespass. The trial court disagreed, finding that the city trespassed because Marlow's consent was based on a mistaken belief held by all parties that the city owned the north strip.

The court of appeals began its analysis by applying the basic principles of trespass. A trespass occurs when a person "enters or remains on premises in the possession of another without a privilege to do so." *Rich v. Tite-Knot Pine Mill*, 245 Or. 185, 191 (1996). A privilege to enter may be "created by the possessor's consent or otherwise." In addition, the court analyzed Restatement Section 892B, which provides a mistake negates a landowner's consent to trespass only (1) where the trespasser knew of the mistake, or (2) where the mistake was induced by the trespasser's misrepresentation. Comments to Section 892B emphasize that consent is not invalid even when it is based on *mutual* mistake.

In this case, the record showed Marlow and the city all believed, mistakenly, that the city owned the land. There was no evidence that the city knew of the mistake or that the city induced Marlow's consent through misrepresentation. The court quashed Marlow's argument that unknowing, innocent misrepresentation is not misrepresentation as explained under Restatement Section 892B. Therefore, the court held that Marlow's consent to the city's entry on the land was a complete bar to the action for trespass.

Marlow v. City of Sisters, 281 Or. App. 462 (2016).
Max Forer

Can't Use a Declaratory Judgment Action to Rehash a Land Use Decision

Martin owns real property in Lane County that he wanted to develop. In 1979, the county adopted an ordinance that established the property's zoning as Agriculture, Grazing, and Timber Raising with a five-acre minimum lot size. In 1984, the county adopted its comprehensive plan, repealing prior plan and zone designations with seven plan exceptions. The Martin property is not located in one of the seven plan exceptions. Per the comprehensive plan, the zoning for that property is exclusive farm use with a 40-acre minimum lot size.

On several occasions between 2006 and 2012, Martin asked the county to interpret the impact of the comprehensive plan on his property's zoning. Martin's position was always that the 1979 ordinance governed his property's zoning, while the county's position was always that the comprehensive plan governed.

Unhappy with the county's interpretations, Martin filed an action for declaratory judgment in circuit court asking whether the 1984 ordinance adopting the comprehensive plan could have repealed the 1979 zoning ordinance. The county moved to dismiss for lack of subject matter jurisdiction. The circuit court agreed and dismissed the action.

On appeal, Martin asserted that the issue before the court did not involve a land use decision but rather was an issue of statutory construction and within the court's jurisdiction. For support, Martin cited *Leupold & Stevens, Inc. v. City of Beaverton*, 226 Or. App. 374 (2009).

In *Leupold*, a circuit court dismissed a property owner's action for declaratory judgment and injunctive relief against a city annexation ordinance. While an appeal of the annexation ordinance was pending before LUBA, the

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2005 legislature enacted SB 887, restricting cities' authority to annex without consent. LUBA upheld the annexation ordinance. The property owner then filed an action for declaratory judgment. The circuit court determined that it lacked subject matter jurisdiction because the annexation ordinance was a land use decision under LUBA's exclusive jurisdiction. On appeal, the court held that the lower court had jurisdiction where the issue involved applying SB 887 to the annexation ordinance.

Here, the county distinguished *Leupold*, arguing that in this case the circuit court's decision would necessarily be a review of the county's previously issued land use decisions, whereas, in *Leupold*, the issue was a declaration of rights and interpretation of the effect of the new law on the annexation.

The court of appeals found that the record indicated Martin sought review of the county's interpretation of county land use laws – a land use decision under LUBA's exclusive jurisdiction. The court concluded that if Martin failed to pursue review of the county's land use decisions, he could not do it now through a declaratory judgment action.

Martin v. Lane County, 461 Or. App. 285 (2016).
Rebekah Dohrman

Short LUBA Summaries

LUBA Procedure

Most local governments have websites, which means notices, staff reports, hearing videos, and other documents relevant to land use hearings are often available online. This creates both opportunities and challenges for a local government in preparing a LUBA record when a land use decision has been appealed. Specifically, is it sufficient to list only a hyperlink to a record item in the record index? In two recent rulings on record objections, LUBA reaffirmed its answer is an emphatic "no."

LUBA rebuffed Oregon City's attempt to include audio and video recordings of land use hearings by means of a hyperlink to the city's website. Petitioner Nicita complained the hyperlinks didn't work and the city subsequently provided new hyperlinks as well as disks containing recordings of the hearings. LUBA ruled that it is insufficient to list the hyperlinks in the record index as the sole means of accessing relevant documents located on the city's website. Identifying the recordings on disk and supplying copies of the disks to Nicita remedied this problem. *Nicita v. City of Oregon City*, LUBA No. 2016-045 (Sept. 8, 2016).

What about a hyperlink that directs LUBA and the parties to YouTube as a way to access a video of a Power Point presented during a land use hearing? Is it good enough if the parties agree the hyperlink can be listed as a "difficult-to-duplicate" record item consistent with LUBA's rules? Absolutely not, says LUBA in an appeal of a City of West Linn decision. The video isn't part of the city's website and, even more problematic, it is on a third party's website over which West Linn has no control. The appropriate remedy is for the city to either submit a disk containing a recording of the hearing or list the disk as a difficult-to-duplicate item in the record index and submit it at oral argument. *Dodds v. City of West Linn*, LUBA No. 2016-071 (Sept. 27, 2016).

LUBA Jurisdiction: Land Use Decision

Zoning classification decisions are a common way for land use applicants to verify the permissibility, development standards, and land use reviews necessary for a proposed development project. A decision determining the development is an allowed use and/or requires no land use review can pave the way for smooth issuance of building permits – unless discretionary standards are applied as part of the permit reviews. A recent ruling on a motion to dismiss illustrates the benefits and pitfalls of this practice.

The City of Eugene issued a zoning classification decision that concluded Housing and Community Services Agency of Lane County's "The Oaks at 14th" apartment complex and accessory parole and probation office is a permitted use in the underlying zone. No one appealed that decision. When Eugene later approved six building

permits for this project, however, McCullough and others appealed the permits to LUBA. In a dispute over LUBA's jurisdiction, Eugene asserted the permits weren't land use decisions under the statutory exemption for building permit decisions issued under "clear and objective land use standards" (ORS 197.015(10)(b)(B)). McCullough argued the statutory exemption for decisions applying land use standards that do not require "the exercise of legal or policy judgment" is inapplicable because Eugene exercised discretion in determining whether The Oaks at 14th is "needed housing" that requires site review under the city's zoning code (ORS 197.015(10)(b)(A)).

Noting the overlapping language in the two statutory exemptions, LUBA agreed with *both* Eugene and McCullough. The development described in the six approved building permits reflected the project described in the zoning classification decision. There were no additions or changes. Under these circumstances and for jurisdictional purposes, LUBA agreed with Eugene that any discretionary or subjective decision about whether the project is an allowed use was made when the zoning classification decision was issued. Since that use decision wasn't challenged, the permits satisfied the exemption for building permits made under clear and objective standards in ORS 197.015(10)(b)(B).

LUBA took a different tack with McCullough's argument that Eugene necessarily exercised some discretion in determining whether The Oaks at 14th is "needed housing" under the city's zoning code and, if so, whether it requires a land use review (site review). The parties traced different paths through Eugene's code to support their contrary arguments. LUBA described the relevant code sections as "convoluted" and concluded they arguably required some interpretation, pointing to Eugene's lengthy explanation of why the project either wasn't needed housing or required no site review. But even if the code were clear that no site review was needed, LUBA concluded some of the development standards Eugene applied are ambiguous and require interpretation. As a result, the building permits are not exempt from LUBA's review jurisdiction under ORS 197.015(10)(b)(B) and LUBA denied the City's motion to dismiss. *McCullough v. City of Eugene*, LUBA Nos. 2016-058/059/060/061/062/063 (Sept. 1, 2016).

In contrast, Washington County succeeded in persuading LUBA to dismiss MGP X Properties' appeal of an intergovernmental agreement between the county and the City of Sherwood. The IGA spelled out the two local governments' cooperative responsibilities in planning, designing, and building improvements to Tualatin-Sherwood Road. Additionally, Sherwood agreed to rely on Washington County's land use process to decide whether these road improvements comply with both local governments' standards and criteria. When MGP X Properties appealed the IGA to LUBA, Sherwood and Washington County argued the agreement isn't a land use decision because neither local government's comprehensive plan or land use regulations were applied. They also asserted the decision wasn't final because it simply started a process that would lead to later land use decisions and, as a result, argued LUBA lacked jurisdiction to review the IGA approval.

LUBA found neither argument persuasive and concluded the IGA approval was a land use decision subject to its review jurisdiction because it satisfied both the "application of local land use regulations" and "finality" elements of a statutory land use decision. The IGA stated Sherwood lacked a land use process for road improvement projects listed in its Transportation Systems Plan, including the Tualatin-Sherwood Road project. In LUBA's view, the parties necessarily had to review and apply Sherwood's land use regulations to make this determination. Additionally, the IGA was Sherwood's only decision about what land use process would be used to review this project. For this reason, LUBA concluded it was a final decision.

That wasn't the end of the jurisdictional story, however, because MGP X Properties fell short in establishing it had standing to appeal the IGA to LUBA. MGP X argued it was adversely affected by the IGA approval because Sherwood might have to condemn part of its property for the project and remove a traffic signal that would make access to its property more difficult. While that might be true, LUBA agreed with both local governments that the IGA didn't approve any improvements to Tualatin-Sherwood Road. It simply spelled out the process that would be used to review and approve these improvements in the future. MGP X didn't argue Washington County's land use review process was insufficient or that it would be precluded from participating in any future county land use review proceeding. In short, LUBA concluded MGP X failed to show it was adversely affected by the IGA approval and dismissed the appeal. *MGP X Properties, LLC v. Washington County*, LUBA No. 2016-036/037 (Sept. 29, 2016)(under appeal).

LUBA Jurisdiction: Mootness

LUBA has not been receptive to dismissing appeals on the grounds of mootness and a recent decision in Lane County is no exception. This appeal has a messy procedural history. The salient events are: Lane County's April 2015 approval of Egge's single application for eight property line adjustments, Bowerman's belated appeal of the PLA approval in January 2016 (the subject of this appeal), and the Lane County planning director's June 2016 decision readopting the PLA decision. Based on the director's decision, Egge moved to dismiss Bowerman's appeal as moot – even though Bowerman had appealed the director's decision to the county hearings officer and he had not yet issued a decision.

LUBA rejected Egge's mootness argument and declined to dismiss the appeal for three reasons. First, LUBA agreed with Bowerman that there was no certainty the hearings officer would make a final decision on his local appeal if LUBA dismissed Bowerman's LUBA appeal. Egge could later withdraw his application to readopt or verify the April 2015 PLA decision. Under these circumstances, the LUBA appeal was Bowerman's only avenue to challenge the original PLA decision.

Second, Bowerman's LUBA appeal raised both substantive and procedural issues, not just procedural issues as Egge asserted. If all Bowerman sought in his LUBA appeal was notice and an opportunity to be heard on the PLA decision, it is possible that Bowerman's local appeal could provide that procedural relief and potentially moot his LUBA appeal. But Bowerman's LUBA appeal challenged the merits of the PLA decision as well.

Third, relying on the principle that a local government lacks jurisdiction to modify a land use decision that is the subject of a LUBA appeal, LUBA concluded the hearings officer could not change the April 2015 PLA decision in deciding Bowerman's local appeal. In other words, the hearings officer could not address the substantive issues in Bowerman's LUBA appeal by modifying the April 2015 decision and his decision would be the same as the original PLA approval. As a result, LUBA concluded its decision will have a practical effect and Bowerman's LUBA appeal is not moot.

Bowerman v. Lane County, LUBA No. 2016-008 (Oct. 24, 2016).

Exclusive Farm Use Zones and Schools

Schools in exclusive farm use zones have been the topic of statutory and administrative rule changes over the years. This creates a risk that a partially built school could be caught in regulatory limbo, as the McDougal Foundation discovered when it tried to complete construction of a school many years after it was first approved. In 2005, Lane County approved McDougal's application to build a private school on EFU-zoned property located approximately three miles outside of the City of Springfield's urban growth boundary. As proposed, the school consisted of three buildings: separate girls' and boys' dormitories and a school/administration building. At the time Lane County approved the school, ORS 215.213(1)(a) allowed a public or private school, including all buildings essential to the school's operation, in an EFU zone. Under the implementing administrative rule, a decision approving a school became void after two years unless development was "initiated" within that two-year period (OAR 660-033-140(1) and (2)). The rule allowed Lane County to approve a single extension of up to one year if the county found "the applicant was unable to begin or continue development during the approval period" for reasons beyond the applicant's control. Lane County's May 2005 decision approving McDougal's private school contained a condition that allowed a single extension consistent with this rule.

McDougal received a building permit for the first building, a boys' dormitory, in 2006 and completed construction in 2008. Lane County issued a building permit for a modular classroom in 2008 and it was installed in 2009. Also in 2009, the legislature adopted statutory amendments that: (1) required a public or private school in EFU zones to be "primarily for residents of the rural area in which the school is located"; and (2) allowed nonconforming schools approved under ORS 215.213(1)(a) a restricted ability to expand. That same year, DLCD amended its administrative rules to prohibit any enclosed structure, including a school, within three miles of a UGB if it has a design capacity greater than 100 persons, which McDougal's school did. McDougal took no further action toward completing the

school until it applied for a building permit for the girls' dormitory in 2014. Lane County approved the permit in 2016 and Landwatch Lane County appealed it to LUBA.

The key question before LUBA was whether the three-building school was a unitary use as Lane County asserted or whether each of the three buildings should be viewed separately under the changed regulatory scheme and administrative rules as Landwatch contended. In Lane County's view, approval of the boys' dormitory in 2006 was sufficient to "initiate" development within the allowed two-year period, did not require McDougal to ask for a one-year extension, and allowed the county to approve the building permit for the girls' dormitory in 2016 as a nonconforming use. Landwatch argued the county's decision ignored language in both the administrative rule and conditions of approval and McDougal could only continue development after applying for and receiving an extension of the 2005 development approval, which it failed to do.

LUBA agreed with Landwatch that the rule and condition of approval precluded Lane County from treating the development approval as valid indefinitely as long as McDougal obtained a building permit ("initiated the development action") within the initial two-year period (May 2005 to May 2007) – at least in the absence of any approved extension. In LUBA's view, the county's 2016 decision simply ignored language in the rule that required approval of an extension only if McDougal was unable to begin *or continue* construction during the initial two-year period. It was also contrary to the legislature's apparent intent to require development in an EFU zone, such as McDougal's school, to be completed quickly and limit the duration of development approvals. Lane County's view that taking an initial step during the initial two-year period allows development to stop and start over an indefinite period of time is "flatly inconsistent" with this intent. One small victory for the county was LUBA's disagreement with Landwatch that the rule required McDougal to complete construction within two years and any extension period. In another small victory, LUBA remanded Lane County's decision, rather than reversing it, reasoning there were other possible bases for approving the 2016 building permit that weren't considered and LUBA couldn't say the county's decision was legally prohibited.

Landwatch Lane County v. Lane County, LUBA No. 2016-038 (Sept. 16, 2016).

Kathryn S. Beaumont

Federal Appellate Cases

D.C. Circuit Finds Structural Infirmities at CFPB

On October 11, 2016, a divided panel of the United States Court of Appeals for the District of Columbia Circuit decided *PHH Corporation, et al. v. Consumer Financial Protection Bureau*. The court held (1) that the CFPB was "unconstitutionally structured," but it used the severability clause to remove the offending provision and preserve the CFPB; (2) that the CFPB had violated due process principles by misconstruing its statutory authority and attempting to apply its construction retroactively; and (3) that administrative actions to enforce RESPA initiated by the CFPB are subject to the same three-year statute of limitations as judicial actions.

The underlying facts are fairly simple. PHH is a mortgage lender. It requires borrowers to obtain mortgage insurance. Mortgage insurers in turn obtain mortgage reinsurance from third party reinsurers. PHH established a subsidiary entity, which provided reinsurance coverage to mortgage insurers that provide mortgage insurance to PHH borrowers (an arrangement known as "captive reinsurance"). Fees were paid by the mortgage insurers to the PHH subsidiary.

The CFPB brought an administrative action against PHH regarding this arrangement, taking the position that the captive reinsurance arrangement, and the payments by the mortgage insurers to the PHH subsidiary, violated Section 8 of the Real Estate Settlement Procedures Act (the anti-kickback provision), without regard to whether the payments were for reasonable market value. The CFPB's position contradicted longstanding precedent that such payments are acceptable as long as they are for reasonable market value. The CFPB also applied this reversal of position

retroactively to PHH's conduct going back to 2008 and imposed a $109 million disgorgement order, among other relief. PHH appealed.

What has garnered the most attention (although viewed by some, such as Senator Elizabeth Warren, as much ado about nothing), is the court's opinion that the CFPB, an independent agency, was unconstitutionally structured, because the agency has a single director who may only be removed by the President for cause. The court concluded this placed far too much unaccountable power in the hands of the director – and commented that the director was arguably more powerful than even the President, given the agency's scope of authority. But the court, instead of scrapping the CFPB entirely, applied the severability clause. It severed the "for cause" termination provision from the remainder of the enabling legislation (the Dodd-Frank Act) and rendered the director subject to removal by the President at will, similar to other executive agencies. The court stressed that this "targeted remedy will not affect the ongoing operations of the CFPB."

As a side note, given the election of Donald Trump for president and the Republican majority in the Senate and House, this development may have more significance for CFPB operations. Upon taking office, President Trump may simply remove current director Richard Cordray and replace him with a far more conservative director who may even be opposed to the CFPB itself. Also, the Republican Congress has already been discussing changing the governing structure of the CFPB to a multi-member commission.

The court also held that the proper interpretation of the RESPA Section 8 anti-kickback provisions was as it had been, so that resolution of this case depends on whether the payments by the mortgage insurer exceeded reasonable market value. The court remanded to have this question answered.

The CFPB also took the position that no statute of limitations applied to administrative actions for enforcement of RESPA. The court shut this down in short order, calling the CFPB's position "absurd," and confirmed the three-year statute of limitations applies to both judicial enforcement actions initiated by the CFPB as well as administrative enforcement actions. Private parties may only bring enforcement actions in court, and for such parties, the statute of limitations is one year.

PHH Corp. v. Consumer Financial Protection Bureau, No. 15-1177 (D.C. Cir. 2016).

David Ambrose

Editors' Note: Ed Sullivan shares with *RELU Digest* readers two important cases from the Ninth Circuit, each dealing with application of the Bill of Rights to land use and free speech restrictions.

Ninth Circuit Remands Dismissal of Gun Store Claim Over Denial of CUP

Teixeira v. County of Alameda involves the county's denial of an application for a conditional use permit to establish a firearms retail outlet. The land use regulations require such a permit only for superstores and firearms sales businesses, and the criteria included "public need" for the proposed use, whether the use would adversely affect the health or safety of persons residing or working in the vicinity, and whether the use would be detrimental to the public welfare or property. In addition, firearms retail stores may not be located within 500 feet of certain "disqualifying uses," such as day care facilities or schools.

The planning department advised the applicant that the 500-foot measurement would be measured from the closest door of his proposed business to the front door of a disqualifying use. After measurements, the store applied for the conditional use. While expressing some concern with conformity to the local plan, the staff report found all requirements met except for the 500-foot requirement, measuring instead from the closest exterior wall of the premises to the closest property line of a disqualifying use. The county's Board of Adjustment approved the use with a variance, finding the situation unique. Neighboring property owners appealed the matter and the Board of Commissioners reversed the Board of Adjustment and denied the use.

The store owner filed the instant proceedings in federal court, claiming that the denial violated the Second Amendment. He produced a study demonstrating that, under the Board's application of the 500-foot rule, there were

no properties in the unincorporated portions of the county that could be used for a retail gun business. He also asserted that the ordinance singled out gun stores but not other similarly situated businesses, and thus violated the Equal Protection Clause. The county moved to dismiss for failure to state a claim, the trial court granted the motion, and the store owner appealed to the Ninth Circuit.

The Ninth Circuit rejected the argument that gun owners were a protected class or that a fundamental right was involved and thus that the ordinance was subject to strict scrutiny under the Equal Protection Clause. Because other retail gun dealers are subject to the same prohibitions, no Equal Protection claim exists. To the extent the owner complained as to the substance of the regulations, those claims were subsumed under either substantive due process or the Second Amendment. Similarly, the owner's "class of one" argument failed because there was no evidence of a similarly situated business being treated differently.

In evaluating the regulations, the Ninth Circuit used a two-step inquiry, determining first whether they burdened conduct protected by the Second Amendment and, if so, the appropriate level of scrutiny to be applied. The court noted that in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized a Second Amendment right for possession of firearms for traditionally lawful purposes, such as self-defense, and subsequently applied that rationale to state gun regulations. The court then considered whether the right to keep and bear arms also includes the right to purchase the same and answered in the affirmative, finding such activity part of a natural right of self-defense. Blackstone and American revolutionaries acknowledged this right and the court concluded that the Second Amendment codified this English right and that the right to purchase firearms was implicit in the right to keep and bear arms. These rights, the court concluded, were independent of any connection with a militia.

Having determined a burden on the Second Amendment existed, the Ninth Circuit then turned to the appropriate level of scrutiny to be applied, noting the instruction from *Heller* that longstanding laws imposing conditions and qualifications on commercial sales of arms were not to be doubted. The regulation must be longstanding and included within the *Heller* list of historically recognized exceptions, with the burden falling on the government. The court held: "the County has failed to demonstrate that the Ordinance is the type of longstanding regulation that our predecessors considered an acceptable intrusion into the Second Amendment right."

The result of not falling into the category of longstanding regulations was the application of a strict scrutiny analysis to evaluate how close to the core of the Second Amendment (that is, the right to self-defense) the regulation gets and the severity of the burden on that right created by the regulation. In other decided cases, courts found domestic violence misdemeanants were not "law-abiding citizens" entitled to Second Amendment protections, while regulations requiring that arms be locked in containers in the homes of their owners were detrimental to self-defense, as was a local zoning ordinance severely limiting the available lands for firearms training. The court concluded that strict scrutiny might be appropriate in this case, as it came close to the core of the right to self-defense.

Thus, the Ninth Circuit remanded the case for a heightened scrutiny analysis on the Second Amendment claim, but affirmed dismissal of the Equal Protection Claim. Judge Silverman dissented in part, suggesting that if there are lawful gun stores in Alameda County, there is no violation of the Second Amendment, implicitly using an analogy of the application of the First Amendment to adult uses. The majority chided the dissent for advocating a cursory review of regulations affecting a fundamental right, treating it as a "second class right."

This is one of the first cases to deal with the application of the Second Amendment to land use law and should be studied by public law attorneys.

Teixeira v. County of Alameda, 822 F.3d 1047 (9th Cir. 2016).
Edward J. Sullivan

Ninth Circuit Upholds Regulation of Mobile Billboards

Lone Star Security and Video, Inc. v City of Los Angeles was an appeal from the grant of summary judgment to several defendant cities in cases brought by a sign company and an individual user of such signs, who challenged the regulations under the First Amendment. The California legislature had allowed these types of signs to be regulated

locally, limiting signs affixed to motorized and nonmotorized vehicles parked or left standing in city streets. The rationale for regulation included prevention of blight on city streets and endangerment to residents and reduction of on-street parking conflicts. Four cities in Los Angeles County adopted nearly identical regulations, which are the subject of this litigation. The trial court found the regulations to be valid. content-neutral time, place. and manner restrictions. Plaintiffs appealed.

The Ninth Circuit held that the First Amendment applies to state and local governments and noted the recent United States Supreme Court decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which found that content-based regulation of speech was "presumptively invalid" and required application of strict scrutiny, so that the regulation would be upheld only if the same were narrowly tailored to serve compelling state interests and left open adequate alternative channels of communication. This application is particularly significant if the speech sought to be regulated occurred in a traditional public forum, such as public streets. The burden was on the government to justify the regulations.

This case involved a facial challenge to the local ordinances, so that the sign company was obliged to demonstrate these regulations were unconstitutional in all of their conceivable applications. The court turned first to whether the regulations were content-neutral. In *Reed*, the difference in treatment of political signs and church event signs was found to be content-based and could not survive strict scrutiny. In this case, the regulation applied to signs placed "for the purpose of advertising," a term that was not defined. Plaintiffs asserted that "advertising" was a proposal for a commercial transaction and thus was treated differently from political, social, or religious messages, rendering the regulations unconstitutional. Following California case law, the Ninth Circuit construed that term to include all messages affixed to a motorized or non-motorized vehicle (including blank signs). In other words, the regulations focused on the placement of signs, rather than their content. If a motor vehicle contains "advertising," that is the end of the matter.

The Ninth Circuit further determined the regulations were narrowly tailored to serve a significant governmental interest, which includes traffic control and aesthetics. These narrowly tailored regulations need not be the most efficient means of promoting that interest, so long as that objective would be achieved less effectively without the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Even if that interest could be served by a less restrictive alternative, the regulations will be upheld so long as the means chosen are not substantially broader than necessary. The Ninth Circuit held that aesthetic interests alone justifid the ban in this case. Moreover, by removing vehicles that have no other purpose than advertising, the regulations at issue also serve the purpose of parking control and reduction of traffic hazards. Absent the regulations, these goals would be achieved less effectively. Citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 508 (1981), the court said the most direct and effective means of solving the problems created by such signs is prohibition. The regulations were thus upheld.

Judge Owens concurred, with the additional suggestion that the United States Supreme Court re-examine its views on aesthetic regulations as the basis to foreclose an entire medium of advertising without regard to the aesthetic impacts of competing modes of advertising.

How this decision plays out in Oregon, with a higher free expression standard in our state constitution, is open to speculation. Whether aesthetics or traffic control constitutes a "compelling," "substantial," or "significant" governmental interest that would be dispositive in the First Amendment calculus is for future First Amendment cases. Perhaps the broad application of "advertising" used by the Ninth Circuit and derived from California case law will also be used, as well as the more troubling requirement that the regulation apply to motor vehicles that are used "for the primary purpose of advertising" rather than transport of people and goods. There is no reasonable prospect of these issues being resolved anytime soon.

Lone Star Security and Video, Inc. v. City of Los Angeles, 827 F.3d 1102 (9th Cir. 2016).

Edward J. Sullivan

Other News

Portland City Council Weighs Inclusionary Zoning

Editors' Note: Jennifer Bragar and Jon Chandler wrote about inclusionary zoning in the April 2016 issue of the *RELU Digest*.

The Oregon Legislature passed SB 1533 in the 2016 legislative session, which removed the statewide ban on inclusionary zoning and left it up to municipalities. Oregon became the 49th state to remove inclusionary zoning bans, leaving Texas the only remaining state that does not allow that type of land use. By April of 2016, the Portland City Council announced that it would immediately start drafting its inclusionary zoning ordinance with substantial community and developer involvement. On December 21, 2016, the City Council unanimously passed Title 33.245, set to take effect immediately.

The regulation mandates that new building or repurposing of a building to create 20 or more dwelling units must make at least 20 percent of units affordable to families earning 80 percent of "area median income," or AMI. Alternatively, the developer can make 10 percent of the units affordable to those at 60 percent AMI. As of 2016, a three-person family in the Portland Metro area at 80 percent AMI earned $52,800 per year and could pay $1,525 per month in rent. At 60 percent AMI, income was $39,600 per year and rent $1,143 per month. In exchange for building these lower-income family units, developers would get incentives including density bonuses, parking requirement exemptions, a 10-year property tax exemption, and an exemption from the construction excise tax on affordable units.

The new regulation applies to new developments or redevelopments with 20 or more dwelling units in one building, as opposed to one site. Projects that have more than 20 units on one site but are broken up into smaller than 20-unit buildings would be exempt from the program, though subject to regular setback conditions around each building. Projects that have triggered this requirement may pay a fee-in-lieu to opt out of building the mandatory affordable housing.

Inapplicable building projects – like residential buildings with fewer than 20 units, commercial projects, and exempt large residence projects like group homes and college dormitories – may voluntarily use the program to purchase density bonuses. The density bonus is capped at a 3 to 1 Floor to Area Ratio or a 100 percent increase in the number of allowed units. This essentially allows almost any project, whether exempt from the mandatory inclusionary zoning program or not, to purchase additional density and gap fill to reach the maximum density limit. The rates for the fee-in-lieu opt-out will parallel the rates for purchasing density bonuses.

In addition to the ability to purchase bonus density, bonuses may be earned through building amenities in certain lower-density zones. Building amenities like playgrounds or bar benches, or even planting trees, would create a small density bonus that would stack per amenity built.

So if the main incentive of the program is to allow for greater density, it may also inadvertently trigger minimum parking requirements which might scale with the density of the project. The inclusionary zoning ordinance eliminates these minimum parking requirements for sites located 1500 feet or less from a transit station, or 500 feet or less from a transit street with 20-minute peak hour service. The idea is that the removal of parking is a boon to developers and it coincides with the Portland Metro's plan to invest another billion into public transportation.

What comes as a low blow, at least to this writer, is that any affordable housing required to be built under the inclusionary zoning ordinance is also exempt from minimum parking requirements, including units built off-site and away from ready public transit.

At this time, the fee-in-lieu rates have not been created that would give teeth to the program. A separate city ordinance is being drafted by the Housing Bureau to create a schedule of fees for the fee-in-lieu.

Milan Hanson