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Supreme Court Action

Federal Government Allowed to Join Texas in Claims Against New Mexico for Breach of Water Compact

In *Texas v. New Mexico*, the Supreme Court resolved a preliminary question raised in a dispute over water from the Rio Grande River. The case concerned a suit brought by Texas against New Mexico for asserted violations of the Rio Grande Compact. At issue before the Supreme Court was whether the United States, as an intervenor, could assert against New Mexico "essentially the same" claims that were brought by Texas. Due to the "distinctly federal interests" at issue, the Court allowed the United States to pursue its claims.

The United States' interest in the Rio Grande Compact traces back to the 1890s when the United States entered into a treaty with Mexico to guarantee a regular release of water below the border. Pursuant to that treaty, the United States constructed the Elephant Butte Reservoir in New Mexico, approximately 105 miles north of the Texas state line.

After construction of the Reservoir, the United States entered into a number of agreements to supply water from the Reservoir to downstream water districts in New Mexico and Texas. The Court referred to these as the "Downstream Contracts."

Shortly thereafter, Colorado, New Mexico, and Texas formed the Rio Grande Compact, which was approved by Congress in 1939. The purpose of the Compact was to resolve disputes among the states regarding water rights on the Rio Grande, and the Compact provided that it should not be "construed as affecting" the United States' treaty with Mexico. The Compact required Colorado to deliver a specified quantity of water to the New Mexico state line and required New Mexico to deliver a specified quantity of

water to the Reservoir. The Downstream Contracts provided that certain amounts of water delivered to the Reservoir would be delivered to Texas water districts.

In 2013, Texas brought an action against New Mexico claiming that New Mexico water users were withdrawing water downstream of the Reservoir in a manner not anticipated by the Downstream Contracts and that New Mexico effectively breached the Compact by failing to prevent those withdrawals. The United States filed a complaint with parallel allegations. The special master appointed by the Supreme Court recommended dismissal of the United States' claims, and the parties filed exceptions. The Supreme Court heard two of the exceptions, which involved the scope of claims that the United States can assert in an original action.

The Court began its analysis by emphasizing the Court's unique role when reviewing interstate compacts. In interstate compact cases, the Court has original jurisdiction and may "regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice." Under that authority, the Court has allowed the United States to participate in compact cases to defend "distinctly federal interests."

Four considerations caused the Court to conclude that New Mexico's alleged breach of the Compact impacted distinctly federal interests. First, the Court determined that the Compact is "inextricably intertwined" with the Downstream Contracts. Specifically, the United States has a strong interest in seeing that water is delivered to the Reservoir consistent with the terms of the Compact because the United States must ensure that it is able to satisfy its obligations under the Downstream Contracts. Second, the Court noted that the United States plays an "integral role" in the Compact's operation. Third, the Court observed that a breach of the Compact could jeopardize the United States' ability to satisfy its treaty obligations to Mexico. Fourth, and finally, the Court considered that the relief sought by the United States was not materially different from the relief sought by Texas. All four factors, together, justified allowance of the United States' claims.

This opinion could invite the United States to play a more active role in enforcement of, and disputes regarding, interstate water compacts. However, the Court cautioned that the permission granted to the United States to participate in compact suits "should not be confused with a license," and the Court declined to decide "whether the United States could *initiate litigation* to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States" (emphasis added), leaving unanswered the question of whether the United States may sue a state directly for violations of a compact.

Texas v. New Mexico, 538 U.S. ___ (Mar. 5, 2018).
Kirk Maag and Hayley Siltanen

Ninth Circuit Cases

Ninth Circuit Affirms Ripeness Ruling in Metro UGB Case

Blumenkron v. Eberwein is an appeal from a dismissal of a takings claim by summary judgment on grounds of ripeness. The LCDC had previously approved a boundary amendment within the Metro Urban Growth Boundary; the plaintiffs sued, claiming future damages; the Oregon Court of Appeals remanded back to LCDC. LCDC in turn remanded the case to Metro and Multnomah County (in which the subject property was located). Plaintiffs then filed suit in the District of Oregon. Judge Anna Brown dismissed that case because there was not a final decision in the state proceedings, so the case was not ripe.

The Ninth Circuit reviewed the summary judgment decision de novo using a "clear error" standard and agreed with the trial court that the remand proceedings reopened the land use decisions on urban and rural reserves, so that plaintiffs would have an additional opportunity to persuade Multnomah County to change the designation. In that event, the decision is neither final, nor ripe, as a future decision must yet be made and as yet has no immediate effect. A claim for prospective relief based on land values between 2012 and 2016 is not the kind of claim of possible financial loss that a court would evaluate in determining whether plaintiffs suffered a hardship if judicial review were

withheld. The Ninth Circuit concluded that while the homeowners could have suffered damages while the LCDC 2011 order was on appeal, there wasn't any proof that they had done so. Without such proof of damages, the Ninth Circuit affirmed, albeit with the proviso that the opinion was neither suitable for publication nor to be used for precedent.

This is a run-of-the-mill ripeness case that follows the current understanding that takings claims are not ripe until there is a final decision on the permitted uses of the subject site. Property rights groups are seeking vehicles to overcome the ripeness doctrines, but unless and until they succeed, the final decision requirement will generally prevail in "as applied" takings claims.

Blumenkron v. Eberwein, No. 15-35847 (9th Cir. Dec. 4, 2017).

Edward J. Sullivan

Oregon Appellate Cases

She Said Hearsay: A Cautionary Tale for Foreclosure Lawyers

The swirling eddy of judicial foreclosures and associated documents has taken another twist. It is a familiar fact pattern: bank lender attempts to judicially foreclose on its deed of trust by filing a motion for summary judgment and arguing that there are no material facts in dispute. In *U.S. Bank Nat'l Ass'n v. McCoy*, the plaintiff arranged for an employee of its loan servicer (Wells Fargo) to supply a declaration stating, among other things, that she was "competent to testify to the [information in the declaration] based upon [her] personal knowledge of the facts and [her] review of the business records herein." In her declaration, the employee apparently reviewed and relied upon business records to prove that the plaintiff had possession of the note and the requisite standing to bring the foreclosure action. Those records were not introduced into evidence.

The homeowner fighting the foreclosure moved to strike the portion of the declaration describing the content of the business records, arguing they constituted inadmissible hearsay. On appeal, the court reversed the trial court by concluding that although the business records themselves could qualify as a hearsay exception if they were introduced

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into the record and met the factors under OEC 803(6), the declarant's mere testimony about what those business records say was inadmissible hearsay and the homeowner's motion to strike should be granted.

While this case may appear to present a discrete procedural matter, practitioners who file judicial foreclosures should be cautious to ensure their witnesses do not fall into this hearsay trap.

U.S. Bank Nat'l Ass'n v. McCoy, 290 Or. App. 525 (2018).
Tyler Bellis

Sometimes Gates Make Good Neighbors...

Two neighbors fought over a gate. An express easement gives Tressel the right to access her property over the Williams' driveway. When the easement was granted in 2007, there was an electronic gate that was operated by a remote control or key code. The Williams knew of the gate and easement when they purchased the property and removed the gate in 2010. Tressel, frustrated that the Williams then blocked Tressel's driveway, moved for declaratory relief, injunctive relief, and damages. The trial court ruled that Tressel's easement was valid and that the Williams had breached the easement by blocking the driveway and by removing the electronic gate,

On review of the Williams' three assignments of error and Tressel's four cross-assignments of error, the court of appeals rejected all assignments of error except the Williams' second: The Williams contended that the easement imposed no affirmative obligation to maintain an electronic gate and that the trial court had erred by ruling otherwise. The relevant paragraph of the easement provides as follows: "Access for ingress + egress over + across the driveway for [Williams' property], to [Tressel's property]. Along with Remote control + code for gate." The Williams argued that the grant of easement could not be read to require them to maintain an electronic gate in perpetuity, but instead merely requires them to provide gate access so long as a gate exists. The court of appeals agreed, finding that the nature and scope of the easement unambiguously required the Williams to provide Tressel with a remote control and key code for the gate so long as a gate exists but did not impose an affirmative obligation on the Williams to maintain a gate in perpetuity. Viewing the words of the express easement in the context of the entire document, the court of appeals reasoned that the gate provision in the easement document merely facilitates the stated purpose of the easement – to provide ingress and egress – and that, otherwise, a gate would prevent Tressel from the reasonable use and enjoyment of the easement. The court also noted that the gate provision helps avoid any contention that the existence of the gate interferes with the easement. Nevertheless, the court held that "[r]equiring defendants to provide keys to an existing gate, however, does not mean that defendants are legally obligated to maintain that gate or any gate in perpetuity" and that "[a] gate is not necessary for plaintiff to enjoy her ingress and egress rights, which is the stated purpose of the easement." Notwithstanding evidence showing that Tressel deemed the gate important and expected it to remain, the court of appeals determined that such testimony failed to establish that the easement was intended to impose a permanent, affirmative obligation on the Williams' servient estate to maintain an electronic gate. Accordingly, the court reversed and remanded in part.

Tressel v. Williams, 291 Or. App. 215 (2018).
Christopher Tackett-Nelson

...But Sometimes Gates Make Bad Neighbors

In a case of first impression, the Oregon Court of Appeals reviewed timely notice requirements, statute of limitations, and standing for public easement filings under the Oregon Tort Claims Act. The Central Oregon Irrigation District, a municipal corporation, had filed a public easement in 1980 along a canal path in Bend. Over the next twenty-nine years, neighbors would run, skate, and walk along the canal path. In 2009, COID allowed one family, the Lees, to build a 5-foot high fence blocking a public passage. Another family, the Hagstroms, also built a 5-foot fence, as well as a gate "wrapped in barbed wire." Plaintiffs are thus unable to walk the entire length of the canal path because of the Lee and Hagstrom gates and sued them in September 2014. In the early days of litigation, plaintiffs

discovered that COID had actually permitted the Lees and Hagstroms to build those gates and had recorded "joint road use agreements" in the Deschutes County records in 2009. Until they learned of the documents from opposing counsel, they had relied on a statement by COID's former lawyer, who denied that permission had been given. Plaintiffs amended their complaint and added COID as a party in July 2015 under the OTCA.

COID moved to dismiss the claims against it on the basis of untimely notice and expired statutes of limitations under the OTCA. It argued that plaintiffs could have discovered the 2009 filings in Deschutes County, notwithstanding its prior counsel's statement, and thus should have given notice of their OTCA claim within 180 days thereafter. It also moved to dismiss on the basis of standing, arguing that plaintiffs could not establish a crucial element of real or probable injury because plaintiffs did not plead lawful access over the easement pathway. The trial court accepted COID's motion to dismiss, conflated the Lee and Hagstrom arguments with COID's, and dismissed the entire matter. Plaintiffs appealed.

The court of appeals generally sided with plaintiffs rather than COID, concluding that plaintiffs *could* suffer actual injury for not being able to use a public easement. To the timing issues – whether plaintiffs' failure to know of the recorded documents was fatal to their claim against COID – the court acknowledged the dearth of OTCA claims in a public easement context. (Here we are, together for the first time! It is exciting to be a *RELU* reader with such issues arising.) The court explained that there are two arguments for determining when the OTCA clock begins ticking. First, the period might begin when a reasonable plaintiff should have known of an injury and cause in fact. Second, it might begin when the plaintiff actually discovers the potential claim. After an analysis of the notice period and OTCA statute of limitations, the court reasoned that for purposes of the OTCA, a "tort" is a breach of a legal duty imposed by law, "the breach of which results in injury *to a specific person or persons* for which the law provides a civil right of action" (emphasis in the opinion). As such, the "natural reading of the statute is that the OTCA notice period runs on an individual basis." The pertinent periods ran not from 2009, with the public recording, but from the actual discovery that COID had given express permission to the Lees and the Hagstroms to build their respective gates, blocking plaintiffs' access to the canal path. The court remanded the case back to the Deschutes County trial court for continued litigation against all parties, private and public.

Kutz v. Lee, 291 Or. App. 470 (2018).

Judy Parker

To Pay or Not to Pay?

Editors' Note: The following summary was written by appellant's counsel. The opinions contained therein are his alone and, as he notes, "shared by few if any."

Payment: that is the question. In *Timmermann v. Herman*, the Oregon Court of Appeals thoroughly reviewed the legislative history of and cases interpreting ORS 90.370 to answer the question of whether a residential tenant, in a nonpayment FED with counterclaims, needs to pay rent into court in order to retain possession.

The facts are simple. Tenant failed to pay her rent. Landlord issued a nonpayment of rent termination notice and filed an FED based on that notice. Tenant filed a counterclaim for unlawful access under ORS 90.322. At the end of the case, the court determined that Tenant owed Landlord $606 for back rent and that Landlord owed Tenant $2,550 for three instances of unlawful access. The trial court declined to apply ORS 90.370(1)(b) to offset the back rent owing against the award of damages on tenant's counterclaim and awarded possession to Landlord.

But the appellate court disagreed and ruled that the trial court must offset the amounts of rent owed against any award of damages even if no rent is paid into court. After reviewing prior decisions interpreting ORS 90.370, the court held that ORS 90.370(1)(b) must be applied anytime a tenant brings a counterclaim in a nonpayment FED. Tenants must be awarded possession in a nonpayment of rent FED in which a tenant has counterclaimed, 1) if the amount awarded on tenant counterclaims equals or exceeds the amount of rent owed, 2) if the amount awarded plus rent paid into court equals or exceeds the amount of rent owed, or 3) if the amount paid into court equals or exceeds the amount of rent owed.

Things to take away: ORS 90.370 applies to *all* authorized counterclaims not just those for habitability (ORS 90.320). If a tenant is ordered to pay rent into court and may need that payment to offset rent due to the landlord, consider having the order reflect that one of the grounds for the order is ORS 90.370 (but see *Eddy v. Parazoo*, 77 Or. App. 120 (1985), for an instance of a tenant paying rent into court without an order).

Timmermann v. Herman, 91 Or. App. 547 (2018).
Harry Ainsworth

Multiple Adjustments, Single Jurisdiction – Part 2

Editors' Note: Mr. Forer summarized the original appellate decision of this summary in the October 2017 issue of the *RELU Digest*.

Bowerman, supported by Lane County, petitioned the Oregon Court of Appeals for reconsideration of its decision in *Bowerman v. Lane County*, 287 Or. App. 383 (2017). The parties questioned anew whether ORS Chapter 92, which governs property line adjustments, allows a single application for multiple PLAs.

Bowerman argued that he has a significant interest in knowing whether he must pay only a *single* application fee or *multiple* fees. Lane Country likewise argued that it has a strong interest in knowing whether it can permit an applicant to submit a single application requesting a sequence of PLAs where requested adjustments are to property lines that will not exist unless the country approves one or more of the adjustments requested earlier in the sequence. Persuaded, the court agreed to resolve the issue it had previously declined to address.

The court concluded that ORS Chapter 92 does not contain a limitation on property line adjustment applications. LUBA therefore erred when it concluded that Chapter 92 prohibited the county from approving the sequence of lot line adjustments because they were requested in a single application.

To come to this conclusion, the court relied on statutory interpretation. Specifically, no provision in Chapter 92 imposes the limitation that LUBA found. In fact, the plain terms of ORS 92.190(3) expressly grant local governments wide latitude to establish their own procedures for the approval of property line adjustments. The only explicit limitation on that authority is that the procedures adopted by a local government must provide for recording of approved PLAs. The court found LUBA erred in concluding to the contrary.

Bowerman v. Lane County, 291 Or. App. 651 (2018).
Max Forer

Short LUBA Summaries

Remand Proceedings

In *Rawson v. Hood River County (Rawson II)*, LUBA affirmed the county's decision to reject Rawson's appeal of a planning commission decision approving Verizon Wireless's application for a permit for a wireless transmission tower. The April 2017 *RELU Digest* included a summary of *Rawson I*. In that summary, we focused on the issue waiver discussion. LUBA remanded the county's decision approving the tower to allow the county to adopt additional findings related to public interest, property values, and public need, as required by the county's code.

On remand, Hood River County decided not to reopen the evidentiary record but gave the parties the opportunity to present legal arguments on the remand issues. Accordingly, the county ended up rejecting a number of documents presented by petitioner Rawson during the remand proceedings but accepted documents presented by intervenor's attorney.

In this case, Rawson argued it was unfair not to reopen the evidentiary record and to reject petitioner's evidence while allowing intervenor's "new sources." LUBA rejected his argument, finding that local governments have

significant discretion in determining how they will proceed following a remand from LUBA. Local governments may choose to limit consideration of issues to those that must be addressed on remand.

Intervenor's attorney submitted, and the county accepted, legal argument on remand that included dictionary definitions for the terms "distribution plant" and "substation." Petitioner classified intervenor's submittal as "new sources." Because Rawson argued that she submitted similar materials and the county unfairly and improperly rejected those materials, LUBA reviewed the materials to determine whether the county erred in rejecting them. The documents were not limited to dictionary definitions but also included printouts from a Google search of the terms "distribution plant" and "substation," links to Wikipedia and other evidentiary material, as well as pages from an online continuing education course on electrical transmission and distribution substations. LUBA agreed with the county that Rawson's documents were properly excluded as new evidence (dictionary definitions are not evidence and are properly included in legal arguments).

LUBA affirmed the county's decision to reject Rawson's appeal and to approve the application for a permit for a wireless transmission tower.

Rawson v. Hood River County, LUBA No. 2017-107 (May 17, 2018).

Non-Conforming Use

A medical cannabis grow site was located in the RR-5 zone before the county amended its code to prohibit grow sites in that zone. Feetham submitted an application to establish his nonconforming rights to continue to operate as a grow site. He argued that he had rights to possess between 60 to 90 mature plants, based on statutes that allow 6 mature plants for every OHA card that designates the property as its grow site. A hearings officer determined that, no, in fact, Feetham could only establish rights to possess up to 18 mature plants.

On appeal to LUBA, Feetham argued that the number of OHA cards that identify the property as a grow site conclusively establishes the scope (or extent) of his nonconforming use right to be equal to the number of plants authorized by the cards.

To determine the scope or grant of a nonconforming use right, the relevant legal question is the extent of the activity that is *actually* occurring on the property on the date on which the use becomes nonconforming. An allowance for changes in the volume or intensity of a use is permitted, if the changes are attributable to growth or fluctuations in business conditions.

LUBA concluded that the number of OHA cards is not conclusive in determining the activity that was actually occurring on the subject property on the date the county amended its code to prohibit cannabis production in the zone. LUBA also critiqued Feetham's evidence: The OHA cards he presented included some that were expired, some that post-dated the code amendment, and others that were duplicates. Only three of the OHA cards in Feetham's evidence were valid.

Somewhat reluctantly, LUBA affirmed the hearings officer's conclusion that 18 mature plants were the scope of Feetham's nonconforming rights.

Feetham v. Jackson County, LUBA No. 2017-130 (Apr. 16, 2018).

LUBA's Jurisdiction

The Millers applied to the county for a conditional use permit to operate a new commercial winery and tasting room on intervenor's property. Access to the proposed development would be through a private access easement that extends over the Seits property. Interestingly, while Seits participated in the conditional use permit proceedings, he did not appeal the decision to the county board of commissioners. However, he then appealed a Commercial Access Construction Checklist/Inspection Form signed by the county public works directors and a fire official. The Construction Checklist is required as part of the building permit application for commercial structures. The county moved to dismiss the appeal because the Construction Checklist was not a "final decision" as defined in ORS 197.015(1)(a) and therefore did not fall within LUBA's jurisdiction. Further, the county argued that the Construction

Checklist is not a "land use decision" because it does not apply a comprehensive plan provision, a land use regulation, or a new land use regulation within the meaning of ORS 197.015(10)(a). Instead, the Construction Checklist is intended to implement a provision of the county's building code that requires a structure to have suitable access for fire protection equipment or otherwise meet fire protection standards. The county's building code has not been adopted as part of the county's land use code.

LUBA found that Seits failed to establish that the fire official's approval of the Construction Checklist was a "final" decision by the county within the meaning of ORS 197.015(10)(a). The fire official is not an employee of the county and lacks authority to waive a condition of approval set by the county or to issue a decision on behalf of the county and petitioner. Further, LUBA found that petitioner failed to establish that the Construction Checklist applies a comprehensive plan provision or a land use regulation. LUBA dismissed the appeal.

Seits v. Yamhill County, LUBA No. 2017-132 (Apr. 20, 2018).

Deference to Local Interpretation

In *Martin v. City of Tigard*, petitioner appealed the city's approval of a proposed medical oncology facility and parking lot in an area known in the city as Tigard Triangle. The challenged decision follows remand of *Martin v. City of Tigard*, LUBA No. 2017-020 (July 31, 2017) *(Martin I)*. The issue in this appeal and *Martin I* is whether the proposal violates two Tigard Community Development Code requirements – "Street alignment and connections" and "Street connectivity." For this proposal, those requirements mean the applicant must demonstrate that the development will not preclude a future street extension. In *Martin I*, the city's findings as to that issue were inadequate.

On remand, the city provided interpretations of its code and adopted additional findings of fact that essentially indicated that the street connections and connectivity requirements could not apply in the circumstances presented by the proposed development. Martin argued that there were alternative ways to interpret the requirements so that a street connection could be required and met. LUBA deferred to the city's interpretations of its own code, noting that the question is whether the city council's contrary interpretation of those standards – to require that a street extension connect with other streets on both ends of the extension – is plausible. LUBA decided that the city's interpretation was certainly plausible and, in LUBA's view, much stronger than petitioner's alternative interpretation, which could result in dead end street connections.

LUBA distinguished this case from *Holland v. Cannon Beach*, 154 Or. App. 450, *rev. den.* 328 Or. 115 (1998). In that case, the city denied an application and found that its slope and density standard were repealed and didn't apply. On remand, the city changed its interpretation and found that the slope and density standards did, in fact, apply and denied the application on those grounds. The court of appeals concluded that the change in interpretation regarding the applicability of the slope and density standard violated ORS 227.178(3), which limits applicable approval standards to the standards that were in effect when the application was first submitted or deemed complete.

Unlike the city in *Holland*, the city in this case is not deciding that the standards do not *apply*. Rather, the above-quoted findings simply adopt a different interpretation regarding *how* the standards apply. LUBA affirmed the city's decision.

Martin v. City of Tigard, LUBA No. 2017-116 (Apr. 13, 2018).

Honorable Mention

Practitioners with cases that require amendment of a comprehensive plan designation of impacted forest land to a more intense use might benefit from reviewing *Landwatch Lane County v. Lane County*, LUBA No. 2017-114 (May 8, 2018). #soilclassification; #goal3; #cannabiscultivation.

Although this decision interprets Portland's code, *Patel v. City of Portland*, LUBA NO. 2017-112 (May 7, 2018), could be helpful in parsing the differences between modifications, adjustments, and variances, or the distinctions between site-related versus use-related development standards.

Rebekah Dohrman

Cases from Other Jurisdictions

Texas Federal Court Denies Comfort Animal Designation to Lemur in ADA and FHAA Challenges to "Exotic Animal" Ordinance

Baughman, a woman living in Elkhart, Texas, claims she has a disability and that her lemur, a primate from Madagascar, is an emotional support animal that improves her quality of life. Lemurs have digits and nails, not claws, and are known for their "solitary but social" albeit dull torpor. They can, however, become aggressive. Baughman admits that her lemur has bitten people on two occasions; each time the lemur was quarantined for thirty days and returned to her. Elkhart adopted an ordinance banning all non-human primates from the city and, without a hearing, refused her request for an accommodation. In addition to the non-primate pet prohibition, the ordinance also banned any vicious animal and defined that term to include animals that had attacked humans. When Baughman requested an accommodation, she declined to name her specific disability or health condition but instead discussed her proposed security arrangements. The Civil Rights Division of the Texas Workforce Commission investigated and declined to bring a case on discrimination, concluding instead that Elkhart was not unreasonable in denying her request for an accommodation because of the lemur's known history of injuring humans. Baughman then sued to enjoin enforcement of Elkhart's "Exotic Animal" ordinance on multiple constitutional and statutory grounds.

The magistrate hearing the city's motion for summary judgment first found the individual members of the city council had legislative immunity from suit under the federal Civil Rights Act. As to the city's liability on substantive due process grounds, Baughman has a property interest in her pet and the city must show a reasonable relationship between the denial of that property right and a legitimate governmental interest. If the question of a conceivable legitimate objective is debatable, the ordinance will stand. The magistrate found that the minutes from the city council meeting and the mayor's affidavit supported the city's assertion that the ordinance was enacted to preserve and protect the health, welfare, and safety of its citizens. Baughman did not submit any evidence to show that the ordinance was enacted for any other reason. Applying the deferential "rational basis" test, the city was able to show a conceivable legitimate objective for the ordinance that justified any alleged interference with Baughman's property rights.

Baughman also asserted a claim under the Fair Housing Amendments Act, which makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap." The magistrate found that her FHAA claim was not reasonable, given the lemur's attacks and a legitimate concern for public safety.

Finally, as to the Americans with Disabilities Act discrimination claim, the magistrate noted that qualification for a reasonable accommodation concerning an animal requires an animal that is "specially trained to perform tasks directly related to a disability, contrasted with animals that have received only general training, provide only emotional support, or otherwise perform tasks not directly related to a disability." If the animal only provides comfort, rather than day-to-day tasks related to the disabilities of a human, it does not provide the basis for a reasonable accommodation under the ADA. Shockingly, this lemur did not pass the test of providing day-to-day tasks related to Baughman's disabilities. The magistrate granted summary judgment on this claim as well and dismissed the case with prejudice.

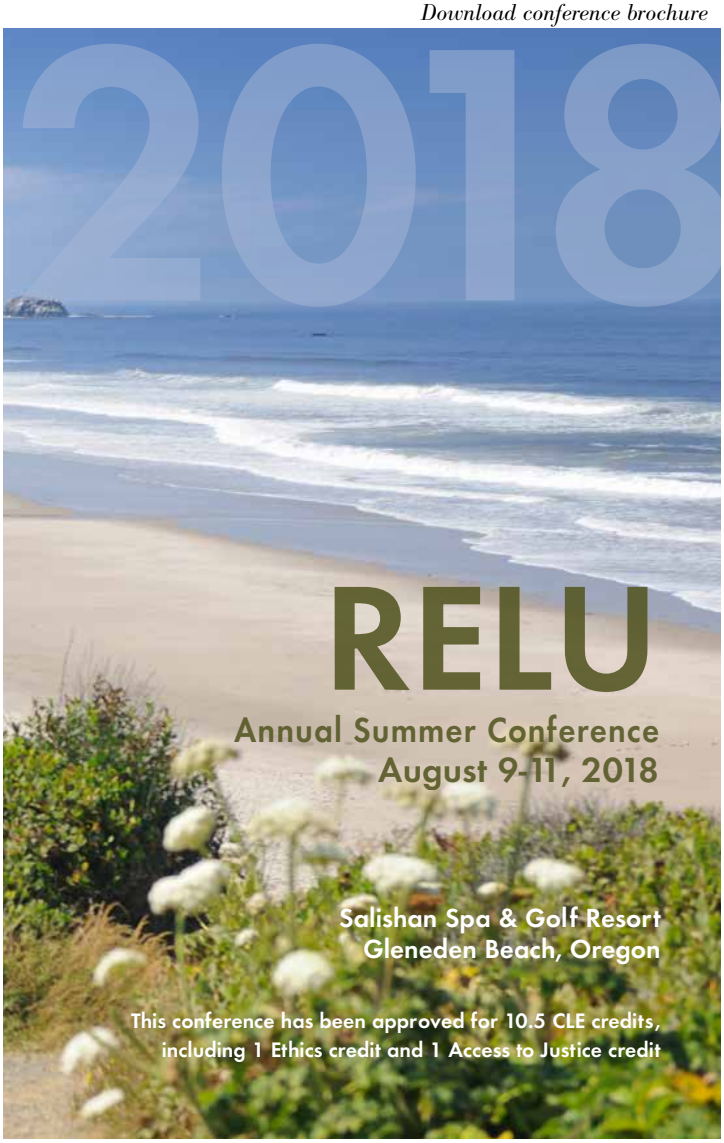
"Comfort animals" get much press these days. This case, however, reviews the Civil Rights grounds for such claims and finds their basis wanting, even for the generally docile lemur.

Baughman v. City of Elkhart, 2018 U.S. Dist. LEXIS 50241 (E.D. Tex. Mar. 27, 2018).
Edward J. Sullivan

Sign Up Now for the 2018 Annual Conference

The 2018 Annual Conference is upon us, RELU members! For three days, mingle with your peers and colleagues while you enjoy the latest case law and legislative updates. Both Friday and Saturday will have specific breakouts whether you are a RE lawyer or a LU lawyer (or both!).

Download conference brochure



On Friday morning, RELU section chair Dustin Klinger will officially open the conference. We then will have a land use case law update followed by discussion of considerations specific to leasing and siting wireless facilities. After a presentation on property tax and condemnation issues, we will have the section's annual meeting and election of officers during an extended lunch.

Friday afternoon we will have industry-specific breakout sessions. The land use breakout will focus on transportation planning rules, replanting, tiny house and ADU issues, and land use regulations. The real estate breakout will focus on tax law, drainage issues, arbitration, and adverse possession and prescriptive easements. We will rejoin after the breakouts for an hour of ethics credit focusing on privilege and confidentiality while working with consultants.

Saturday morning will cover real estate and land use legislative updates from the 2018 legislative session, followed by a real estate caselaw session. Saturday morning's real estate breakout will focus on retail leasing and online economy issues, home contracting, and HOA regulations, while the land use breakout will delve into property line adjustments, exhaustion and collateral attack, and non-conforming uses. We then will bring all our section numbers together for a final CLE on access to justice.

And of course, the conference will feature social activities guaranteed to connect you with old friends and make new ones! Thursday night is the ever-popular winetasting, while Friday evening offers beer tastings for our hophead fans. If you bring your canine friends, Salishan hosts a Yappy Hour each evening with snacks and bacon-flavored water for your (registered) four-legged friends!

The venue has set aside a number of guestrooms for the conference beginning Thursday August 9. Call Salishan at 1-800-452-2300 and ask for the OSB-Real Estate and Land Use Section group. Or register online and use the group booking code, OSBRELU18. The last day to reserve a room is July 9, 2018.

Sign up for the conference here and pay with a VISA or MasterCard. It is $275 for a RELU Section member and $300 for a non-member. Your registration fee includes the Thursday evening wine tasting, full breakfast, lunch, and evening reception on Friday, and a full breakfast on Saturday. The registration fee includes electronic access to the handbook and materials; for an additional $75, you may order a printed handbook.

Laura Craska Cooper