

the law would limit the public trust doctrine to submerged and submersible lands, so that pedestrians along the lakeside would be able to use only the "wet sands" area.

This was apparently a hard fought and lengthy battle that resulted in new law regarding public and private rights along the shores of Lake Huron. Issues involving access to lakeshores must be resolved by the courts of each state. The three opinions in this case totaling more than 100 pages show that the resolution of this issue is a daunting task.

Edward J. Sullivan

*Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 1 (2005).

### ■ CONVERSION OF FOREST LAND TO AGRICULTURAL USE IN COLUMBIA RIVER GORGE NATIONAL SCENIC AREA EXEMPT FROM SCENIC RESOURCES REVIEW, SAYS WASHINGTON COURT OF APPEALS

In *Friends of the Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Board*, 129 Wn. App. 35, 118 P.3d 354 (2005), Division II of the Washington Court of Appeals addressed the issue of whether scenic resources review is required for conversion of forest land to new agricultural use in the Columbia River Gorge National Scenic Area. Deferring to the Washington Department of Natural Resources' interpretation of state law incorporating certain guidelines pertaining to forest practices in the Scenic Area, the court held that conversion of forest land to new agricultural use in the Scenic Area is exempt from scenic resources review.

The case involved 40 forested acres in Skamania County owned by Appellant Ostroski. 30 of the 40 acres lie within a special management area (SMA), a portion of which Ostroski planned to convert to new agricultural use, including growing hay and raising cattle. To achieve the conversion, Ostroski planned to remove trees and build temporary logging roads. At the direction of DNR, Ostroski submitted a State Environmental Policy Act (SEPA) checklist to the Skamania County Planning Department and sought review of his proposal's compliance with the SMA forest practice requirements from the United States Forest Service.

The Forest Service determined that although the proposed use was technically a forest practice, the governing standards did not address conversions from forest to agricultural use, and concluded that because the land would be taken out of forest production, DNR should review the proposal only for the final agricultural uses. This meant DNR would review the application for potential impact to cultural and natural resources, but not scenic or recreational resources. The county issued a modified determination of non-significance (MDNS) specifying conditions of approval and agreeing with the Forest Service that Ostroski's proposed timber harvest was exempt from

review for compliance with scenic resource guidelines. Ostroski then submitted a forest practices application to DNR, which issued a conditional approval incorporating some of the Forest Service and county conditions.

Friends of the Columbia Gorge appealed Ostroski's DNR permit to the Washington Forest Practices Appeals Board, arguing that DNR was required to apply all SMA restrictions, including scenic resource review, before issuing a permit for conversion of forest to new agricultural use. On cross motions for summary judgment, the board interpreted the applicable law and found that though the legislative intent to allow conversion under the Scenic Act was clear, the Act was ambiguous about how to effect such a conversion. The board determined it should therefore defer to DNR's interpretation of the portions of the Management Plan implementing the Scenic Act that are incorporated into state regulations under the state Forest Practices Act. The board granted DNR's and Ostroski's motions for summary judgment.

Friends appealed the board's decision to the Thurston County Superior Court, and moved for a temporary restraining order, which the court granted. Friends then moved for an injunction. At the hearing, the superior court reversed the board's decision, finding that the permit application must be reviewed per the SMA forest practice guidelines for cultural, natural and scenic resources impacts. The superior court agreed with the board that the process for conversion for forest to agricultural use was unclear, but ruled that it did not owe special deference to DNR. The court converted the temporary restraining order into a permanent injunction and entered a stipulated final judgment. DNR and Ostroski appealed the superior court's decision.

In determining whether the proposed conversion of forest land to new agricultural use was exempt from scenic resources review, the court of appeals first examined the regulatory framework creating the applicable forest practice guidelines.

The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p, enacted by Congress in 1986, created certain areas subject to land use and development regulations in the Columbia River Gorge National Scenic Area, a 292,600-acre region encompassing lands in three Oregon counties and three Washington counties. The Act authorized the creation of the bi-state Columbia River Gorge Commission and requires the commission and U.S. Forest Service to develop various land use designations and policies and to integrate these rules into a Management Plan implementing the Act. For lands within designated Special Management Areas (SMAs), the Act also requires the Forest Service to develop additional Management Plan guidelines that must ensure that timber production and construction of roads used to harvest forest products take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area.

Most pertinent per the court of appeals, the Act further requires the Management Plan and implementing county land use ordinances to include a provision to "protect and enhance forest lands for forest uses and to *allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces.*" 16 U.S.C. § 544d(d)(2) (emphasis added).

The Washington Forest Practices Act, Chapter 76.09 RCW, requires the state Forest Practices Board to adopt forest practice rules, which are implemented by DNR. Current state rules incorporate by reference the Management Plan SMA forest practices, with the caveat that to the extent state forest practice rules are inconsistent with the SMA guidelines, the SMA guidelines control. WAC 222-20-040(5)(b). DNR therefore applies the SMA guidelines when it administers the permitting process for forest practices in the SMA portions of the Scenic Area.

The Forest Land section of the Management Plan provides that some uses within the SMA are allowed without review, including "new agricultural and open space uses . . . except where there would be potential impact to cultural or natural resources." This provision, referred to by the parties as the "agricultural use rule," precipitated the controversy over whether scenic resources review applies to SMA forest-to-agriculture use conversions because it expressly omits scenic resources.

The parties agreed that the operative law governing Ostroski's permit application was the state Forest Practices Act and implementing regulations, which DNR is charged with administering and enforcing. However, the parties disagreed about which portions of the Management Plan were incorporated into the state forest practices regulations, and over DNR's interpretation of those rules. Specifically, the parties disputed application of the agricultural use rule.

Friends argued that because it is an agricultural rule, it was not incorporated into state law, so the board erred in upholding DNR's application of the rule in exempting the project from scenic resource review. DNR and Ostroski challenged Friends' characterization of the agricultural use rule, arguing that because the rule is in the SMA portion of the Forest Land section of the Management Plan under the heading "SMA Guidelines," it therefore constitutes an SMA forest practices guideline that was thus incorporated into state law. Friends responded that regardless of where the rule was located, it was not incorporated because state law expressly incorporated only those rules created under 16 U.S.C. 544(f), which require scenic resources review. Noting that the agricultural use rule does not require such review, Friends argued that the agricultural use rule could not have been created under 544(f) and thus did not meet the regulatory definition of guidelines incorporated into state law.

The court of appeals disagreed with Friends and stated that if Friends believed the Management Plan itself did not

comply with federal Scenic Act mandates, its remedy was to petition for rulemaking directly under the APA, not to challenge the rule indirectly by contesting DNR's application of the rule as it had done here. Accordingly, the court declined to address whether the agricultural rule as applied here was consistent with the Scenic Act, and held that DNR had properly assumed the agricultural use rule to be valid, incorporated into state law, and applicable to Ostroski's permit application.

Friends also took issue with the classification of Ostroski's permit application as a new agricultural use, rather than a forest practice. Friends observed that Ostroski's planned conversion would initially involve harvesting timber and constructing logging roads. Thus, Friends argued that the board had erred in deciding that Ostroski's permit did not constitute a forest practice subject to scenic resources review. DNR and Ostroski argued that the whole permit, including the final use, must be considered when determining which guidelines apply. Moreover, DNR argued that the Scenic Act and Management Plan did not directly account for the dual nature of Ostroski's conversion proposal, that the lack of an express provision exempting such agricultural conversion from the SMA forest practices guidelines was an ambiguity, and that DNR had to resolve this ambiguity.

The court of appeals agreed that the permit involved both forest and agricultural activities, or a dual classification, for which the Scenic Act did not specify applicable guidelines. DNR asserted that applying all forest practice restrictions to agricultural conversions would result in a de facto prohibition, and because the Scenic Act and Management Plan allow such conversions, DNR could imply an exemption from forest practice restrictions to effectuate the Act's purpose to allow agricultural uses of forest land without the imposition of the scenic resource restrictions. Friends disputed DNR's assertion that application of the scenic guidelines would be fatal to this or other conversion proposals.

Friends argued that DNR's interpretation would result in a loophole that would undermine the Scenic Act's purpose to protect scenic resources. Further, Friends asserted that if applications for forest-to-agricultural use conversions were not classified as forest practices, applicants could avoid scenic regulations and clearcut in the SMAs by applying for new agricultural uses and then abandoning the planned agricultural uses once the permits are granted.

The court disagreed with Friends that such a result could occur, given that the Management Plan had recently been revised to resolve the question of which guidelines apply to a conversion, and that the MDNS issued by the county specifically provided that in the event the conversion was not complete within one year of the completion of the logging of the property, then reforestation requirements would be required. Further, the court found that forest practices applications would still be subject to review for impacts to cultural and natural resources.

The court of appeals also found that the superior court had erroneously interpreted WAC 222-20-040(5)(b) to mean that where SMA forest practices guidelines within the Management Plan conflict, the stricter rule prevails. In fact, the appellate court stated that this section addresses a conflict between state forest practice rules and Management Plan rules, and because there was no such conflict implicated here, WAC 222-20-040(5)(b) did not apply and did not answer the question about which guidelines apply to a dual classification permit.

Finding that there was an ambiguity in the way the Management Plan could be interpreted, the court of appeals determined that it must defer to DNR's interpretation, because it was the agency charged with administering this portion of the plan. The court therefore affirmed DNR's and the Forest Practices Appeals Board's ruling that conversion from forest land to new agricultural use in the Scenic Area does not require scenic resources review.

Finally, Friends argued that DNR acted arbitrarily and capriciously when it granted Ostroski's permit without scenic resources review, in that DNR failed to follow DNR and Forest Service staff members' recommendations to review the permit under scenic resources guidelines, and that the board's statement that in the future the review process for conversions would be on a case by case basis illustrated that the agencies' approach was arbitrary. Applying the Washington Administrative Procedure Act, Chapter 34.05 RCW, the court of appeals found that Friends had not shown that DNR had acted without consideration of the relevant facts or circumstances when its approval of Ostroski's permit differed from the action its employees proposed. The court found this set of facts demonstrated that DNR had given the matter due consideration, not arbitrariness. Further, the court found that it was not clear from the board's comments what DNR would be evaluating on a case-by-case basis, and absent evidence of what would be reviewed, the court could not assume that DNR had acted arbitrarily. The court of appeals therefore affirmed the Forest Practices Appeals Board's decision upholding DNR's issuance of Ostroski's permit.

Lisa Knight Davies

*Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.*, 129 Wn. App. 35, 118 P.3d 354 (2005).

■ 11TH CIRCUIT SAYS COUNTY VIOLATES THE EQUAL TERMS PROVISION OF RLUIPA BY ALLOWING PRAYER GROUPS AND OTHER RELIGIOUS ACTIVITIES IN RESIDENTIAL ZONE ONLY THROUGH A SPECIAL EXCEPTION

In *Konikov v. Orange County, Florida*, 410 F.3d 1317 (2005), the Eleventh Circuit held that a zoning ordinance violated the equal terms provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),

42 U.S.C. §§ 2000cc-2000cc-5. The challenged ordinance allowed single-family homes, accessory buildings, home occupations, model homes, and family day care homes within an R-1A zone but required a "special exception" for all other land uses within that zone including "religious organizations."

Defendant Orange County alleged that as part of his activities as a *Chabad* rabbi, the plaintiff held meetings on Friday nights and Saturday mornings, in addition to other meetings for Torah study and holiday celebrations. The county claimed that the plaintiff was operating a "religious organization" in violation of the R-1A zone requirements. After holding a hearing on the matter, the county code enforcement division determined that the plaintiff had not come into compliance with the requirements of the R-1A ordinance, created a lien on the property, and continued to fine him \$50 per day for each day the violation continued. Rather than challenge the enforcement decision, the plaintiff filed a complaint seeking compensatory damages, seeking injunctive and declaratory relief under 42 U.S.C. § 1983, and claiming violations of RLUIPA.

First, the plaintiff claimed that the ordinance placed a substantial burden upon his religious exercise in violation of section (a)(1) of RLUIPA. The court quoted from the substantial burden standard established in *Midrash Sephardi, Inc. v. Town of Surfside*: "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." 366 F.3d 1214, 1227 (11th Cir. 2004). The zoning ordinance at issue required the plaintiff to apply to the Board of Zoning Adjustment for a special exception in order to operate a "religious organization." As such, the court denied this claim, concluding that the ordinance did not prohibit the plaintiff from engaging in religious activity nor coerce conformity of a religious adherent's behavior.

The plaintiff also made a facial challenge to the ordinance on the ground that it placed his religious assembly on less than equal terms with nonreligious assemblies in violation of section (b)(1) of RLUIPA. First, the court considered whether any other assembly-type uses were allowed in the zone that could be compared with the religious assembly use proposed. The only type of use that came close to qualifying was family day care homes, which were limited to 10 children. Finding these two uses somewhat similar, the court went on to consider whether the ordinance "subtly or covertly departs from requirements of neutrality and general applicability" and as such, would not survive strict scrutiny. *Midrash*, 366 F.3d at 1232. Permitting family day care homes is a neutral classification, the court concluded, because it did not target religious groups. Rather, the exception for family day care homes acknowledged the fundamental right to freedom of personal choice in marriage and family life. See *Moore v.*