

**April 2006 Oregon State Bar Real Estate & Land Use Digest**

## **No “Self-Help” for Ripeness on Inverse Condemnation Claim**

**By Mark J. Fucile  
Fucile & Reising LLP**

In late December the Oregon Court of Appeals issued a decision on the ripeness prerequisite for a regulatory taking claim on a very unusual set of facts. *Murray v. State of Oregon*, 203 Or App 377, \_\_\_ P3d \_\_\_, 2005 WL 3484648 (Dec. 21, 2005), concerned a 20.5 acre parcel in Wasco County subject to the Columbia River Gorge National Scenic Area Act (“the Gorge Act”). The plaintiffs purchased the property in 1990 knowing it fell within the regulatory requirements of the Gorge Act. One of those was the requirement of an archaeological survey in conjunction with any development application review.

Beginning in 1990, the property owners submitted a series of development applications to the Gorge Commission for a variety of uses, including a residence, a partition, a barn and a quarry. In each instance except for the barn, the Gorge Commission denied the applications in part because the property owners did not include the required archeological survey. Notwithstanding the denials, the property owners began conducting surface mining and quarry operations on the property in an area that contained significant Native American artifacts. The Gorge Commission obtained a preliminary injunction in Wasco County Circuit Court. Ignoring the injunction, the property owners “used a tractor with ripper blades on the portion of the property where it was believed that cultural resources were present” and sent a letter to the court saying ‘I will not

pay any attention to any directive, statement, judgment or order regarding me mining on my property.” The trial court then issued a permanent injunction against the property owners barring the quarry operation and any other activities until required permits had been obtained.

The property owners then sued the State of Oregon on an inverse condemnation claim alleging, in relevant part, that the permanent injunction constituted a taking. The State responded to the regulatory takings element of the claim by moving for summary judgment on ripeness, arguing that the property owners had never completed the development application process. The trial court denied summary judgment and later awarded the property owners \$220,000 in damages. The State appealed and the Court of Appeals reversed.

In doing so, the Court of Appeals agreed with the State that the property owners’ regulatory takings claim was not ripe because they never completed the application process by submitting the archeological survey. The Court of Appeals then addressed the property owners’ conduct and found that ignoring the applicable regulations and having an injunction entered against them instead didn’t ripen their claim: “Plaintiff’s actions prevented the regulatory agency from making such a decision. Ignoring an administrative regulatory body and taking actions completely contrary to the regulations and orders of that body has never been a proper alternative means of creating a final determination in order to make ripe for judicial review, nor should it be now.”

Because the Court of Appeals held that the ripeness issue was dispositive, it did not reach the question of whether the State was a proper defendant. The Gorge Commission, not the State, was the plaintiff in the injunction proceeding that formed the core of the property owners' inverse condemnation claim. Although the Gorge Commission used Oregon's state court in seeking the injunction, the Gorge Commission is not an Oregon state agency. Rather, it is a bi-state entity created by a Congressionally approved compact between Oregon and Washington.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his condemnation practice, Mark both prosecutes and defends direct and inverse condemnation cases involving a wide variety of commercial, residential, industrial and specialty properties in Oregon state and federal court. Mark also handles the "court side" of land use cases for developers. Mark is the contributing editor-author for condemnation for the Oregon State Bar Real Estate & Land Use Digest and has also written articles on condemnation procedure and valuation for the Oregon State Bar's Litigation Journal. He is a member of the Oregon State Bar's Litigation and Real Estate & Land Use Sections. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.