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Oregon Appellate Cases

Appeals Court Upholds Denial of McKenzie River Water Right Application

In *Willamette Water Co. v. WaterWatch of Oregon*, the Oregon Court of Appeals upheld the Water Resources Commission's final order denying Willamette Water Company's application for a permit to divert water from the McKenzie River for a quasi-municipal use. The Commission originally affirmed the denial of the application on two bases, finding that the application (1) was not entitled to a statutory presumption that would lead to approval of the application; and (2) ultimately could not be approved because the proposed use would impair or be detrimental to the public interest. The Commission's conclusion that the application was not entitled to the statutory presumption was based on its determination that the application failed to comply with Oregon Water Resources Department rules requiring compatibility with land use laws. The Commission's conclusion that the proposed use would impair or be detrimental to the public interest was based on its finding that the record did not demonstrate the company's ability to make timely beneficial use of the requested water and that the proposed use would be "speculative."

On appeal, the company argued that the Commission misconstrued the land use compatibility rule. Under the company's reading, an applicant is permitted to obtain final approval of its water use permit prior to seeking discretionary land use approvals, so long as the actual water use permit is withheld until the land use approvals have been granted. The court of appeals rejected this argument. Although it acknowledged that the company's interpretation was reasonable, the court explained that to overcome the Commission's interpretation of its own rule, the company would have to demonstrate that the Commission's interpretation was "not plausible," in light

of the rule's text, context, or other applicable sources of law. After reviewing the text of the rule, the court held the Commission's construction of the rule constituted a "natural reading" and was supported by the rule's plain terms.

With respect to timely beneficial use, the company challenged the Commission's factual finding that it would take at least ten years before the company would begin to make use of the water covered by the proposed permit. Again, the court disagreed. First, the court noted that the record contained an affidavit supporting the Commission's finding. The company challenged the affidavit because the administrative law judge who originally heard the appeal "disregarded" part of the affidavit. The Commission responded that the disregarded paragraphs were unrelated to the beneficial use timeline and, as a result, the administrative law judge did not disregard the testimony supporting the disputed finding. The court agreed with the Commission's understanding of the record. Because it was evident that the work contemplated by the permit could not be completed within five years, the court affirmed that ORS 537.230(1) precluded the issuance of a permit.

Willamette Water Co. v. WaterWatch of Oregon, Inc., 288 Or. App. 778 (2017).

Jessica A. Schuh

Oregon Supreme Court Affirms Win Over TriMet

Editors' Note: Mr. Stadtler was one of the attorneys representing plaintiff.

Property owners in condemnation proceedings now have additional leverage to ensure that they are made whole for losing their property – not only justly compensated but fully reimbursed for all attorney fees incurred in the process, per the Oregon Supreme Court's *TriMet v. Aizawa and Noble-Irons*.

TriMet sought to acquire part of the American Plaza Condominium to construct the Milwaukie MAX line. One of the condominium owners fought the amount of the just compensation offer – TriMet had initially offered only $1,040. In 2013, the property owner received a judgment for $22,000, plus payment by TriMet of the attorney fees she incurred in litigating the fair market value of the condemned property. TriMet, however, took the position that the property owner was only entitled to payment by TriMet of a portion of her attorney fees (only those attorney fees the property owner incurred in litigating the fair market value of the condemned property, not those additional attorney fees the property owner incurred in obtaining an attorney fee award from the trial court). The trial court ruled in the property owner's favor and awarded all of the property owner's fees under the condemnation statute. TriMet appealed and the court of appeals affirmed. In this most recent iteration, the supreme court agreed with the property owner's interpretation of the condemnation statute, finding that it entitles a property owner to be fully whole for any and all attorney fees incurred in litigating the fair market value of the condemned property, and also the additional attorney fees incurred in obtaining the fee award.

TriMet v. Aizawa and Noble-Irons, 362 Or. 1 (2017).

Josh Stadtler

Columbia Gorge Commission

Railroad's Second Mainline Aspirations Derailed by Treaty Considerations

The Columbia River Gorge Commission recently reviewed two consolidated appeals of a Wasco County Board of Commissioners land use decision. The county denied an application by Union Pacific Railroad to construct roughly four miles of secondary mainline track near Mosier, Oregon. A coalition of non-governmental organizations – Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility – appeared in both actions, either as intervenor-respondents or as appellants. Additionally, the Confederated Tribes and Bands of the Yakama Indian Nation intervened in both appeals, siding with the county in one instance and against it in the other.

The Commission initially reviewed several arguments put forth by Union Pacific in *Union Pacific R.R. Co. v. Wasco County*. Union Pacific first assigned error to the County's decision that its National Scenic Area Land Use Development Ordinance permitting process was not preempted by the Interstate Commerce Commission Termination Act, insofar as it applied to interstate railroad development projects like that proposed by Union Pacific. Finding Union Pacific's preemption argument unpersuasive, the Commission held that the county's NSALUDO is neither state nor local law subject to preemption by the ICCTA. In reaching that conclusion, the Commission explained that as a component of a cooperative federalism program, the County's NSALUDO implements the National Scenic Area Act and the Columbia River Gorge Compact and applies the Columbia River Treaties. It is therefore "federal law or binding federal regulations, or it has the force and effect of federal law even without a federal moniker." The Commission also weighed whether the NSAA unduly restricted Union Pacific from conducting its operations or unreasonably burdened interstate commerce, and whether the county had applied its NSALUDO in a discriminatory manner or to frustrate or prevent Union Pacific operations. The Commission held that the ICCTA neither completely preempted the NSAA nor the county's NSALUDO, the relevant implementing authority, and explained that because treaties are the supreme law of the land and because Congress never considered whether the ICCTA should preempt treaty-reserved rights, that therefore the ICCTA does not preempt treaty rights reserved to the Columbia River Treaty Tribes.

In its second assignment of error, Union Pacific argued that the county had erred in denying Union Pacific's permit application on the ground that the development proposal affects treaty-reserved fishing rights. Union Pacific argued not only that the Tribes' reserved fishing rights only pertain to historically identified usual and accustomed fishing stations and current in-lieu sites, but also that there was insufficient scientific evidence of the proposal's adverse impacts on fish populations. The Commission rejected that argument in favor of the Yakama Nation's contention that treaty fishing rights are not geographically limited in the manner alleged by Union Pacific, but rather that the term "usual and accustomed" in this context encompassed all of the area between Bonneville Dam and McNary Dam. Additionally, the Commission explained that because the courts have settled that the Tribes' treaty-reserved fishing rights includes the right to a fish habitat free from human acts of despoliation, the county properly considered whether Union Pacific's application could result in habitat damage.

Union Pacific's third assignment of error alleged that the county had erred when it refused to consider and give effect to an Army Corps of Engineers determination that Union Pacific's proposed development would not impact

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Editor
Jennie Bricker

Assistant Editor
Judy Parker

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treaty fishing rights. The Commission observed that the Corps' decision was not available to the county while the county record was open, and that Union Pacific did not submit that evidence until after the county record had closed and on the same date that the county deliberated to a final decision. Although the Commission stated that the county should have made related findings, the Commission nonetheless held that the county did not err in rejecting Union Pacific's new evidence, which would have not only prejudiced the opposing parties' ability to timely respond thereto, but which also lacked evidentiary and persuasive value with regard to compliance with the NSALUDO.

The Commission declined to take up Union Pacific's fourth and fifth assignments of error. In explaining that decision, the Commission noted that both of those assignments of error related to conditions of approval, and, because the challenged decision is a denial, those conditions of approval are of no effect.

On review of the second appeal, *Friends of the Columbia Gorge, et al. v. Wasco County*, the Commission initially resolved a question of standing and determined that Friends had standing as parties adversely affected. However, the Commission declined to address any of Friends' assignments of error because the Commission's resolution of Union Pacific's assignments of error had rendered all of the remaining assignments of error moot.

In sum, the Commission held that the county's decision properly construed applicable law, did not violate provisions of law, and was not clearly erroneous. The Commission further held the county's findings of fact were supported by substantial evidence, and that the county's decision was supported by those findings. Thus, the Commission affirmed the county's decision to deny Union Pacific's development application.

Union Pacific Railroad Company v. Wasco County Board of Commissioners, CRGC No. COA-16-01 (Columbia River Gorge Commission 2017).

Christopher Tackett-Nelson

LUBA

Buildable Land

Venture Properties, Inc. proposed a six-lot subdivision on a 2.54 acre parcel zoned Residential 5 Units Per Acre. A creek flows through the property and Washington County's Goal 5 map shows the property includes two significant natural resources. Before the hearings officer, Venture argued that the county's development standards for property with identified Goal 5 resources are not "clear and objective" and could not be applied to this "needed housing" application as defined in ORS 197.303(1). The hearings officer agreed and did not apply the Goal 5 development standards to the application. The hearings officer approved the application under "clear and objective" standards.

The specific issue on appeal to LUBA was whether the subject property is "buildable land" as that phrase is used in ORS 197.307(3) and as defined in ORS 197.295. Petitioners argued that the hearings officer erred in determining that the application was for "needed housing" when the property was not "buildable land." Petitioners argued that the property is subject to natural resource protection measures and is not suitable and available for residential uses.

Intervenor responded that the property is included in Metro's 2014 Buildable Lands Inventory and is therefore "buildable land." Petitioners challenged intervenor's argument asserting that while the property may be included on the BLI, that does not demonstrate that the entire property is "buildable land."

LUBA examined the map and found that it was unclear whether the entire 2.54 acre property was included in the BLI. LUBA could not tell from the record or Metro's BLI whether any part of the subject property was removed from the BLI as environmentally constrained land. LUBA remanded the decision to determine what property is included in the BLI and is subject to the "clear and objective" protections of ORS 197.307(4).

Warren v. Washington County, LUBA No. 2017-032 (Nov. 6, 2017).

Replacement Dwellings

Intervenor applied for three replacement dwellings on EFU land. All three dwellings were demolished in 1997 and were removed from the tax rolls at that time. Lane County approved the applications. ORS 215.213(1)(q) provides the criteria for replacement dwellings under the "2013 Act," Oregon Laws 2013, Chapter 462. Section 2(b) of the 2013 Act allows replacement of a dwelling if the dwelling was assessed for purposes of ad valorem taxes for the previous five years. OAR 660-033-0130(8) is the implementing rule.

The county interpreted the applicable statute as requiring an applicant to show only that a dwelling was assessed as a dwelling up until the time that the dwelling was demolished and eliminated from the tax rolls. On appeal, petitioner argued that the county misconstrued the statute. Petitioner interpreted the statute to mean if the dwellings were not assessed as dwellings for the previous five property tax years, the county is required to deny the applications.

LUBA agreed with petitioner's interpretation based on legislative history. LUBA explained that the statutes specify a default period of five years, as the longest look-back possible. The look-back period can be shortened if the dwelling existed for fewer than five years or the value of the dwelling was eliminated as a result of destruction or demolition in the last five years. The look-back period may not be lengthened. For a former dwelling that has not been taxed as a dwelling for the past five years, the only way to satisfy the statute is to establish that the dwelling was destroyed within that five-year period or was improperly removed from the tax rolls.

LUBA concluded that the legislative history did not support the county's interpretation because the three dwellings were not assessed for property taxes for the last five years. Accordingly, LUBA reversed the decision.

LandWatch Lane County v. Lane County, LUBA No. 2017-056 (Oct. 24, 2017).

School Expansion on EFU Land: The Three-Mile Rule

First, this is a gem/doozy of a decision with loads of useful information. This summary will not do it justice. I recommend flagging the decision for future reference should you encounter a similar issue. Second, this decision is on appeal to the Oregon Court of Appeals.

Oak Hill School requested approval to expand two existing school buildings located on farm land and less than three miles from the Eugene and Springfield UGBs. The school is not located on high-value farm land. The school is designed to serve more than 100 students and the expansion would allow the school to serve even more. Lane County approved the school's request.

On appeal, petitioner challenged the county's conclusion that it is unnecessary to apply the three-mile rule to the requested expansion. Oak Hill School is an existing structure that is not located on high-value farm land. With regard to those types of existing structures, OAR 660-033-0130(2)(c) provides that schools may be maintained, enhanced, or expanded on the same tract subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule. "Requirements of this rule" is a reference to the OAR 660-033-0130(2)(a) requirement that the design capacity of enclosed structures be no greater than 100 people and the OAR 660-033-0130(2)(b) requirement of no less than one-half mile spacing.

LUBA determined that the county erred by not applying ORS 215.135 and OAR 660-033-0130(18)(b) and (c) to the proposal. It was undisputed that Oak Hill School was designed to serve more than 100 people and that its buildings were located less than one-half mile from each other. Therefore, the school could not meet the requirements of OAR 660-033-0130(2)(a) and could not be allowed to expand under the rules. LUBA reversed the county's decision.

LandWatch Lane County v. Lane County, LUBA No. 2017-043 (Oct. 16, 2017).

Solar Power Facility on EFU Land

This decision involves an application for a reasons exception to Goal 3 to site a solar power facility on 80 acres of high-value farm land. ORS 215.283(2)(g) authorizes a county to approve commercial utility facilities for the purpose of generating power for public use by sale in the EFU zone, as a conditional use. OAR 660-033-0130(38)(f) restricts the size and density of power generation facilities, including solar facilities, on agricultural land. Under the current rules, a solar facility on high-value farm land is limited to 12 acres, unless an exception is taken to Goal 3.

The application justified the reasons exception based alternatively on two provisions of OAR 660-004-0022. The first justification was that there is a "demonstrated need" for the solar facility, based on the requirements of a statewide planning goal. Specifically, intervenor argued that Goal 13 requires the county to promote renewable energy sources such as solar energy. The second alternative justification was that the proposed solar facility constituted "industrial development" for purposes of OAR 660-004-0022(3) and that a reasons exception is warranted because the facility would have a "significant comparative advantage" due to its location near an energy facility.

The county approved the application based on these two alternative justifications. LUBA disagreed. Regarding the first justification, LUBA determined that Goal 13 does not *require* a county to promote the development of renewable energy such as the proposed solar facility, and a reasons exception under OAR 660-004-0022(1)(a) is predicated on the *requirements* of a statewide planning goal.

Regarding the second justification, OAR 660-004-0022(3)(a) through (c) set out three independent bases for a reasons exception for industrial development on rural lands, including circumstances where the industrial use would have a "significant comparative advantage" due to its location near existing industrial activity, an energy facility, or products available from *other rural* activities. The county concluded that the proposed solar facility is a "rural industrial use" for purposes of OAR 660-004-0022(3). According to LUBA, however, the county's findings repeated in various ways that the proposed solar facility would be dependent upon a substation located within Medford's UGB. The findings characterized the substation as a "resource" for the proposed use. However, for purposes of OAR 660-044-0022(3)(a) it is clear that such a resource must be located on rural land, specifically agricultural or forest land, which necessarily excludes land within UGBs. LUBA concluded that OAR 660-003-0022(3)(c) does not allow rural industrial development that could subvert one of the principal structures of the statewide land use program: the urban growth boundary.

LUBA determined that reversal was appropriate where the county misconstrued the applicable law with respect to the only two alternative reasons advanced to justify the proposed exception to Goal 3.

1000 Friends of Oregon v. Jackson County, LUBA No. 2017-066 (Oct. 27, 2017).
Rebekah Dohrman

LUBA Remands Multiple Property Line Adjustment Approval to Align with *Bowerman*

Lane County has two methods of processing property line adjustments – through the ministerial process under LC 13.450(4)(c) or through the planning director under LC 13.450(5). *Bowerman v. Lane County* held that Lane Code 13.450(4)(c) applies only to an application to adjust one property line at a time, while LC 13.450(5) is the process for multiple property line adjustments. (See my article, *Multiple Adjustments, Single Jurisdiction* in the October 2017 *RELU Digest*.) LUBA recently applied *Bowerman* to remand a case with similar facts (albeit different timing arguments) back to Lane County.

Intervener owns six parcels of land zoned for forest use in Lane County. In 2014, it filed a single application to approve multiple property line adjustments. The planning office processed this application under the ministerial approval process of LC 13.450(4)(c) rather than the alternative county planning director review, a process which requires notice to adjoining property owners and the opportunity to comment. As a result of the ministerial process, petitioner did not have notice and thus did not have an opportunity to appeal until more than two years later, in May

2017. In the meantime, however, intervenor obtained a county decision in April 2017 that verified the legal lots and recited the current configuration of the parcels as a result of the property line adjustments. Intervener agreed that the multiple application under the ministerial process was a procedural error, but it argued that petitioner was precluded from a collateral attack on the April 2017 decision. However, LUBA agreed with petitioner that the 2017 legal lot decision did not mean that the county properly approved the property line adjustments in 2014. Accordingly, LUBA remanded the approval back to Lane County.

Sarret v. Lane County, LUBA No. 2017-055 (Nov. 8, 2017).
Max Forer

Cases From Other Jurisdictions

Seventh Circuit Deals With First Amendment Claims Regarding Freeway Overpass Signs

Luce v. Town of Campbell involved a content-neutral provision of a local ordinance that prohibited hanging of signs on highway overpasses. Plaintiffs brough an action against the local government and its police chief, asserting violation of the First Amendment.

One aspect of the case was the personal animosity between the police chief and one of the plaintiffs. After plaintiffs distributed videos showing town police preventing unfurling an American flag on an overpass, the police chief posted one plaintiff's name and email address on gay and pornographic websites and covertly suggested on social media that this plaintiff was in default in a private debt and in his taxes. The chief signed these comments "Bill O'Reilly," but the source was ultimately disclosed. Although the chief resigned and was prosecuted for his actions, plaintiffs alleged official retaliation for asserting First Amendment rights. The trial court determined the chief's activities were not "state actions" under civil rights laws and that state law criminal remedies were sufficient.

Plaintiffs asserted the chief's actions undercut the evidentiary support required to underlay a "time, place, and manner" restriction. There was little evidence either way and the town suggested evidentiary support was not required. Reviewing the opinions of the United States Supreme Court in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), the court concluded that a majority of the Justices would have permitted "commonsense judgments" of governing bodies to ban all overpass signs, without evidentiary support, because "[i]t does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it."

While noting that experts may disagree on the distraction caused by overhanging signs on freeway overpasses, the legislative judgment to limit or prohibit them was neither irrational nor an unlawful attempt to limit free speech.

However, the challenged regulation also applied to a 100-foot area from the overpass and the town presented no justification for that extension. The court determined that time, place, and manner restrictions must serve a "significant governmental interest" and be no more extensive than necessary. Because the prohibition within the 100-foot radius of an overpass was not justified, it failed.

This case attempts to respond to the question the Supreme Court did not decide in the *Metromedia* case: the burden and sufficiency of proof required to show harm caused by the visual intrusion of signs. The distinction made between the prohibitions on overpass signs and elsewhere provides a supportable allocation of the interests of the public under the First Amendment.

Luce v. Town of Campbell, 2017 WL 4216238 (7th Cir. Sept. 22, 2017).
Edward J. Sullivan

Ohio Federal Court Finds Stop-Work Order Triggers Appeal Period

STC Towers, LLC v. Rettig involved an extended discussion between Napoleon Township, Ohio, and a communications provider over the applicable land use regulatory scheme for a cell tower. The communications provider informed the township it would build such a facility and the zoning inspector informed the provider that it would need a conditional use permit to do so in this residential district. The dialogue continued, to include the county's prosecuting attorney, who acted as counsel for the township and confirmed its view that a conditional use permit was necessary; and a statement by the township that it would not issue such a permit. When construction continued, the township imposed a stop-work order and plaintiff filed a challenge under the Telecommunications Act of 1996. Plaintiff sought a declaratory judgment claiming the township lacked authority to enforce zoning regulations regarding cell towers, that the effect of its regulatory scheme was to prohibit provision of personal wireless services, and that the township tortiously interfered with its business.

The township moved for judgment on the pleadings, asserting that the TCA imposed a 30-day period for challenging a denial, which ran when various township officials observed that a conditional use permit was required. Plaintiff cited an Ohio law that required townships that wished to regulate cell towers to provide applicants with written notice through their chief fiscal officer. Because that action was not taken, the trial court found no basis on which to regulate those towers. Moreover, because the only official township action in this case was the stop-work order, the court found the posting of that order could provide for the 30-day appeal period to be triggered, so that the declaratory judgment action could be bought.

This case presents a timely reminder that a careful municipal attorney will always check for jurisdictional preconditions before taking official action, particularly regarding enforcement of land use regulations and in cases involving recovery of attorney fees for improper action.

STC Towers, LLC v. Rettig, 2017 WL 4417754 (N.D. Ohio 2017).
Edward J. Sullivan

Cases to Watch

Supreme Court Grants Certiorari in Four Cases

The United States Supreme Court issued certiorari in four cases that affect *RELU Digest* readers. Two are about water rights, one is about sovereign immunity, and the fourth concerns tribal lands.

The Apalachicola-Chattahoochee-Flint River Basin provides water to three states: Alabama, Florida, and Georgia. The Army Corps of Engineers operates five dams within the Basin. Florida brought an action arguing that Georgia's storage and use of the Basin water exceeded a 1992 Memorandum of Agreement. A Special Master concluded that Florida could not establish that a usage cap on Georgia would increase the minimum water flow to Florida. Florida sought certiorari arguing that the Special Master applied the wrong guarantee standard. The Court granted cert to determine "Whether the Special Master erred by requiring Florida to establish by a 'guarantee' standard that imposition of a consumption cap on Georgia's water use from the Apalachicola-Chattahoochee-Flint River Basin would not be offset by the operations of dams and reservoirs within the ACF Basin by the Army Corps of Engineers." *Florida v. Georgia* will be heard on January 8, 2018.

The Court will hear a second case involving water rights on January 8: *Texas v. New Mexico and Colorado*. Texas has accused New Mexico of unlawfully diverting water in violation of the 1938 Rio Grande Compact. New Mexico argued, however, that the Compact required only delivery of a share of the Rio Grande water to the Elephant Butte Reservoir – and after such a delivery, it could lawfully divert the water to its own users. The United States intervened as a third-party plaintiff. The Special Master recommended that New Mexico be prohibited from recapturing and diverting the Elephant Butte Reservoir water. The United States seeks declaratory and injunctive relief. Colorado, on the other hand, argues that the United States be limited in its relief. The Court will hear the parties argue "Whether

New Mexico is prohibited from recapturing water it has delivered to Elephant Butte Reservoir pursuant to the 1938 Rio Grande Compact, after that water is released from the Reservoir."

The Salt River Project Agricultural Improvement and Power District supplies electrical power in Arizona. It added additional fees to users who received their power from different providers. Respondents (a solar-power provider) sued in Arizona district court claiming violations of the Sherman and Clayton Acts. The Power District moved to dismiss on the grounds that it was a state actor and therefore immune from antitrust suits, which the court denied on the basis that the state had not expressly authorized such conduct. On appeal, the Ninth Circuit held that the Power District sought immunity from liability, rather than liability from suit, and thus the collateral-order doctrine did not apply. The doctrine permits immediate appeals on conclusive interlocutory orders which address issues separate from the merits of the case and therefore unreviewable on appeal from final judgment. In *Salt River Project v. SolarCity Corp.*, the Court will hear "Whether orders denying state-action immunity to public entities are immediately appealable under the 'collateral-order' doctrine." A hearing date has not yet been set.

Finally, in *Upper Skagit Indian Tribe v. Lundgren*, the Court will determine "Whether tribal sovereign immunity applies to in rem actions against tribal property in which there is no congressional abrogation or waiver by the tribe." Lundgren had built a fence around a piece of property and had occupied it, then sought to quiet title acquired by adverse possession. The Upper Skagit tribe purchased the land and moved to dismiss the adverse possession suit on sovereign immunity grounds. The Washington State Supreme Court affirmed denial of the motion to dismiss, holding that sovereign immunity did not detach the trial court's in rem jurisdiction and that Lundgren's successful adverse possession claim negated the tribe's interest in the property.

Spotlight: Oregon's Housing Goal

The Forgotten Genesis of Oregon's Housing Goal

SB 100 required that LCDC adopt statewide planning goals by the end of 1974; however as of early December 1974, three goal drafts were proposed but none contained a housing goal. About six weeks before the deadline, Betty Niven, the Chair of the State Housing Council, proposed such a goal: "To ensure that fulfilling the other goals of the statewide land use plan will not unreasonably impact the supply of modestly priced housing." Niven elaborated on the justification for the proposed Goal:

> Shelter is such a basic need that it would appear to require no justification. However, in the past twenty years, under various governmental programs and in the name of many public uses, we have demolished millions of houses without considering the implications of our actions. . . .
>
> It would be a grievous error for the state not to recognize this potential conflict between housing need and the conservation of the state's natural resources and to fail to take steps to minimize it. Housing can be considered to be a replaceable resource only when provision is made to replace it with comparable housing, available to those displaced at a cost equivalent to that being paid by the occupants of the housing being destroyed.

A principal reason for the enactment of state land use laws in Oregon was the preservation of rural lands for resource uses. Niven endorsed these objectives, but pointed out that a program that preserved those lands without providing for housing would lose public support over time, asserting a delicate balance of housing obligations and citizen participation as public policies and seeking to prevent local opposition from trumping needed housing. Niven testified at a public hearing on November 26, 1974, noting different levels of citizen participation, depending on the size of the community, but remained concerned over NIMBYism in housing cases.

Ultimately, Niven was able to win allies to the cause of affordable housing. In a recent paper authored by Portland State University faculty members Sy Adler and Andree Tremoulet, the authors observe:

> One of the key aspects of the early history of the Oregon land use planning program is the creation of an alliance among environmental activists, conventional and manufactured

> homebuilders, realtors, planners, and affordable housing advocates. They supported policies to facilitate residential development inside urban growth boundaries as necessary complements to regulations to preserve farm and forest lands outside them. 1000 Friends of Oregon, the land use watchdog group that emerged from the mix of environmental organizations, especially OEC, OSPIRG and NEDC in 1975, played a leadership role in establishing the alliance. 1000 Friends attorneys began meeting with building industry and related groups as well as local government planners in 1976 to highlight the ways in which LCDC's Goal 10 could and should be used to expand the supply of affordable housing by transcending the limits set by exclusionary zoning practices.

Niven advanced the idea that housing should have an equal status among the goals and that "modestly priced housing" should be a state policy objective. While Niven succeeded in convincing LCDC to adopt a statewide housing goal, it was the language and approach of another key stakeholder, the Oregon Home Builders Association, that provided the foundation of the goal's approach and standards, proposing the following goal language:

> To provide housing units at price ranges and rent levels that are commensurate with the financial capabilities of Oregon households. Efforts shall be made to minimize the impact public policies have on the availability and cost of housing and to allow for maximum flexibility in housing location, design and density.

These concepts, if not all the words, became part of Goal 10.

When the goals were adopted in December 1974, a dispute emerged between environmental groups focusing on resource issues and housing advocates. The Oregon Environmental Council and a coalition of environmental advocates initially supported an Urban Lands Goal, which gave weak support for housing in a non-binding guideline to that proposed goal: "Housing opportunity should be maximized, especially for low and moderate income households, minorities and the elderly."

At the last public hearing before adoption of the goals on December 13, 1974, Maggie Collins, of the Oregon Environmental Council, testified in favor of relegating housing to a non-binding guideline that also used the word "should":

> Housing – Housing is obviously not the only activity which occurs on urban lands. We would suggest that an urban land goal is a framework within which the housing goal more properly functions. An Urban Land Goal would also provide an integration point for [other goals relating to urban lands].

But the housing goal proposed at the final public hearings and LCDC work sessions in December 1974 was generally supported, though some environmental advocates continued to support low and moderate-income housing only as a guideline. However, testimony from others at these final hearings generally supported a housing goal (though support varied with the interests of the presenter) and was given by the League of Oregon Cities, the Association of Oregon Counties, the Oregon Association of Realtors, the Oregon Home Builders Association, and the State Housing Council. The governmental supporters sought to limit the scope of their housing obligations to their comprehensive plans, rather than to all public policies, while housing advocates emphasized robust and enforceable policies to allocate sufficient land for housing at all income levels.

What may be forgotten in Oregon's land use history is just how close it was to obtain a viable housing goal and that some environmental groups were at the root of the problem. Oregon owes a great deal to the advocacy of Betty Niven.

Edward J. Sullivan