

Federal Cases

Ninth Circuit Rejects Takings Claim for Tenant
Relocation Fees 1

Oregon Cases

Oregon Supreme Court Rules Hydroelectric
Water Right Must Be Converted to Instream Use
By Sarah Liljefelt..... 1

Appeals Court Clips Aurora’s Wings
By Gordon Howard 3

Court of Appeals Finds Cannon Beach Code
Contains Clear and Objective Setback Standard
By Rebekah Dohrman 4

Appellate Court Finds LUCS Form Lacks Formality
By Judy Parker..... 5

Short LUBA Summaries

By Gordon Howard

Subdivisions 6

Relative Farm Help Dwellings..... 6

Goal 6: Stormwater Management Plan..... 6

Residential Development Applications 7

Cases From Other Jurisdictions

Eleventh Circuit Upholds \$3.5 Million
Takings Verdict Against Alabama City
By Edward J. Sullivan 8

Save the Date

2022 Annual Conference..... 8

Federal Cases

■ Ninth Circuit Rejects Takings Claim for Tenant Relocation Fees

Citing the housing crisis, the California city of Oakland established a tenant relocation ordinance. This ordinance requires landlords to pay tenants a relocation payment when retaking occupancy of their houses after a lease’s expiration. The Ballingers, a military couple moving out of state, had rented their home. Upon return to the city, the Ballingers wanted to move back into their house but the ordinance required them to pay their evicted tenants \$6,000 in relocation fees. They sued the city, alleging that the relocation fee was an unconstitutional taking of their money – for private rather than public purpose – without the just compensation they thought would be owed. (Of course, they hoped to challenge the law rather than receive compensation.) They also argued in the alternative that the fee was an unconstitutional exaction of their home as well as seizure of their funds under the Fourth and Fourteenth Amendments. The trial court dismissed their suit and they appealed to the Ninth Circuit, which affirmed. The court held the relocation fee was not a taking of an identifiable property interest but rather a regulation of the landlord–tenant relationship. The court also rejected the Ballingers’ theory that the ordinance was an exaction on the use of their house.

Ballinger v. City of Oakland, __ F.3d __ (9th Cir. 2022).

Oregon Cases

■ Oregon Supreme Court Rules Hydroelectric Water Right Must Be Converted to Instream Use

In Oregon, water rights must be beneficially used according to their terms at least once every five years

to remain in good standing. If they are not, water rights are subject to cancellation for forfeiture. ORS 540.610. Thus, Oregon’s forfeiture statute enacts the “use it or lose it” principle that is common in prior appropriation water system states. Water right holders must use their water rights or risk cancellation.

In the late 1980s, the Oregon State Legislature recognized instream beneficial uses for water, allowing the State to hold or lease water rights for instream purposes such as recreation, navigation, pollution abatement, and fish and wildlife. Under ORS 537.348, water right holders may temporarily lease water rights to the State for instream purposes for up to five years, with renewals. The statute provides that water rights leased instream are considered a beneficial use. As such, the forfeiture provisions of ORS 540.610 are not triggered during the instream lease period. Many water right holders use the instream lease program to safeguard their water rights in times when such water rights might not otherwise be used once every five years. The instream lease program serves dual purposes of providing instream flows while protecting private property interests in water use.

WaterWatch of Oregon v. Water Resources Department questioned whether a hydroelectric water right could be leased instream and thereafter, once the lease(s) expired, be used again for hydroelectric or other beneficial uses of water. At issue in this case is a hydroelectric water right held by Warm Springs Hydro, LLC. In 1995, Warm Springs’ predecessor shut down the associated hydroelectric project and began a series of instream leases from 1995 to 2020. WaterWatch of Oregon petitioned for judicial review of the Oregon Water Resources Department’s final order approving the 2015–2020 instream lease, and Warm Springs intervened.

In addition to the forfeiture provisions that are applicable to all water rights, ORS 543A.305 (enacted in 1997) applies specifically to hydroelectric water rights. The statute provides:

Five years after the use of water under a hydroelectric water right ceases, or upon expiration of a hydroelectric water right not otherwise extended or reauthorized, or at any time earlier with the written consent of the holder of the hydroelectric water right, up to the full amount of the water right associated with the hydroelectric project shall be converted to an in-stream water right, upon a finding by the Water Resources Director that the conversion will not result in injury to other existing water rights.

ORS 543A.305(3). Further, the statute specifies that the conversion to an instream water right “shall be maintained in perpetuity, in trust for the people of the State of Oregon.” ORS 543A.305(2).

Prior to this case, OWRD interpreted ORS 543A.305(3) similar to the forfeiture statute; that is, so long as a hydroelectric water right continues to be used for hydroelectric water use or another beneficial use under an instream lease, the hydroelectric water right is not subject to conversion to a permanent instream water right. WaterWatch challenged OWRD’s interpretation, arguing hydroelectric water rights are subject to conversion five years after the specific hydroelectric use of water ceases. The Marion County Circuit Court and the Oregon Court of Appeals both ruled in favor of OWRD and Warm Springs, but the Oregon Supreme Court reversed and remanded the decision.

The Oregon Supreme Court reviewed the text of the two statutes in conjunction with the context of the statutes and legislative history. The court held “the use of water under a hydroelectric water right” means water use only for hydroelectric purposes as specified in the water right certificate, and does not include beneficial use under an instream lease. The court reasoned that once a hydroelectric water right is leased instream, the beneficial use is converted to another purpose other than hydroelectric water use. The court further held that “ceases” under the statute has an ordinary meaning, so Warm Springs’ water right was subject to conversion to an instream water right in the year 2000, five years after the hydroelectric project was shut down.

The Oregon Supreme Court’s ruling will have significant impacts on hydroelectric water rights in the State. Most obviously, other hydroelectric water right holders in situations analogous to Warm Springs may face conversion of their water rights to permanent instream rights. As such, property owners who believed they were appropriately safeguarding valuable water right holdings through instream leases may find themselves mistaken.

Another consequence of the court’s decision is that instream leases over four years in length are essentially “off the table” for hydroelectric water rights. Hydroelectric water uses must resume within five years or risk

conversion to permanent instream water rights. Thus, there is no incentive for hydroelectric water users to lease their water rights instream to avoid forfeiture, and, in the process, to guarantee instream flows. Instead, the ruling incentivizes quick transfers to other, possibly more consumptive, water uses through the transfer process before the hydroelectric water right is converted to a permanent instream water right.

Finally, conversion of appropriative water rights to instream water rights allows the State to enforce against upstream junior water users to ensure instream rights are satisfied. Conversion of large, early priority hydroelectric water rights to permanent instream purposes may have the outcome of increased regulation against other water right holders.

WaterWatch of Oregon v. Water Resources Department, 369 Or. 71 (2021).

Sarah Liljefelt

■ Appeals Court Clips Aurora’s Wings

The Oregon Court of Appeals reversed and remanded a decision by the Land Use Board of Appeals, after LUBA dismissed a petition from Schaefer and others that challenged findings from the Oregon Aviation Board. The Aviation Board had determined that the Aurora Airport Master Plan complied with the Marion County Comprehensive Plan and therefore the Board did not need to consider whether it complied with any statewide planning goals.

The court of appeals reversed several aspects of LUBA’s decision. First, the court determined that LUBA had misinterpreted the specificity of the Airport Layout Plan approved by the Department of Aviation as part of the Aurora Airport Master Plan. LUBA had determined that the Airport Layout Plan was conceptual enough to not impact land zoned Exclusive Farm Use in Marion County. The court disagreed, finding that the Airport Layout Plan clearly showed expansions onto EFU land. As a result, the Aviation Board was required to make findings of compliance with the Marion County Comprehensive Plan regarding agricultural lands policies – findings that the Aviation Board did not make.

Oregon Real Estate and Land Use Digest

Editor

Jennie Bricker

Assistant Editor

Judy Parker

Editorial Board

Thomas Bahrman

Kathryn Beaumont

Alan Brickley

Laurie Craghead

Meriel Darzen

Dustin Klingner

Caroline MacLaren

Ed Sullivan

Rebecca Tom

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.