

COURT RESTRICTS APPEALS IN OREGON LAND USE CASES

A recent decision by a closely divided Oregon Court of Appeals, *League of Women Voters of Coos County v. Coos County*, ___ Or App ___, ___ P2d ___ (CA A111594, September 26, 2001) (*Utsey*), has changed the requirements for appeals from decisions by the Oregon Land Use Board of Appeals (LUBA). The probable effect is that unless *Utsey* is appealed to the Oregon Supreme Court, which seems likely, statewide organizations, such as Oregonians in Action and the League of Women Voters, may find it more difficult to obtain judicial review of LUBA orders. The heart of the holding is that persons or organizations cannot appeal LUBA orders unless they explain their interest in the decision and how they would be affected by it in one way or the other.

In *Utsey*, the owners of a 531-acre tract of land zoned, in part, for Exclusive Farm Use (EFU), applied for a conditional use permit for an "Off-Highway Vehicle Recreational Trail System Park," including a motocross racetrack. The owners proposed that the park be approved as a "private park," which is a conditionally permitted use in EFU zones under ORS 215.283(2)(c). The League of Women Voters (League) filed a letter in opposition with the county, stating that the League opposed the application but without explaining the League's interest. The League then appealed to LUBA the county's decision approving the application. Subsequently, LUBA agreed with the county that the proposed development could occur on EFU land, and the League appealed to the Court of Appeals.

In an opinion by Judge Jack Landau, the Court of Appeals dismissed the appeal on the ground that the court lacked jurisdiction, because the claim was not justiciable as a matter of state constitutional law. Oregon statutes allow any party to a proceeding before LUBA to seek judicial review of LUBA's final order. The Court of Appeals concluded that persons or organizations must demonstrate the challenged agency action would have a "practical effect" on them. In other words, although the League had complied with the statutory requirements, it could not appeal to the court because it had not complied with an additional state constitutional requirement.

The gist of the decision is that "without some demonstration that the challenged agency action will have a practical impact on the person challenging it, such a case amounts to no more than a request for an unconstitutional advisory opinion." It is not enough that a person or organization has an abstract interest shared with every other member of the public. The court's analysis is lengthy and complex and relies, in part, on the context of federal constitutional law.

What is "practical effect" or "practical impact?" Prior decisions offer examples of what suffices, without defining the outer boundaries. In one case, a taxpayer was apparently successful in establishing practical effect by arguing that a bill would impact him as a taxpayer because it would affect the distribution of tax revenues. In truth, there are no Oregon cases before *Utsey* where an appellate court has flatly concluded that a land use statute authorizing an appeal to the courts is unconstitutional as applied.

Four judges (out of nine) dissented from the *Utsey* decision, while two judges joined in a separate concurrence. The dissenters disagreed that existing precedents are unclear, noting that the Oregon Supreme Court has never before rejected, on constitutional grounds of nonjusticiability, a land use case that satisfied statutory requirements. All of the dissenters agreed that the legislature has the authority to define what qualifies as a legal interest for purposes of seeking judicial review from administrative decisions, such as a LUBA order, and thus to determine who has a right to appeal.

Utsey is important to developers, property owners, and land use advocates. After *Utsey*, persons or organizations that seek judicial review of LUBA orders will have to include a statement, supported by some evidence already in the record, explaining how the challenged decision will have a practical effect on their interests. This may be difficult in some cases for statewide watchdog groups that monitor land use decisions in every region for compliance with state law. How difficult remains to be seen. It may mean as little as preparing a pro forma statement of interest or enlisting a neighbor to participate minimally as a front for the organization. It could mean more, perhaps much more. In the short term, the *Utsey* decision may provide opportunities to developers who seek dismissal of a party by the Court of Appeals, when the party either did not support the requisite “practical effects” statement with evidence or did not furnish it at all.

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