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## U.S. Supreme Court

### U.S. Supreme Court Punts on Federal Authority over River in Alaska

In *Sturgeon v. Frost*, the U.S. Supreme Court vacated the Ninth Circuit's decision interpreting the extent of the National Park Service's authority to regulate activities on Alaska's Nation River, declining to decide whether and to what extent the Park Service may regulate state-owned rivers in National Park Service units in Alaska.

At issue in this case was the applicability of National Park Service regulations to a state-owned river that flows through the Yukon-Charley Rivers National Preserve, a 1.7-million-acre federal preservation area managed by the Park Service. This case arose after John Sturgeon, who was using his hovercraft on the Nation River to reach his moose hunting grounds, was approached by three rangers. The rangers told Sturgeon that hovercraft use was prohibited under National Park Service regulations. Sturgeon argued that the regulations did not apply because the Nation River was owned by the State of Alaska, but the rangers ordered Sturgeon to remove the hovercraft from the preserve. To avoid criminal prosecution for operating his hovercraft on the Nation River, Sturgeon sued the National Park Service, seeking declaratory and injunctive relief allowing him to operate his hovercraft within the boundaries of the preserve. The State of Alaska intervened in support of Sturgeon.

The central dispute between the parties was whether Section 103(c) of the Alaska National Interest Lands Conservation Act creates an "Alaska-specific exception to the National Park Service's general authority over boating and related activities in federally managed preservation areas." Section 103(c) of ANILCA provides: "Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of

such unit." 16 USC § 3103(c). ANILCA defines "land" to include "lands, waters, and interests therein," and "public land" to include "land situated in Alaska which, after December 2, 1980, are Federal lands," with certain exceptions. Section 103(c) goes on to provide: "No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units."

Sturgeon, joined by the State of Alaska, argued that Section 103(c) operates to prohibit the National Park Service from regulating "non-public" land, including state-owned rivers. First, Sturgeon argued that the Nation River is not owned by the federal government and therefore is not "public land" under ANILCA and not part of the Yukon-Charley. Second, Sturgeon asserted that "because the Nation River is not part of the Yukon-Charley, the Park Service lacks authority to regulate it."

In contrast, the National Park Service argued that the agency "has longstanding authority to regulate waters within federally managed preservation areas, and that Section 103(c) does not take any of that authority away." According to the National Park Service, the United States interest in the river arose under the reserved water rights theory: When the federal government created the Yukon-Charley, it "reserved the water within the boundaries of the conservation system unit to achieve the Government's conservation goals." Thus, the "Federal Government has 'title' to an 'interest' in the Nation River, making it 'public' land subject to Park Service regulations." In the alternative, the Park Service argued that even if the Nation River is not "public" land, the agency has the power to regulate it because Section 103(c) of ANILCA "imposes only a limited restriction on the agency's power, prohibiting it from enforcing on 'non-public' lands only those regulations that explicitly apply 'solely to public lands.'" Because the hovercraft regulation at issue applied within "the boundaries of federally owned lands and waters administered by the National Park Service" and to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters * * * without regard to the ownership of submerged lands," 36 CFR § 1.2(a), the National Park Service asserted that the regulation did not apply "solely to public lands" and therefore Section 103(c) did not preclude the Park Service from enforcing it.

The District Court granted summary judgment to the National Park Service, and the Ninth Circuit affirmed in pertinent part. The Ninth Circuit did not reach the question of whether the Nation River counts as "public land" under ANILCA, instead holding that the Section 103(c) phrase "regulations applicable solely to public lands within such units" allows the Park Service to enforce nationally applicable regulations on "public" and "non-public" property provided the regulations are not Alaska-specific regulations. According to the Ninth Circuit, "[b]ecause of its general applicability, the [hovercraft] regulation may be enforced on both public and nonpublic lands alike within [units of the National Park Service situated in Alaska]."

In a unanimous decision issued March 22, 2016, the U.S. Supreme Court vacated and remanded to the Ninth Circuit for further proceedings, holding that the Ninth Circuit had not given due deference to the provisions of ANILCA. Finding the Ninth Circuit's interpretation of Section 103(c) "inconsistent with both the text and context of the statute as a whole," the Supreme Court stopped short of deciding whether the Nation River qualifies as "public land" under ANILCA and whether the National Park Service has authority to regulate the activities on the Nation River even if the river is not public land. Although it is unclear why the Supreme Court opted not to delve into these more complex questions, environmentalists, public access advocates, and states will follow with great interest the Ninth Circuit's resolution of these tough questions about federal authority over lands in Alaska.

*Sturgeon v. Frost*, 577 U.S. ___ (Mar. 22, 2016).
Sarah Stauffer Curtiss

## Diversity Jurisdiction Based on Citizenship of All REIT Members

The U.S. Supreme Court in *Conagra v. Americold* resolved a circuit split last month, addressing the issue of citizenship of real estate investment trusts. For the purposes of diversity jurisdiction under 28 USC 1332(a), the Court

held that REITs are citizens of *all* the states in which *any* of their members is a citizen. The Court expressly rejected the concept that a REIT is a citizen of the state of the principal place of business of the trustee.

This diversity jurisdiction case followed on the heels of *Hertz Corp. v. Friend*, a 2010 U.S. Supreme Court unanimous decision that the citizenship of a corporation for purposes of diversity jurisdiction is its principal place of business – that is, its "nerve center." Here, Conagra, having its nerve center in Nebraska, brought a breach of contract claim in Kansas state court against Americold, a REIT based in Maryland. Americold asserted diversity of citizenship and removed the case to federal court.

The parties cross-moved for summary judgment. The Kansas District Court found diversity jurisdiction in favor of Americold. On appeal, the Tenth Circuit ruled, *sua sponte*, that the federal court lacked diversity jurisdiction because Americold, the removing party, had not shown that none of its members were citizens of Nebraska and therefore the members of Americold were not completely diverse from Conagra's nerve center. The Supreme Court affirmed unanimously.

This decision classifies the diversity citizenship of REITs as that of their members, in line with other unincorporated entities such as joint stock companies, limited partnerships, and labor unions, and in contrast with the nerve center of corporations.

*Conagra v. Americold*, 577 U.S. ___ (Mar. 6, 2016).

Mary W. Johnson

## High Court to Review Takings Challenge

The United States Supreme Court granted a writ of certiorari to review *Murr v. Wisconsin*. The issue before the Court is "whether, in a regulatory taking case, the 'parcel as a whole' concept as described in *Penn Central Transportation Company v. City of New York*, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes." The Court will hear the case during the October 2016 term, but no date has yet been set for argument.


Oregon Real Estate and Land Use Digest



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## When Can a Bicyclist Be a Licensee for Premises Liability?

In *Currier v. Washman*, the Oregon Court of Appeals found that an injured bicyclist presented sufficient evidence that owners of a car wash had impliedly consented to the entry of bicyclists on their property to avoid a directed verdict that the bicyclist was a mere trespasser. This case contains a useful discussion of how to prove implied consent for purposes of licensee status for premises liability.

Washman owns a car wash at an intersection in Portland. The property is open to the adjacent streets. The accident occurred at a location where cars leave the car wash on a marked lane exiting onto the street. Bicyclists, pedestrians, and vehicles regularly use the streets, bicycle lanes, and sidewalks adjoining the car wash. Bicyclists and pedestrians have unimpeded access across the property, with no access restrictions or "no trespassing" signs. Area businesses do not restrict bicyclist or pedestrian use of their parking areas and drive lanes. Currier presented testimony that most people consider local commercial properties to be open for use by the travelling public.

To avoid a car exiting the car wash and blocking the bike lane and sidewalk, bicyclist Currier rode into the car wash's drive lane and parking area. He rode over an area of wash water drippage on the concrete pavement, his bicycle tires slid out, and he fractured his hip and suffered a deep elbow cut. Washman knew of this slippery area and that bicyclists and pedestrians would traverse the car wash parking lot, including to avoid exiting cars blocking the bike lane and sidewalk. While signs warned customers not to park in this slippery area, there was no other signage.

A jury awarded the bicyclist damages after Washman failed to convince the trial court that a directed verdict was proper. The trial court found that there was sufficient circumstantial evidence to submit to the jury the matter of implied consent to licensee status. The court of appeals affirmed, applying the test for implied consent in premises liability cases in the *Restatement (Second) of Torts* section 330 comments c  and e (1965), adopted by the court of appeals in *Denton v. L.W. Vail Co*, 541 P.2d 511 (1975).

Relying on the concept of licenses created by actions not words and the use of circumstantial evidence and community custom to determine whether a reasonable person would conclude a property owner had consented to pedestrian and bicyclist use, the appellate court determined that the trial court was correct to allow the matter to go to the jury. Evidence of Washman's knowledge of the situation, the failure to take action to notify bicyclists or otherwise deter use of the property to circumvent a blocked public way, and of the community custom of bicyclists and pedestrians using parking areas and drive lanes of local businesses, was considered enough for a jury to infer implied permission to enter the car wash property.

This case illustrates some of the difficulties of identifying who is a licensee for purposes of premises liability and how community custom can successfully be used to support such a finding. Resolution of implied consent situations can be very expensive and the outcome uncertain. In areas regularly trafficked by the public, property owners need to pay close attention to any significant risks posed by their properties. They need to be aware how other commercial businesses in the area deal with pedestrians and bicyclists. Property owners wishing to avoid claims such as this need carefully to consider whether warning signage or other access restrictions will address their exposure.

*Currier v. Washman*, LLC, 276 Or. App. 93 (Jan. 27, 2016).
David Ashton

## More Answers, More Questions in Foreclosure Law

*Wolf v. GMAC* is the latest clarifying decision from the Oregon Court of Appeals regarding application of the Oregon Trust Deed Act to non-judicial foreclosure sales of real property. At heart, the court's holding is straightforward: To foreclose a defaulted borrower's interest in real property by non-judicial sale, *former* ORS 86.770(1), *renumbered* ORS 86.797 (2013), requires the sale be conducted by a validly appointed trustee as defined in *former* ORS 86.705(8), *renumbered* ORS 86.705(9) (2013). However, the broad implication of the decision – that a

borrower can bring *post-sale* challenges to trustee's sales, coupled with the court's explicit statements as to what was not decided, leaves many questions open for further litigation.

The pertinent facts are brief. Wolf obtained a $168,000 loan secured to real property by a trust deed. The trust deed named Mortgage Electronic Registration Systems, Inc. as the beneficiary, and MERS subsequently named LSI Title Company as "successor trustee." LSI properly served Wolf with a notice of default and election to sell, subsequently selling the property to GMAC at a trustee's sale. GMAC then brought a forcible entry and detainer action against Wolf, who responded by filing his own declaratory action to halt the FED and declare the trustee's sale invalid.

Relying on the Oregon Supreme Court's decisions in *Brandrup v. ReconTrust Co.*, 353 Or. 668 (2013), and *Niday v. GMAC Mortgage, LLC*, 353 Or. 648 (2013), Wolf argued that MERS was neither a valid trustee nor beneficiary under the trust deed and lacked authority to appoint LSI as a successor trustee, thereby invalidating the foreclosure sale. GMAC responded that, regardless of any violations under the OTDA, Wolf was barred from bringing a post-sale challenge under *former* ORS 86.770(1) ("the trustee's sale forecloses and terminates the [borrower's] interest in the property") and *former* ORS 86.780, *renumbered* ORS 86.803 (2013) (upon recording of a trustee's deed "the recitals contained in the deed and in the affidavits ... shall be prima facie evidence in any court of the truth of the matters set forth therein, but the recitals shall be conclusive in favor of a purchaser for value in good faith relying upon them.").

The court rejected GMAC's arguments, holding: "[I]n the absence of a validly appointed trustee, there is no "trustee" at all for purposes of the OTDA – and, hence, no "trustee's sale" with the power to foreclose the other persons' property interests." Therefore, "[b]ecause *former* ORS 86.770(1) (2011) applies only to a 'trustee's sale,' it cannot preclude a post-sale challenge to the sale of Wolf's property by someone who was not, in fact, the trustee." The court also noted, in reference to *Mikityuk v. Northwest Trustee Services, Inc.*, 952 F. Supp. 2d 958 (D. Or. 2013), a federal district court case commonly cited to argue borrower-litigants lack standing to bring claims: "we are not persuaded by *Mikityuk's* interpretation of the legislature's intention."

Despite the clear holding that a non-judicial trustee's sale can be challenged under the circumstances of this case, the court declined to answer several large questions that would have provided a clearer definition of the scope of its holding. First, it declined to "resolve" whether the OTDA requires "strict compliance" with every pre-sale requirement, instead concluding, "that the participation of a "trustee" is so fundamental to a "trustee's sale" that a sale cannot foreclose and terminate an individual's property interest ... unless that sale is conducted by an actual trustee."

Second, the court alluded to the tension between its holding here and *former* ORS 86.780, *renumbered* ORS 86.803, which states the recitals in a trustee's deed "shall be conclusive in favor of a purchaser for value in good faith relying upon them." Rather than directly address this tension, the court reaffirmed the more amorphous principle that the OTDA represents a "balance of interests" between providing creditors a quick remedy and protecting borrowers from unlawful foreclosures, and held that granting GMAC's arguments as a matter of law, "would run afoul of the "strict rules" and "well-coordinated statutory scheme" that the legislature established for nonjudicial foreclosure."

These questions, and others unaddressed, will likely remain points of contention between lenders and borrowers.

*Wolf v. GMAC Mortgage, LLC*, 276 Or. App. 541 (Feb. 18, 2016).
Raife Neuman

## The Statute Means What It Says

*Harvey v. Davis* concerned a dispute between Jack Davis, the purchaser of three commercial properties under a land sale contract, and Brenda Harvey, the seller.

In 2004, Harvey's predecessors entered into a land sale contract with Davis for three commercial properties in northeast Portland. The land sale contract included a forfeiture remedy as provided for in ORS 92.905-93.945. After Davis defaulted under the terms of the land sale contract with more than 75 percent of the balance of the purchase

price still owing, Harvey mailed him a letter titled "Notice of Default Pursuant to ORS 93.915." The letter demanded that Davis cure the default and stated that if the default were not cured by June 24, 2013, Davis would "forfeit [his] interest in the Contract of Sale and the Properties." The deadline was 62 days from the date of the letter (because more than 75 percent of the original contract balance remained unpaid, ORS 93.915(3)(a) controlled, which requires 60 days be given to cure the default). Davis did not cure the default by June 24, 2013. On the following day, Harvey's attorney recorded a declaration of forfeiture declaring the contract forfeited and stating that Davis had no further right in the properties. After the declaration was recorded, Harvey filed three FED complaints, each seeking possession of one of the three properties. Davis denied that Harvey was entitled to possession and the three actions were consolidated for trial.

At trial, Davis argued that the contract did not include a forfeiture remedy as that term is defined in the statute and that the notice of default was insufficient. The basis for the latter argument was that, while the notice was sent 62 days ahead of the deadline, the contract itself contained a provision that made all notices delivered by mail effective *three days* after mailing. Thus, continued the argument, Davis effectively only had *59* days to cure, not the *60* days required by ORS 93.915(3)(a). Harvey responded by arguing that, to the extent there was a problem with the timeliness of the notice, Davis had waived his right to raise that argument because he failed to notify Harvey that he claimed a right to a longer period of time in which to cure the default, pursuant to ORS 93.915(5). Harvey also argued that the forfeiture remedy in the contract was adequate. The trial court ruled in Harvey's favor on both issues, leading to this appeal.

On appeal, Davis reasserted the 59/60 day argument. Harvey's response cited ORS 93.915(5) and argued that the deadline for curing a default is conclusively presumed to be correct unless the recipient of the notice notifies the seller by registered or certified mail that the recipient claims a right to a longer period of time. It was undisputed that no such notice was ever sent.

Davis then argued that Harvey was required to introduce evidence that he, Davis, did not send the registered or certified mail notice. Davis contended that, since Harvey as the plaintiff was the party seeking application of the conclusive presumption, he was thus required to introduce evidence showing that it did not occur.

The court soundly rejected that argument. The court looked at the text of ORS 93.915(5) and concluded that it attaches conclusive effect to the forfeiture date unless the recipient has taken the steps set out in the statute. The court emphasized that the statute was phrased such that the presumption applied *unless* the recipient provides the notification by registered or certified mail. The court went on to hold that "ORS 93.915(5) unambiguously places the onus of avoiding the conclusive presumption on the recipients of the notice." Since it was undisputed that Davis did not challenge the forfeiture deadline, the date was presumed to be correct and the court rejected Davis's arguments. In other words, the statute means what it says.

In his second assignment of error, Davis contended that the forfeiture remedy within the contract was not valid. He argued that the forfeiture remedy in ORS 93.905(2) means "the non-judicial remedy whereby the seller ... extinguishes the debt," whereas the contract provision stated that upon the completion of the forfeiture process "this Contract shall be extinguished." Davis was attempting to make a distinction between the statutory language referring to extinguishing the *debt*, as opposed to the contract language that referred to the *contract* being extinguished. The court rejected this argument, noting that there was nothing ambiguous about the nature of the forfeiture remedy in the contract and the remedy clause stated that upon recordation of the affidavit, the contract would be extinguished and cancelled. The court went on to note that, since the contract contemplated recordation of the affidavit and the extinguishment of the contract, the debt was also extinguished. Thus, the court of appeals affirmed the trial court ruling.

*Harvey v. Davis*, 276 Or. App. 680 (Mar. 2, 2016).
Gary Kahn

# Cases from Other Jurisdictions

## Washington Supreme Court Finds "Community Bill of Rights" Outside Initiative Power

*Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution* involved the successful gathering of signatures to put a "Community Bill of Rights" on the ballot. This proposal would amend the Spokane Charger to require large developments to receive voter approval in the neighborhood; give the Spokane River the legal rights to "exist and flourish"; give city residents the rights to access and use that river; give employees rights against employers; and strip the legal rights of any corporation that violated the rights secured in the measure.

Petitioners filed a declaratory judgment challenging the validity of the proposal. The trial court found petitioners had standing to challenge the validity of the proposal but that, on the merits, the proposal exceeded the initiative power. The Washington Court of Appeals made the opposite rulings on these issues and ordered the matter to be put to a vote. The Washington Supreme Court accepted review.

As to standing, the supreme court required that the interest sought to be protected be "arguably within the zone of interests to be protected or regulated" by the statute or constitutional provision at issue and that a potential plaintiff must show the challenged action caused an "injury in fact, economic or otherwise, to the party seeking standing."

While the Washington Constitution has a process for state initiative measures, local initiatives are governed solely by statute, under which local governments may establish their own processes. Moreover, Washington case law shows that courts are loathe to interfere prematurely with the initiative process, generally limiting such review to procedural challenges and to the question whether the matter is proper for direct legislation. The state's high court thus rejected the heightened standing requirements of the court of appeals, focusing on the adverse effect on the plaintiffs and concluding that plaintiffs had alleged sufficient injury to provide standing.

As to whether the proposals were within the scope of the initiative power, the court said that power is limited to matters within the authority of the city and affirmed the trial court ruling that all four proposals were not so limited, as they either dealt with non-legislative matters or were otherwise outside the city's authority. If a matter were administrative in nature, or if statutory law reposes authority in the mayor and council, or if the city would not have authority to undertake the action proposed in the initiative, then the proposal may not be sent to the electorate.

Here, the proposal did not qualify. For example, the requirement of voter approval for large development implicated an existing statutory scheme for city development approvals, and modification of those processes is administrative in nature. Two provisions conflicted with state law: the proposal giving the Spokane River legal rights to "exist and flourish" and the proposal to expand employee rights. Similarly, the provision to strip the legal rights of corporations conflicted with both state and federal law. The appellate court thus affirmed the trial court order striking the measure from the ballot.

The wording and structure of the Washington Constitution differs from Oregon and it does not necessarily follow that the result of similar challenges would be identical, nor does this holding imply that an Oregon court would undertake pre-election review. Given the fairly detailed procedures for local land use regulation, it might be difficult to impose additional requirements in the local process, especially in light of the 120- or 150-day time limitations provided by Oregon statutes. But it could be a wild ride in the meantime.

*Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, 2016 WL 455957 (Wa. 2016).
Edward J. Sullivan

SAVE THE DATE! The RELU 2016 Annual Conference will be held August 11 – 13 at Salishan Spa & Golf Resort on the Oregon Coast. We look forward to seeing you there!

## EFU Land – Golf Course

Oregon Coast Alliance succeeded in its first challenge to Curry County's approval of an 18-hole golf course development on part of the EFU-zoned Knapp Ranch. LUBA remanded that decision based on the county's faulty calculation of the development's design capacity. The county prevailed in the Alliance's second appeal of its decision on remand, however, when LUBA agreed that certain areas of the proposed golf club development are not counted toward the 100-person design capacity limit for golf courses within 3 miles of an urban growth boundary. The exempt areas include indoor hallways with view windows, which LUBA viewed as pedestrian transit areas and not gathering places, and unenclosed outdoor decks and patios. Despite the presence of benches and 15 lockers in the men's and women's locker rooms, LUBA affirmed the county's finding that each locker room had a design capacity of four people absent any focused challenge by the Alliance.

*Oregon Coast Alliance v. Curry County*, LUBA No. 2015-080 (Jan. 27, 2016).

## Nonconforming Use – Compost Facility

After weathering years of state and local permitting and appellate challenges, Howard Grabhorn couldn't persuade Washington County or LUBA that his composting facility is a nonconforming use. In his efforts to do so, however, Grabhorn raised creative legal arguments that asserted procedural, evidentiary estoppel, and preemption challenges to the county's decision.

On the procedural front, LUBA acknowledged the county hearings officer's decision may have mistakenly referred to 1984 rather than 1962 as the date Grabhorn's composting facility became a nonconforming use. In fact, 1989 may have been the earliest relevant year for determining nonconforming use status. Since Grabhorn had ample opportunity to present evidence showing composting activities began in 1962, LUBA viewed the mistaken date reference as a harmless error. LUBA also agreed the county appropriately limited its consideration to only Tax Lot 2302 of Grabhorn's property because that was the site identified in Grabhorn's application to verify nonconforming use status.

Faced with a "close call" on Grabhorn's substantial evidence challenge to the county's finding concerning the year his composting use began, LUBA agreed with the county. LUBA acknowledged that Grabhorn offered credible evidence that he began composting in 1962. Contrary evidence consisting of local, Metro, and state permitting documents and Land Use Compatiblity Statements indicated formal composting activities were established much later than that. LUBA concluded that Grabhorn's evidence was not compelling or significant enough to undercut the conflicting evidence the county found most persuasive.

LUBA also quickly dispatched Grabhorn's estoppel argument, which relied on a 2011 franchise and DEQ permit agreement with him that referred to composting as a lawful use. Citing appellate precedent, LUBA refused to consider Grabhorn's argument since he failed to establish that LUBA has any statutory or equitable authority to apply the equitable estoppel doctrine in overturning land use decisions. Even if it did, LUBA treated the franchise agreement's characterization of Grabhorn's use as a legal conclusion and not a factual statement that would assist him in establishing all five elements of equitable estoppel.

Finally, Grabhorn's preemption argument is premature in LUBA's view. He based his argument on the county's sign-off on a 2013 DEQ registration for the composting facility. Nothing about the state registration, which required Grabhorn to comply with a disputed 2011 franchise approval, definitively determined the nonconforming use status of any compost facility for zoning purposes. Nor did it preclude the county from later reexamining whether Grabhorn's facility is a nonconforming use under its zoning regulations as it did in the challenged decision.

*Grabhorn v. Washington County*, LUBA No. 2015-065 (Jan. 28, 2016).

## Local Procedure

In remanding the City of Millersburg's decision denying a planned unit subdivision application, LUBA offered two practical reminders to applicants and decision makers in the local land use process. First, it is the applicant's burden to propose conditions of approval necessary to comply with local approval criteria. Here, LUBA rejected J. Conser and Sons' claim that Millersburg should have fashioned approval conditions to enable their application to be approved and to avoid a denial. Although the zoning code describes a denial as meaning conditions couldn't be developed to satisfy the approval criteria, that alone was insufficient to shift the burden of proposing conditions from J. Conser to the county. Second, a decision denying a land use application must give the applicant guidance about changes that could be made to garner an approval. In LUBA's view, Millersburg's decision consisted of "critique and rebuttal" of J. Conser's application and failed to give them any clues about how to address the flaws the city identified in its application.

*J. Conser and Sons, LLC v. City of Millersburg*, LUBA No. 2015-065 (Jan. 28, 2016).

## LUBA Jurisdiction

The horizons of LUBA's jurisdiction don't extend to Oregon City's resolution determining a city property is not the type of park, known as a "Charter Park," that requires voter approval before it can be transferred. The resolution's recitals and findings state in passing that the city's comprehensive plan designates the property as a park. The Oregon City commission concluded, however, this land use designation doesn't control whether the property is a Charter Park. Since the commission wasn't obligated to apply the comprehensive plan or zoning regulations in deciding the charter question, the resolution is not a statutory land use decision for purposes of LUBA review. It is also not a significant impact land use decision – to the extent the significant impact test is still relevant – because the city resolution doesn't change the property's status quo.

*McLoughlin Neighborhood Association v. City of Oregon City*, LUBA No. 2015-098 (Feb. 9, 2016).
Kathryn S. Beaumont

# SPOTLIGHT ON INCLUSIONARY ZONING

Editor's Note: Inclusionary zoning – the planning requirement that new housing developments must offer a portion of the new units at affordable levels of purchase or rent – is a hot topic. The Supreme Court denied review of a case challenging a California city's inclusionary zoning regulations. Locally, the Oregon Legislature passed SB 1533, which permits inclusionary zoning in certain municipalities, in the 2016 short session. Jennifer Bragar, Chair of the RELU Section, and Jon Chandler, executive director of the Oregon Home Builders Association, will be discussing different views on Oregon's inclusionary zoning at the April 29, 2016 RELU Spring Forum at the Bar Center. We invited them to share their thoughts on the topic with *RELU Digest* readers.

**SB 1533: Point**

As part of a four-bill package – SB 1533, SB 1573, HB 4143, and HB 4079 – the Speaker of the House, Tina Kotek, used the short session to try and push housing advocates' agenda forward, but the bills got hijacked by development interests. This article explores the so-called inclusionary zoning bill, Senate Bill 1533. Housing advocates never expected inclusionary zoning to singularly solve the affordable housing crisis but hoped it would be one avenue to create equitable neighborhoods. The hope was to have affordable housing placed in all neighborhoods, near transit options, fresh food, and quality schools. But, at the end of the day, Oregon jurisdictions are left with little in the way of mandating inclusionary housing, except for possibly the City of Portland.

In most inclusionary zoning programs across the country, the threshold sale or rent level is left to the local government to decide and is often set at 60 percent of the median family income as determined by the Department

of Housing and Urban Development. Under SB 1533, affordable housing is defined as housing where rents are set at 80 percent or above of the median family income for the county in which the housing is built, and it is at that level where local governments can impose the affordability requirement. For example, in 2015, Multnomah County's 80 percent median family income for a family of three was $52,950 and corresponded with rental limits for a two-bedroom unit of $1,323 per month. In comparison, the 60 percent median family income for a family of three in 2015 was $39,720 and rental limits for a three-bedroom unit were $1,051 per month. Thus, SB 1533 artificially reduces the populations that can be served by inclusionary zoning programs and acts to exclude people who cannot afford $300 in additional rent per month.

The authorization under SB 1533 to impose the requirement to construct affordable units for the 80 percent median family income group requires that the new construction is a multi-family structure. The definition of "multi-family structure" is where Senate Bill 1533 got lost in translation. The definition is a structure with three or more housing units sharing at least one wall, floor, or ceiling surface in common with another unit. However, inclusionary zoning requirements can only be imposed on multi-family structures that contain at least 20 housing units. Most cities in Oregon do not support this kind of high density development occurring within single structures; those that do will face development proposals that artificially reduce density below 20 units to avoid inclusionary zoning impacts.

Moreover, developers must be provided with the option of paying an "in lieu fee" to avoid building inclusionary units. This in lieu fee option further erodes the equity factor that housing advocates sought because the city or county is under no obligation to use those fees to create housing in particular neighborhoods. Further, the efficiencies of inclusive housing are lost when the developer – schooled in construction of housing – can add units to a project at lower cost than government-funded housing developments.

In addition, SB 1533 offers cities and counties the ability to impose a construction excise tax on those projects that add new residential structures or additional square footage in an existing residential structure, in residential zones; as well as commercial and industrial zones. The tax may not exceed the low percentage of 1 percent of the permit valuation for residential construction permits. However, the funds raised through the excise tax in residential zones must be used in the following manner:

- 50 percent to fund developer incentives for inclusionary zoning (which could include, but are not limited to, increasing the number of affordable housing units in a development and/or building affordable units for households who have qualifying incomes below 80 percent median family income);
- 15 percent distributed to the Housing and Community Services Department to fund home ownership programs; and
- 35 percent for programs and incentives of the city or county related to affordable housing.

Some have suggested that in those cities or counties where inclusionary zoning will never occur, the jurisdiction must still adopt an inclusionary zoning ordinance in order to impose an excise tax for residentially zoned property, and 50 percent of those funds must be held aside until a qualifying project comes along. It is unclear how this provision will play out.

The use of excise tax funds raised in commercial and industrial zones is less restrictive than the use of those funds raised in residential zones. The only restriction on the use of these funds is that 50 percent must be used for housing.

What should have been straightforward, overturning of Oregon's statutory ban on inclusionary zoning, instead became a closed-loop system for multi-family developers: Offering extensive incentives to entice developers to construct inclusionary units; and collecting taxes from developers and redistributing them among the very same developers through the construction excise tax. Instead of giving local governments the option to create inclusionary zoning programs that work in their neighborhoods, it is likely that only the City of Portland will be able to impose a workable inclusionary system – and it will be at least six more months before we know what the City's program could entail.

Jennifer Bragar

### SB 1533: Counterpoint

SB 1533 dealt with two issues – inclusionary zoning, or "IZ," and construction excise taxes, or "CET." With regard to IZ, the bill allows cities and counties to adopt mandatory IZ ordinances on either for-sale or for-rent units, but only on multi-family projects of 20 units or more, and with a maximum of 20 percent of the units required to be affordable, with "affordable" defined as 80 percent or more of area median income. Jurisdictions that adopt mandatory IZ also have to provide tangible financial incentives (such as SDC waivers, property tax abatements, and so on) and may also provide site-specific intangible incentives, such as density bonuses or expedited processing. A fee-in-lieu option is also required, as is the use of clear and objective approval standards.

As for the CET, we agreed to a local option residential CET of up to 1 percent of the building permit value, with the proceeds dedicated to the financial incentives listed in the bill (50 percent); other local affordable housing programs (35 percent); and down-payment programs administered by the state (15 percent). CETs on non-residential construction are also allowed, but with no cap, and with one-half of the proceeds being dedicated to affordable housing.

With this bill, we put the issue of IZ to rest for the foreseeable future and by limiting it to larger multi-family projects and requiring specific incentives, we did so in a way that might actually work but at least likely won't do any harm. On the CET front, we solved a problem that was going to confront us in 2017 in any event, as the current prohibition on local CETs was going to go away then; by agreeing to this formulation, we at least made sure that any CET on residential construction was put to a housing-related use rather than just going into the city or county general fund.

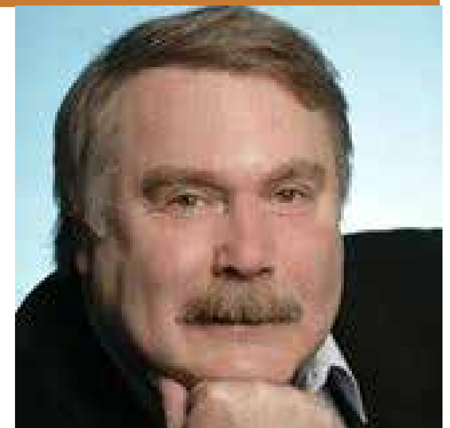
Jon Chandler

## High Court Denies Certiorari in California Inclusionary Zoning Case

The Supreme Court denied certiorari in a challenge to San Jose's inclusionary zoning rules. This decision leaves in place the California Supreme Court's decision that inclusionary zoning is not an exaction: "[t]here can be no valid unconstitutional-conditions takings claim without a government exaction of property, and the ordinance in the present case does not effect an exaction. Rather, the ordinance is an example of a municipality's permissible regulation of land under its broad police power."

*California Building Industry Association v. City of San Jose*, S212072 (Cal. Sup. Ct., June 15, 2015), cert. denied, 577 U.S. ____ (Feb. 29, 2016).

# QUINQUE



*Quinque*, Latin for *five questions*, is an occasional but regular series interviewing non-lawyers whose industries intersect those of *RELU Digest* readers. If you have suggestions for future *Quinque* profiles, please email the editors.

Kelly Githens is a State Certified General Appraiser. Mr. Githens has been a realtor, mortgage broker, builder, and developer and "always a Real Estate Investor." Mr. Githens has a Masters in Business he received after resigning as a Captain in the Army. He writes, "I'm least proud of being an appraiser, because as a species, we go in after a deal and try and quantitatively interpret the market and motivations. I'm most proud of being on the entrepreneurial side of real estate because that's where courage is needed and the rewards are the most." Reach Kelly at 503-477-7089 or kelly@westernequities.com.

*Q1. Tell the readers of the RELU Digest about your job.*

The "Mortgage Meltdown" bent me sideways financially. I figured I had found my niche as a Shoebox Condo Developer – that didn't turn out quite as I planned. Moving forward, due to a chronic bad back, I'm doing some desk type appraisal work to put food on the table and consulting as well as putting together other components such as buying and selling notes, wholesaling, and raising private money for real estate deals to get back seriously into the game. Sidebar: Despite the horrible personal and corporate tax rates, Oregon is still a great place to be involved in any of the many facets of real estate.

*Q2. What trends do you see in your industry with respect to real estate/land use?*

Oregon should be proud to be the home ground for the landmark *Starker* decision in 1979, which turned into the IRC 1031 Tax Deferred Exchange. Right now tax ramifications pertaining to ADUs are a hot-button issue, as is urban density. Another trend to watch is where we are, both locally and nationally, in the real estate cycle. Based upon the relative popularity of Portland and surrounding environs, I feel the bubble, cycle, or trend will be a bit more gentle the next time around, using Mortgage and Fed Funds Rates as prime bellwethers.

*Q3. Tell us your professional horror story.*

Gladly, but I'll have to take off my Appraiser Hat and put on my Developer/Builder hat. I developed and built four townhouses in North Portland facing the St. John's Bridge in the late 90s. I sold them off individually. During one of the sales transactions, which had closed, the new buyer contacted my realtor and said there was a problem with the drywall in the basement garage becoming wet where a leak had developed. I reviewed the sales agreement and got a bid from one of the drywall contractors I'd used during the build-out. I looked at the problem, looked at the sales agreement, and looked at the contractor's bid. It wasn't too bad – a few hundred dollars – but the sales agreement stated clearly that the property was sold as-is, with seller to do no repairs. Okay, so I was in the right in declining to pay for the repairs. But that's not the way life works and she turned into the Buyer from Hell. To say she was mad and carried a grudged for years is saying it mildly. I got written notification a few years later that one of my building permits for one of the townhouses, storm drainage in particular, had been retroactively rescinded – ostensibly from a complaint from my Buyer from Hell. When I finally realized what had happened, I naturally went ballistic and asked for a meeting with the inspector and an arbitrator from the Bureau of Development Services. The inspector was renowned for being a bully with respect to his area of expertise, which was groundwater drainage. I grabbed my contractor and while it was raining, we went and watched drain water flow peacefully into a drainage sump we had created. Based upon that, I requested a re-inspection and got the permit finaled – for the second time. Guess the story illustrates two points: 1) Buyers from Hell do exist and it pays in the long run to be satisfaction-oriented, even though it might cost extra money; and 2) BDS Inspectors can and do create their own fiefdoms and can make things difficult for all parties with which they interact.

*Q4. Do you think the law helps or hinders your industry?*

There are many types of laws with respect to real estate: Landlord-Tenant; Contract Law; Real Estate Law; Land Use Law; HOA Law, Tax Law, and so on. They all intersect and interact. The laws are the laws and if you want to work in this state, it pays to know attorneys who specialize in the various fields.

*Q5. What one thing do you wish you could tell lawyers about interacting with you and your clients?*

Nothing profound. Most of them have their specialties and work hard to keep up with issues as they relate to their clients. Most of the time fees are commensurate with what experience the lawyer brings to the table.