Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 42, No. 6, December 2020

Also available online

Oregon Cases

Fungus Amongus: OLTA's Employee-Occupancy Exemption

This fall, the Oregon Court of Appeals issued a sprawling opinion in *Rowden v. Hogan Woods*. Stemming from claims of damages due to toxic mold exposure, the opinion ruled on the preclusive effect that should be given to a Workers' Compensation Board decision on subsequent civil claims and the ability to pierce the corporate veil prior to the issuance of a judgment. Most relevant to landlords, the court clarified the employee-occupancy exception of the Oregon Landlord Tenant Act.

In 2005, on-site property managers began living in a residential rental building. The managers observed the presence of mold and experienced symptoms consistent with toxic mold exposure. They filed workers' compensation and civil claims against their employer, in part alleging damages under the Oregon Landlord Tenant Act. The Workers' Compensation Board denied the claims, and the trial court in turn ruled that the preclusive effect of the Board ruling prevented the plaintiffs from seeking civil damages. The trial court also denied their related claims on summary judgment.

The appeals court clarified its view of the employee-occupancy exception to the OLTA, listed in ORS 90.110(7), though in a limited scope. The employee-occupancy exception carves out from tenancies the occupancy of a unit where the occupancy is conditional upon an individual's employment on the premises. The court did not make a determination whether the managers were actually exempted from the OLTA. However, the court found a reasonable finder of fact could have found that the managers *were* also tenants and therefore *were not* exempted. In reaching its decision, the court noted the managers' employment agreement stated that a rental credit, not occupancy per

se, was conditional upon employment. In addition, the court noted the agreement did not expressly terminate the managers' right to occupancy upon termination of employment. Rather, the language of the agreement stated that the employees "may" be required to vacate upon termination. The court also gave weight to the fact the unit in question was an apartment used for landlord/tenant relationships. Finally, the court noted that in the employer-landlord's deposition, they had referred to the manager-plaintiffs as "tenants."

There is much to take away from *Hogan Woods*. Landlords and employers wishing to create an employee occupant relationship should expressly condition the actual occupancy of any unit upon employment to the greatest extent possible. Furthermore, they should refrain from any communication referring to these exempted employees as "tenants." Employers should also be aware that denial of a worker's compensation claim does not necessarily preclude employees from later seeking claims under civil liability, and that a judgment need not be issued in order for a party to pierce the corporate veil.

Rowden v. Hogan Woods, 306 Or. App. 658 (2020).
Michael Althouse

A Certain Mister Kine Denied Writ of Mandamas

Local governments must make certain land use decisions — "permits," limited land use decisions, and zone changes — within a stated timeframe. Counties in particular have 150 days to decide. Where those decisions are not made within the required timeframe, the applicant can file a writ of mandamus in circuit court asking the court to order the local government to approve the application. A plaintiff filed a mandamus in central Oregon, landing ultimately in the Oregon Court of Appeals, leading to a disappointing end (for him, at least).

A "permit" is a "discretionary approval of a proposed development of land." A certain Mister Kine argued that a legal lot determination that his property contained eleven legal lots was a "permit"; that the final local decision on that determination was not made within 150 days; and that the court should therefore issue a writ of mandamus ordering the county to approve his request. Relying on a previous case that an annexation was not a permit, because it was not a "proposed development of land," the court of appeals held that a legal lot determination is not a permit, because it did not involve a determination that particular uses were allowed on the land. The court affirmed the trial court's dismissal of the proceeding because the legal lot determination request was indeed not a "permit," and the 150-day deadline did not apply.

One advantage to seeking a writ of mandamus after a deadline is blown, rather than continue with the local process, is that attorney fees are recoverable by a prevailing party. That said, an applicant who loses on a writ of mandamus, or, as in this case, has their case dismissed, can be liable for the other parties' attorney fees at the discretion of the court. In this case, not only was Kine's case dismissed, he was left holding the bill for the attorney fees for the three homeowners' associations that had intervened at the trial court.

Kine v. Deschutes, 307 Or. App. 290 (2020).
Anne Davies

Situs in Situ

In a recent land use case, the Oregon Court of Appeals held that 1) under ORS 197.825(3)(a), a circuit court has jurisdiction to address the issue of a defendants' land use compliance raised as a counterclaim to defend themselves, in the context of a county land use enforcement proceeding; and 2) filing an application seeking site plan approval does not waive whatever rights an applicant had before filing such an application and gaining approval, so long as no county code provision states that filing an application waives those rights.

At issue in this case was a 30-acre portion of a 75.5-acre parcel in Deschutes County zoned Surface Mining. A surface mine for gravel and pumice has existed on that site since the 1940s. (Side note: Tumalo Tuff, one of the materials mined at the site, is a type of rock made from volcanic ash that is pinkish in color and is likely the

inspiration for defendant Pink Pit's name.) In 1981, defendants' predecessor obtained a Department of Geology and Mineral Industries permit to mine the 30 acres. In 1993, the permit was amended to encompass the entire 75.5-acre site. Defendant Pink Pit has been and is in full compliance with the DOGAMI permit.

Mineral and aggregate sites that held a valid DOGAMI permit at the time the county adopted its surface mining zoning are "preexisting sites" under the county code. Preexisting sites are generally not subject to the county's ordinances relating to mineral and aggregate resources, including site plan review, unless there is an expansion of mining activity beyond what is covered in the DOGAMI permit. Nevertheless, for one reason or another, defendants' predecessor applied to the county in 1995 for site plan approval to mine a 35-acre portion of the 75.5-acre site. In 1997, the county approved the site plan without any restrictions.

In 2006, the predecessor sold the site to Mark Latham Excavation, whose owner is one of defendant Pink Pit's principals. In 2007, the county threatened an enforcement proceeding against Latham, asserting that the company was not complying with the 1997 site plan. In response, Latham applied for a site plan and conditional use approval, but noted that the mining operation did not waive its status as a preexisting site. The application was then litigated over a 5-year period in a variety of local and LUBA appeals. In 2012, the county granted Latham site plan approval, which the company never pursued, leaving the original 1997 approval in place.

In 2014, the county received complaints that the defendants were violating the 1997 site plan approval and brought the enforcement proceeding in this matter against Latham. This time, Latham did not seek a conditional use permit or a modification of the 1997 site plan. Instead, defendants asserted as an affirmative defense that either 1) they were not bound by the 1997 approval because the property is a "preexisting site" not subject to the county code's mineral and aggregate resources provisions, and thus not subject to site review in the first place; or 2) the site is a lawful nonconforming use. Latham also filed a counterclaim, seeking a declaration that either they have a right to mine as a "preexisting site," or the use of the site is a lawful nonconforming use not subject to land use regulation.

The county defended against the counterclaim by asserting that Latham had waived or was barred by latches or estoppel from asserting the operation was not bound by the 1997 site plan, because the defendants had submitted to the county's land use authority by applying for site plans and obtaining approvals. The county also contended

Oregon Real Estate and Land Use Digest

Editor
Jennie Bricker

Assistant Editor
Judy Parker

The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.

Subscription Price: free to Real Estate and Land Use Section Members, $30.00 per year for others.

To subscribe, send your name, firm name, address, bar number, and email address, along with your check made payable to OSB and listing account code #825, to the address above. Please indicate that you would like to join the Real Estate and Land Use Section.

that, as a matter of law, Latham had lost any rights as a "preexisting site" or nonconforming use when the company submitted the 1995 site plan application and brought the site into compliance with existing land use regulations under the 1997 approval. The circuit court concluded that the use of the site was a lawful nonconforming use, defendants had not waived their rights as a preexisting site by submitting an application, and they were not barred by estoppel or latches. Accordingly, the circuit court entered a judgment for Latham, dismissing the enforcement action.

At the court of appeals, the county first argued that the circuit court did not have the authority to consider defendants' declaratory judgment counterclaims because they could have and should have raised the issues of the site's preexisting or nonconforming use status in prior proceedings before LUBA – which has exclusive jurisdiction over such questions. The court of appeals disagreed, holding that while the circuit courts cannot engage in land use decision-making, the court can, in the context of a county enforcement proceeding, address the issue of land use compliance when the defense raises it as a counterclaim.

On the merits, the court of appeals agreed with defendants that their site was a "preexisting site" and therefore exempt from the site plan approval, except for expansion of the site. Because the mining operation was a "preexisting site," a use allowed in the SM zone, it could not be a nonconforming use. The court held that the site was not a nonconforming use and thus could not have lost any nonconforming use status when defendants applied for site plan review.

The court also rejected the county's argument that filing an application for site review waives the applicant's right to claim that site review is unnecessary. Practitioners should take note, however, of the court's mention that the county code did not state that approval of a site plan waives a property's preexisting site status. We can expect local government codes to be amended to incorporate such a waiver rule.

Finally, the court held that the county had not met its burden to show that latches should apply. Defendants' delay in raising the claim that the property was a preexisting site was not "unreasonable" because before the county brought the enforcement action, defendants had no reason to raise the issue. In addition, the county failed to show it was prejudiced by defendants' failure to raise the issue of the site's status.

Deschutes County v. Pink Pit, LLC, 306 Or. App. 563 (2020).
Sarah Mitchell

The Composer of Damascus Plays: Supreme Court Validates SB 226

This case involves a challenge to a second legislative attempt to aid in the disincorporation of the City of Damascus. The Oregon Supreme Court ultimately upheld the newly established path to disincorporation, rejecting state and federal constitutional challenges.

In 2004, the City of Damascus incorporated because some residents thought that it would provide greater control over land use decisions. The next year, the city adopted a charter and established home rule authority. By 2013, residents were pushing for disincorporation. The issue was referred to voters in a citizen-initiated measure under the disincorporation statutes, ORS 221.610 and 221.621. The law requires, among other things, that a majority of electors of the city approve disincorporation. The measure failed because a majority of electors – that is, those with the right to vote – did not support disincorporation, even though a majority of those who actually voted did. In response to the failed measure, the 2015 legislature passed HB 3085, which attempted to create a path where a measure could achieve disincorporation with just a majority of those who voted on disincorporation. In May 2016, a majority of voters voted in favor of Ballot Measure 93, which approved disincorporation under HB 3085.

HB 3085 and Measure 93 were challenged in court. In *De Young v. Brown*, 297 Or. App. 355 (2019), the Oregon Court of Appeals determined that disincorporation through Measure 93 was invalid because the legislature failed to exempt the election from compliance with the existing disincorporation statutes.

Afterward, affected governments sought another legislative fix, as the city had already disincorporated and other jurisdictions had annexed property and taken possession of property of the city. In 2019, the legislature passed SB 226, which expressly exempted compliance with ORS 221.610 and allowed for the post hoc ratification of the 2016 vote to disincorporate.

Taking advantage of a provision that allowed expedited review by the Oregon Supreme Court, petitioners sued. The supreme court determined the law was valid.

The court found SB 226 to be consistent with the home rule protections of the Oregon Constitution. Home rule governs the authority of local governments to control their own structures and procedures, and prohibits the state from legislating such structures and procedures except when state action serves a predominant social interest extending beyond the municipality. The court clarified that home rule does not impose restrictions on the legislature's ability to enact *substantive* laws that affect municipalities, such as laws that address social, economic, or other regulatory objectives of the state.

Relevant to SB 226, home rule does not preclude the legislature from making special or local laws, except for laws that enact, amend, or repeal charters or acts of incorporation. The court rejected petitioners' argument that SB 226 displaced city charter provisions, including provisions that required elections to be carried out in conformance with state law. The court also rejected petitioners' characterization that SB 226 impacted initiative and referendum powers over municipal legislation, explaining that the contested law related to state laws governing disincorporation rather than municipal legislation.

To further explain why the law did not violate home rule, the court noted that SB 226 did not directly affect the disincorporation of the city, but rather established a process for disincorporation that was additional to the existing statutory structure. The court was persuaded by the argument that the state had a substantial interest in regulating procedures for disincorporation, as evidenced by the long-time regulation of such procedures in ORS Chapter 221. The court concluded that SB 226 was not irreconcilable with the community's freedom to choose its own political form.

The court also found no implied principle of law precluding retroactive legislation to cure a defect in an earlier election, so long as the legislation does not disturb a vested interest and lies within the purview of the legislature's authority.

The court also rejected petitioners' Equal Protection and Due Process claims. The voters knew what they were voting for in 2016, and SB 226 mirrored that intention.

Finally, the court rejected petitioners' arguments that SB 226 improperly overturned *De Young*. The court distinguished the present case from prior precedent discussing the principle that the legislature cannot pass laws that purport to construe previous legislative enactments, as such acts would constitute judicial functions. SB 226 created a general alternative process, and did not upset the basis for the *De Young* decision, even if the outcome of the city's disincorporation was different.

City of Damascus v. State of Oregon, 367 Or. 41 (2020).
Scott Hilgenberg

LUBA Cases

Abandoned Vineyard?

COVID has changed our world in a day-to-day manner, upending all of our "normal" activities. Time drags on yet speeds by in an instant. And the laws stay constant despite our deep sense of imbalance and concern. I recently had reason to consider how a pandemic — or more to the point, how government restrictions on actions — affects non-conforming uses across the state. One of my winery clients has a non-conforming use under ORS 215.130 thanks to a long-standing legacy vineyard status. It has a beautiful wine processing facility and a tasting room.

Sprawling hills covered with vines and fruit trees lend serenity to guestss and create an inviting backgdrop for large outdoor spaces...

But, of course, all of those uses were prior to 2020. Amd in a "normal" year, not doing a use would be an abandonment. But this wasn't on purpose nor was it negligent — to the contrary, not serving the public was, in addition to being thoughtful and considerate, what was legally required. Query: to what extent does not using a non-conforming use *because of government order* constitute an abandonment under ORS 215.130(7)?

Nervously, I reached out to some of the "LU" members of our RELU Section. A few were optimistic that the county would recognize that state restrictions on certain uses would not render the use abandoned. Others advocated a more litigious approach, arguing that a takings threat would cow the county into walking away from abandonment concerns. Others were more practical: Have a tasting or a wedding now, soon, this year, they suggested. And another in the spring, documented, to preserve the use.

I jumped into the LUBA opinions to see if the Board had discussed COVID — and one case popped up where members of the public advocated for a continuance due to the pandemic. ORS 197.763(a) provides an avenue to request a continuance "to present additional evidence, arguments or testimony." The petitioners in *Jacobus v. Klamath County* had sent an email to a planning director saying, "I would like to request you reschedule this public hearing to a time that will allow more input." Three days later, they sent a letter stating, "Due to the coronavirus and the current stay at home order, we ask that you reschedule this hearing until such a time when all in the community, have been notified and can attend." Both of those requests referenced the underlying reason why they sought a continuance — because of the pandemic — but neither request specified that the petitioners needed "to present additional evidence, arguments or testimony." LUBA concluded that both requests were to reschedule, not to continue, the hearing. This, though, does not answer my question as to whether a government order, obeyed by a compliant entity, excuses nonuse of a non-conforming use.

Jacobus v. Klamath County, LUBA No. 2020-054 (Dec. 10, 2020).

Judy Parker

Cases From Other Jurisdictions

California Appellate Court Upholds School Impact Fee on College Dormitory

A recent case from the California appellate courts reviewed a challenge to the imposition of a school impact fee on a college dormitory complex for unmarried university students. California's Mitigation Fee Act requires a reasonable relationship between the impact of a given activity, such as residential development, and the fee imposed. Under California's School Fee Act, a State Allocation Board determines annually a statewide square footage fee for assessable space of new construction. Under the Mitigation Fee Act, in the context of school impact fees, the reasonable relationship standard can be satisfied by showing 1) the projected total amount of new housing expected to be built within the district; 2) the estimated number of students to be generated by the new housing; and 3) the estimated cost to provide the necessary school facilities for that approximate number of students. That demonstration may be derived from a district-wide estimate of anticipated residential development and impact on school facilities. An individualized, site-specific analysis is not required, as the fee is calculated by an estimate on a class of residential development.

The Chico Unified School District hired a consultant to analyze future development and corresponding impact on its facilities. The consultant secured local government planning estimates for new construction and information from the county assessor over an estimated generation of single- and multi-family buildings, comparing those estimates with the existing breakdown in those categories. The firm calculated the number of students that would be generated at each school grade based on that rate, multiplied by the anticipated number of new residential units to be constructed, and calculated that 709 new students would be generated by new residential construction. The project at issue would house 600 college students. Although the housing was not intended for the general rental

market, the project was private and not associated with any college or university. By law, it could not refuse to rent to families with children. The school district imposed a school fee of $6,098 for the full-time employees of the project, which the residential developer paid without protest. However, the developer also paid $537,576.50 under protest, and filed suit under the Mitigation Fee Act, contending the fee constituted a special tax because the fee exceeded the cost of the school facilities needed to mitigate the impact of the project. The developer also claimed a taking, because there was no nexus between the fee and the cost of the facilities. If the building were part of a formal higher education campus, it would have been entitled to an exemption.

The trial court upheld the fee, finding these student accommodations were not a separate class of residential development, but rather a residential apartment building – regardless of its present or intended occupants. It further held that the adoption of the fee schedule was thus reasonable under the Mitigation Fee Act, and neither a special tax nor a taking. Plaintiff appealed.

The appellate court determined the imposition of the fees was a legislative rather than a quasi-judicial decision and reviewed only for abuse of discretion. The court assumed the school district considered all the relevant statutory factors and made a rational connection between those factors and the choices made, presumed those choices were correct, and refused to question the district's wisdom or substitute other choices where the issues were debatable. The court also declined the developer's request to create a new residential category of a multi-family use that did not generate students.

For those looking for guidance in this area, the case thoroughly delves into case law on school impact fees, including *Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School District*. In *Tanimura*, the appellate court had to decide whether a school district acted reasonably in imposing school impact fees on a new residential development project intended to house only adult seasonal farmworkers. In upholding the fee, the *Tanimura* court pointed to the Mitigation Fee Act's broad definition of "development project" and the grounds on which a fee could be justified under the statute.

The court found the reasoning in *Tanimura* persuasive; because the fee was not unreasonable, it also constituted neither a special tax, nor a taking. The fee was reasonably related to the impacts of new residential development on district facilities and it met the requirements of the Mitigation Fee Act.

The distinction between fees imposed across the board to all projects and individualized fees is an unresolved one in takings jurisprudence. *Nollan*, *Dolan*, and *Koontz* have all involved decisions involving discrete projects. Whether the Supreme Court will apply the essential nexus and rough proportionality requirements to fee schedules is a question still to be answered.

Amcal Chico LLC v. Chico Unified School District, 2020 WL 6498638 (Cal. App., November 5, 2020).

Edward J. Sullivan

Reminder: CLE Credits Available

The Education Committee reminds all RELU members that up to 16 CLE credits – including ethics – are available to listen via MP3 on our RELU Recordings page.