OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

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Appellate Cases — Land Use

NINTH CIRCUIT REVIEWS OREGON BILLBOARD LAW

In *Lombardo v. Warner,* 353 F.3d 774 (9th Cir. 2003), a panel of three Ninth Circuit judges reviewed the Oregon Motorist Information Act (OMIA) against First Amendment and due process challenges in the context of a motion to dismiss.

James Lombardo sued under 42 U.S.C. § 1983, alleging that the OMIA violated his constitutional rights by preventing him from displaying a 32-square-foot sign reading "For Peace in the Gulf." Lombardo sought declaratory and injunctive relief on two grounds: (1) the OMIA is a content-based regulation that favors commercial over noncommercial speech, and (2) the OMIA vests unbridled discretion in state officials and lacks necessary procedural safeguards.

The OMIA distinguishes between off-premise and on-premise signs, and imposes detailed permitting and regulatory requirements for off-premise signs. However, on-premise signs, which are defined as signs that "attract … attention [to] activities conducted on the premises on which the sign is located," are exempt from regulation. ORS 377.710(22), 377.735(1)(c).

Lombardo pointed out that the First Amendment prohibits laws that favor commercial over noncommercial speech. He argued that the OMIA was unconstitutional because it prohibited him from displaying a political message, while the same sign would be exempt if, instead of a political message, it contained a commercial message advertising on-premise activities. The Ninth Circuit panel rejected Lombardo's arguments, citing its prior decisions in *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813–14 (9th Cir. 2003), and *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 609–12 (9th Cir. 1993). According to the court, the primary argument raised by Lombardo was that the OMIA restricts noncommercial speech because it is much more likely that a commercial business would be able to relate a sign to on-site activity than would a resident. The court rejected this argument because any decrease in the number of noncommercial signs would be the result of decisions by individual resi-

dents and because Lombardo had not shown a content-based distinction in the OMIA.

Turning to Lombardo's second argument, the court cited *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988), for the proposition that licensing procedures are invalid if government officials are given "unbridled discretion in deciding whether to approve or deny permits." As the Supreme Court held in *Lakewood*, the danger is that without adequate standards controlling the exercise of discretion, government officials may determine "who may speak and who may not based upon the content of the speech or the viewpoint of the speaker." *Id.* at 763–64. Notwithstanding the fact that the OMIA contains virtually no standards for determining whether a variance should be granted, the Ninth Circuit held that the OMIA does not pose a danger of "unbridled discretion" because "the OMIA expressly precludes content-based decisions by prohibiting officials from 'considering the content of the signs and deciding whether to allow a variance.'" 353 F.3d at 778 (quoting ORS 377.735(2)). The Ninth Circuit also held that judicial precedent provides adequate guidelines to state officials.

The majority opinion in the *Lombardo* case is somewhat short and relies heavily on on the recent *Clear Channel Outdoor* decision. In contrast, Judge Fletcher wrote a lengthy and rather interesting dissent, raising a number of points that were not addressed by the majority opinion. Citing cases from the First and Second Circuits, the dissenting opinion argues that if a sign displaying a commercial message overrides the city's aesthetics and safety interests, then any message that is at least as important in the First Amendment hierarchy must also override those interests. According to the dissent, the OMIA is content-based because "[t]he owner of an Oregon hardware store could not replace his 'Buy Hammers Here' sign with a 'Lower Taxes!' message unless he conducted some tax-related activity in his hardware store." 353 F.3d at 780.

The dissent further argued that the Ninth Circuit has repeatedly held that billboard regulations that draw content-based distinctions among noncommercial messages are subject to strict scrutiny, citing *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); *Desert Outdoor Advertising, Inc. v. City of Morano Valley*, 103 F.3d 814, 820 (9th Cir. 1996); and *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988). The dissent also cited the *Foti* case for the proposition that a regulation is content-based when, in order to enforce the regulation, a law enforcement officer must examine the content of the sign's message to determine whether an exemption applies.

The dissent argued that contrary to the majority opinion, the Ninth Circuit has never upheld a billboard statute that applies an onsite/offsite distinction as the OMIA does. The dissent distinguished the *Outdoor Systems* case, relied upon by the majority, by pointing out that the sign regulations at issue in that case included a "substitution" provision that allowed noncommercial messages where any commercial message was allowed. The OMIA contains no such provision. The dissent also argued that *Clear Channel Outdoor* did not control because the court's discussion in *Clear Channel* of the constitutionality of an onsite/offsite distinction as applied to noncommercial speech was dicta.

Finally, the dissent noted that there is a growing split in the circuits on whether an onsite/offsite distinction is itself unconstitutional. In light of this split, perhaps it is time for the Supreme Court to clarify some of the confusion left in the wake of its 1981 *Metromedia* decision. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

Until the Supreme Court wades in, persons defending sign regulations containing on-site/off-site distinctions will cite *Lombardo* with gusto. However, persons challenging such regulations may be quick to point out that the *Lombardo* case was decided on a motion to dismiss, apparently without a well-developed factual record regarding the impacts that the OMIA actually has on noncommercial speech and how the OMIA is actually applied. It seems somewhat questionable that the Ninth Circuit was able to determine the impacts on noncommercial speech in the absence of a well-developed record. Persons seeking to challenge sign regulations on speech grounds might be well-advised to build an early record showing the impacts to noncommercial speech and how the regulation is actually applied.

Steve Morasch

Lombardo v. Warner, 353 F.3d 774 (9th Cir. 2003).

MORE ON LIMITED LAND USE DECISIONS, AND WHEN SUCH DECISIONS EXIST

In *Hammer v. Clackamas County*, 190 Or App 473, 79 P3d 394 (2003), adjacent landowners appealed a LUBA decision that dismissed an appeal of Clackamas County's recording of a partition plat. The court held that (1) the appellants had failed to preserve their ORS 197.195 defective notice claim; (2) they failed to file their notice of intent to appeal within 21 days of the date they received actual notice that the surveyor had signed the final plat, and thus the appeal was untimely; and (3) the surveyor's decision and final partition plat approval was a "limited land use decision" over which LUBA had review authority.

The adjacent landowners did not appeal the preliminary plat approval. They disputed the survey to establish the major partition and refused to sign quitclaim deeds that had been tendered to them. The county surveyor notified them by letter on October 29, 2002 that he had decided to approve the final plat. He approved the plat on November 8, 2003, and counsel for the county again notified them by letter a few days later. The plat was recorded on November 21, 2002. The adjacent landowners filed a notice of intent to appeal on December 12, 2002.

The adjacent landowners argued at the court of appeals that they were entitled under ORS 197.195(3)(a) to advance notice of the upcoming final plat approval and of an opportunity to comment. The court concluded that because the defective notice claim hadn't been raised below, it would not be considered in the appeal. ("Raise it or waive it" is the practitioner's maxim here.)

The court agreed with LUBA that the actual recording of the partition plat is not the land use decision. Therefore the November 21, 2002 date was insignificant, and the adjacent landowners were too late in filing their appeal notice on December 12.

The most important issue in the case is whether the surveyor's decision to approve the partition is a type of land use decision. The county argued that final plat approval is neither a land use decision nor a limited land use decision. The county took the position that the key land use activity occurs at the preliminary plat approval stage and that the second step of surveyor approval

is ministerial. ORS 197.012(a) defines a limited land use decision as "a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns: (a) the approval or denial of a subdivision or partition, as described in ORS Chapter 92."

Citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12 (1993), the court of appeals laid out the now classic tests for statutory interpretation. First, the court is to examine the text and the context. The court observed that the statute made no distinction regarding a two-step approval process. Further, quoting the subdivision law, the court observed that ORS 92.100(3) and (5) do not confine the surveyor merely to technical matters, but require assurance of compliance with other applicable laws as established by the city or county. Citing another step in the *PGE/BOLI* analysis, the court called attention to ORS 174.010, which requires that the court neither ignore words in the statute nor add words to it. Finally, completing the *PGE/BOLI* analysis, the court indicated that no legislative history was offered by the parties supporting an interpretation of the preliminary partition approval as the only limited land use decision. In a footnote, the court noted the consistency of its conclusion with an earlier LUBA decision, *Bauer v. City of Portland*, 38 Or LUBA 715, 719 (2000).

The decision is predictable and probably right but nevertheless unsatisfying. One reason it is unsatisfying is that it provides "two bites at the land use apple": one at the preliminary plat step, and another at the final plat step. Another reason is that language has been added to the subdivision law clarifying that "approval by a city or county of such tentative plan shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition." ORS 92.040(1).

At least since *Columbia Hills Development Co. v. Land Conservation & Development Commission*, 50 Or App 483, 624 P2d 157 (1981) (building permits, which this author litigated), and *State Housing Council v. City of Lake Oswego*, 291 Or 878, 635 P2d 647 (1981) (systems development charges), there have been questions about what should be considered land use decisions and what should not. Many practitioners see a bright line between decisions of a discretionary nature (*e.g.,* conditional use permits) and ministerial decisions (*e.g.,* building permits). However, for the courts, the line isn't that bright. *See, e.g., Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000) (the term "finished surface" could be construed to have one of two meanings and therefore was ambiguous, thus giving jurisdiction over a building permits to LUBA because the standard was not "clear and objective"). One reason may be a reluctance to submit litigants to some of the more archaic procedures like writs of review, mandamus actions, and declaratory judgments. Until practitioners, judges, and legislators take on the daunting task of clarifying these procedures (which the Oregon Law Commission tried to do in the 2003 Session's HB 3027), judicial review of governmental actions will remain full of traps for the unwary.

Steven R. Schell

Hammer v. Clackamas County, 190 Or App 473, 79 P3d 394 (2003).

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WAIVE BYE-BYE: COURT OF APPEALS PROCLAIMS THE IMPORTANCE OF PRESERVING ISSUES AT THE LOCAL APPELLATE LEVEL

Miles v. City of Florence, 190 Or App 500, 79 P3d 382 (2003), concerns the "raise it or waive it rule" as it relates to the local land use hearing processes and any subsequent LUBA appeals. The case clarifies the relationship between remedy exhaustion and issue preservation, and holds that "a party may not raise an issue before LUBA when that party could have specified [the issue] as a ground for appeal before the local body, but did not do so." 190 Or App at 510.

Petitioner Safeway obtained conditional use approval to construct a gas station. The Florence Planning Commission approved Safeway's application, as did the Florence City Council on appeal. In its appeal to the city council, Bud Miles Oil Co. (Miles) identified four issues for which it sought review. In its appeal to LUBA, Miles asserted two issues, neither of which, Safeway argued, had been identified in the appeal to the city council.

In its opinion, LUBA agreed with Safeway that Miles had not preserved one of the two issues raised. However, LUBA found an issue regarding site frontage to have been preserved because it had been raised before the planning commission (even though it had not been raised before the city council).

Safeway unsuccessfully argued to LUBA that even if the frontage issue had been adequately raised before the city, Miles had waived it by not presenting it again to the Florence City Council. The court of appeals agreed with Safeway that Miles had waived the frontage issue, reversed LUBA's decision, and remanded the case with instructions to affirm Florence's decision.

Before arriving at its holding, the court surveyed the three statutes that bear on whether issues are preserved for LUBA's review. The first statute, ORS 197.763(1), regarding the basis for a LUBA appeal, states that an issue "shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government." The second limits LUBA's review to those issues "raised by any participant before the local hearings body." ORS 197.835(3) (2001). The court decided that when read together, these two statutes require LUBA to consider only issues properly raised by a participant prior to the record's closing at the local level, and not those raised later.

The court then directed its attention to ORS 197.825(2)(a), which limits LUBA's jurisdiction to "cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review." Noting that the statute codifies the traditional principle of exhaustion, the court concluded that LUBA had viewed ORS 197.763(1) and 197.835(3) in isolation when it concluded that Miles did not have to raise the frontage issue on appeal to the city council.

Consistent with the plain language of ORS 197.825(2)(a) and relevant case law applying waiver in the land use arena, the court of appeals decided that "parties should be required to pursue their available local remedies and to present their substantive claims to the local appeal body," lest the objective of requiring exhaustion not be served. 190 Or App at 509. A party's failure to meet both those requirements, noted the court, results in waiver of the claims.

David Doughman

Miles v. City of Florence, 190 Or App 500, 79 P3d 382 (2003).

UNDER "REASONABLENESS" STANDARD, ANNEXATION DECISIONS MUST CONTAIN FINDINGS OF COMPLIANCE WITH APPLICABLE LAND USE REGULATIONS

According to the Oregon Court of Appeals in *Morsman v. City of Madras*, 191 Or App 149, 81 P3d 711 (2003), legislative decisions to annex territory must be "reasonable" in light of the facts and applicable land use regulations. In order to be able to make a "reasonableness" determination, findings of compliance with applicable land use regulations are required. A decision that fails to make such findings must be remanded.

The respondent city annexed 759 acres of contiguous property using the triple majority annexation process in ORS 222.170. The annexed area was largely developed and contained industrial uses, the city's sewage treatment plant, an airport, and the petitioners' mobile home park. The annexation was what is known as a "cherry stem annexation" because the bulk of the annexed area was connected to the city by a narrow "stem." The petitioners challenged the annexation, alleging that it was void because it did not meet the "reasonableness" requirement and it violated local land use planning criteria.

LUBA rejected the petitioners' reasonableness argument but found that the city had failed to demonstrate compliance with local land use laws. LUBA remanded the matter to the city for further proceedings on that issue and others.

The petitioners appealed LUBA's rejection of their argument regarding "reasonableness." The court of appeals agreed that a reasonableness standard applied. The court cited *Portland General Electric Co. v. City of Estacada* for the proposition that "in statutes empowering cities to legislate annexation proceedings, there is implied within the legislative grant that such cities must legislate reasonably and not arbitrarily." 19 Or 145, 159, 241 P2d 1129 (1952). Reasonableness will be determined in part by prior judicial determinations but it is "largely controlled by specific legislative and regulatory criteria." *Dept. of Land Conservation & Dev. v. City of St. Helens*, 138 Or App 222, 227, 907 P2d 259 (1995). According to the court, unreasonableness is akin to arbitrariness.

The petitioners alleged that the city's decision was unreasonable because (1) the annexation was designed to create a property tax windfall for the city, (2) the annexed area would not be provided with significant benefits by the annexation, (3) the annexation irrationally included some high-density residential properties but excluded others, and (4) the city had failed to show a need to expand.

The court agreed that these allegations "suggest[ed] a degree of unreasonableness." 191 Or App at 154. The court determined, however, that the reasonableness standard creates a very low barrier and that case law indicates that the courts must defer to local government legislative decisions unless they are arbitrary or unreasonable. Applying that standard to the facts of this case, the court agreed with LUBA that the annexation did not appear unreasonable.

The petitioners also argued that the city's decision was unreasonable because it failed to make findings demonstrating that the annexation conformed to existing land use laws. The court agreed, stating that because the City of St. Helens held "that compliance with land use laws is the 'largely controll[ing]' component of the reasonableness test," the city should have made findings. *Id.* at 155

(alteration in original). "Until the city has demonstrated that the annexation meets those criteria, no definitive conclusion as to reasonableness is possible." *Id.* The court remanded the case.

Ruth Spetter

Morsman v. City of Madras, 191 Or App 149, 81 P3d 711 (2003).

Editors' Note: *On remand from the Court of Appeals, LUBA modified the part of its earlier opinion that addressed the issue of reasonableness. LUBA agreed with the court that its resolution of this issue was premature and must await the city's determinations concerning compliance with its land use regulations. Consistent with the court's decision, LUBA remanded the city's decision.* Morsman v. City of Madras, *LUBA No. 2003-040 (1/27/04).*

OREGON COURT OF APPEALS UPHOLDS FINE FOR UNAUTHORIZED TIMBER HARVEST CALCULATED ON A PER-TREE BASIS

In *Gambee v. Department of Forestry*, 191 Or App 241, 81 P3d 734 (2003), the Oregon Court of Appeals upheld a $40,737.50 fine under the Oregon Forest Practices Act that was based in part upon a separate penalty for each of fifteen trees that were unlawfully cut.

Petitioner Kent Gambee notified the Department of Forestry in early 1996 of his plan to log property he owned in Klamath County. The department responded that an approved, written harvest plan was required because of bald eagle nests on and near the property. Gambee hired a wildlife ecologist to assess the property and then presented the department with a harvest plan, which it rejected for failure to adequately protect two known eagle nest sites. Gambee did not submit a revised plan, but instead hired a logger, who logged the property despite having been told by Gambee about the nests. After learning of the harvest, the department examined the property and found that one nest tree and fifteen other trees near the remaining nest had been unlawfully harvested. The department also discovered an unlawful skid road and skidder tracks within 300 feet of the remaining nest tree.

The department fined Gambee $2,412.50 for each of the fifteen trees harvested near the second nest tree, plus $400 for logging without an approved harvest plan and $400 for violating the 300-foot buffer. After a hearing and administrative appeal, the Board of Forestry upheld the fines, slightly increasing the amount of the per-tree fine so that the total amount of the penalty was $40,737.50.

On appeal, the court of appeals affirmed the penalty. Gambee first assigned error to the board's conclusion that he was an "operator" as defined in ORS 527.630(13). Applying the rules of statutory construction under *PGE v. BOLI*, 322 Or 132, 903 P2d 351 (1995), the court concluded that an "operator" is not limited to one who personally logs the property. This term also includes one who engages in "any commercial activity relating to the harvest," such as Gambee, who hired the wildlife ecologist and logger.

Gambee's remaining assignments of error challenged the board's authority to impose separate fines on a per-tree basis. First, Gambee argued that the rule authorizing per-tree fines, OAR 629-670-0220, did not apply because it took effect after the harvest. The court rejected Gambee's argument because he had failed to raise the issue below.

Second, Gambee argued that OAR 629-670-0220 provided insufficient guidance for the department's exercise of discretion to impose a per-tree penalty. The court disagreed, holding that "an agency need not adopt rules establishing the agency's policy in regard to every possible factual circumstance that may arise in the course of the agency's exercise of its enforcement functions." 191 Or App at 254. The rule provided sufficient standards by requiring the department to consider the real or potential economic gain derived from the violation, and permitting it to impose a per-tree penalty when the ordinary penalty would be an insufficient deterrent. The court also found that the department need not quantify the amount of economic gain derived from the violation, nor limit the amount of the penalty to the amount of the gain. Because the record contained substantial evidence to support the finding that Gambee enjoyed economic gain from the harvest, the per-tree penalties did not fail for abuse of discretion.

Finally, the court rejected Gambee's argument that the penalty violated ORS 527.685(1), which limits penalties under the Act to a maximum of $5,000 "per violation." The court found that Gambee had failed to preserve this argument, and also that it was not unreasonable for the board to define the harvest of each tree as a separate violation.

David J. Petersen

Gambee v. Dept. of Forestry, 191 Or App 241, 81 P3d 734 (2003).

COURT OF APPEALS REFINES GOAL 5 CONFLICTING USE ANALYSIS

In *Hegele v. Crook County*, 190 Or App 376, 78 P3d 1254 (2003), the court of appeals clarified the meaning of OAR 660-016-0005, which addresses the second step in the Goal 5 compliance process: identifying conflicting uses. The rule provides;

> It is the responsibility of local government to identify conflicts with inventoried Goal 5 resource sites. This is done primarily by examining the uses allowed in broad zoning districts established by the jurisdiction (e.g., forest and agricultural zones). *A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site. Where conflicting uses have been identified, Goal 5 resource sites may impact those uses. These impacts must be considered in analyzing the economic, social, environmental and energy (ESEE) consequences:*
>
> (1) Preserve the Resource Site: If there are no conflicting uses for an identified resource site, the jurisdiction must adopt policies and ordinance provisions, as appropriate, which insure preservation of the resource site.
>
> (2) Determine the Economic, Social, Environmental, and Energy Consequences: *If conflicting uses are identified, the economic, social, environmental and energy consequences of the conflicting uses must be determined. Both the impacts on the resource site and on the conflicting use must*

> *be considered in analyzing the ESEE consequences.* The applicability and requirements of other Statewide Planning Goals must also be considered, where appropriate, at this stage of the process. A determination of the ESEE consequences of identified conflicting uses is adequate if it enables a jurisdiction to provide reasons to explain why decisions are made for specific sites. (Emphasis added.)

LUBA interpreted the rule to say that the impacts of the resource site on neighboring uses and of neighboring uses on the resource site could be identified and considered concurrently in defining the conflicting uses mentioned in the rule.

The court of appeals rejected LUBA's "two-way conflict" analysis. Analyzing the sentence "A conflicting use is one which, if allowed, could negatively impact a Goal 5 resource site," the court concluded it requires a local government to consider only uses that have a negative impact on the Goal 5 resource. It does not allow the local government to consider negative impacts that the Goal 5 resource itself might have on uses other than those already identified as being conflicting uses. Once these conflicting uses have been identified, the language of OAR 660-016-0005(2) requires consideration of both the resource sites and the identified conflicting uses to analyze the ESEE consequences.

The court then discussed what types of negative impacts on a Goal 5 resource may properly be considered under the rule. The court rejected the petitioner's argument that the only way a nearby residential use could negatively impact a mining site is if the mining site created impacts that could give rise to some legal action to block the mining activity, such as a common law action for nuisance or trespass. The court concluded that the rule encompasses a broad range of negative impacts because it uses the words "*could* negatively impact a Goal 5 resource site" (emphasis added). The court noted that the flexibility in the language allows one to conceptualize a broad range of possible conflicts that local governments may consider. For example, legal, social, and economic pressures to restrict, confine, or limit activity on the resource site could be considered.

The court recognized that the outcome of the newly stated analytical approach as applied in specific cases may differ little from the approach taken by LUBA:

> It may well be that most or all allowable uses that are negatively impacted *by* the Goal 5 resource site reasonably can be expected to give rise, in response, to some form of negative social, economic, or legal pressure *on* the resource site. But the express terms of the rule require first an identification of the impact on the Goal 5 resource. The fact that such pressure originates as a reaction to the impact of the Goal 5 resource site on surrounding uses does not become relevant until the next step in the Goal 5 inventory process, when the local government considers the economic, social, environmental, and energy consequences of the conflicting uses.

190 Or App at 385.

The court's approach raises the question whether the drafters of the rule actually intended to limit consideration of conflicts to only those uses determined to have impacts on the resource. The new analytical process outlined by the court will require a higher level of technical finesse and wordsmithing on the part of local governments and may generate opportunities for controversy that LUBA's approach perhaps would have avoided.

Peter Livingston

Hegele v. Crook County, 190 Or App 376, 78 P3d 1254 (2003).

I THINK THAT I SHALL NEVER SEE A BILLBOARD LOVELY AS A TREE—AT LEAST NOT IN GLADSTONE

West Coast Media, LLC v. City of Gladstone, 192 Or App 102, 84 P3d 213 (2004), is notable for its holding that, in reversing the City of Gladstone's unconstitutional decision to deny certain sign permits, LUBA was not required to direct the city to approve those permits. On remand the city could deny the permits under "other than constitutionally prohibited criteria." 192 Or App at 112.

The case stems from applications for four billboards, each 48 feet by 14 feet. The city denied the applications based on advice from the city attorney that billboards are not a permitted use anywhere in the city.

On appeal to LUBA, the applicant argued that the city must approve the applications, because the city code includes a general statement that signs are allowed and does not contain any specific reference to billboards. Although plausible in isolation, LUBA found that this argument was not reasonable in context. Based on the history and nature of the sign regulations, LUBA held that the city code implicitly prohibits signs that it does not expressly allow. 44 Or LUBA 503 (2003). The court of appeals agreed with LUBA's reasoning.

However, LUBA found, and the court of appeals agreed, that the implicit prohibition on billboards violated Article I, sections 8 and 20 of the Oregon constitution, because the city code permits campaign signs and public service information in both off-premises and on-premises circumstances but prohibits commercial advertising on off-premises signs. Therefore, the distinctions in the city code are not content-neutral and require an inquiry into the content of the proposed signs to determine what regulations apply.

The city argued that LUBA must examine the city code to determine whether any constitutional provisions (*e.g.*, standards restricting sign size) could be used to deny the application. If such provisions exist, the city argued that LUBA had to apply them, based on its obligation to construe the city's code in a constitutional manner if possible.

In response to this argument, LUBA concluded that the city decision was not based on such content-neutral regulations on its face; it was based only on the city attorney's advice that the city code prohibits billboards. Because the city decision was not based on the size of the signs, LUBA could not affirm the decision on that basis. The court of appeals agreed, citing the limited authority delegated to LUBA under ORS 197.835.

Lastly, the court discussed the applicant's claim that LUBA was obliged to direct the city to approve the permits. The court reiterated that LUBA's powers are limited to those delegated by the legislature. The law requires LUBA to order a local government to

approve an application only (1) when the decision exceeds the discretion of the local government under its local plan and codes or (2) when the local government intended to avoid compliance with the 120- and 150-day rules in ORS 215.427 and 227.178. ORS 197.835(10)(a). None of those circumstances existed in this case. Therefore, the court held that LUBA had correctly refrained from directing the city to approve the permits, and, on remand, the city could act on those permits "under provisions of the code other than constitutionally prohibited criteria." 192 Or App at 112.

Larry Epstein

West Coast Media, LLC v. City of Gladstone, 192 Or App 102, 84 P3d 213 (2004).

■ NEW GAS PIPELINE FUELS DEBATE OVER RULES FOR SITING ENERGY FACILITIES ON FARMLAND

In *Friends of Parrett Mountain v. Northwest Natural Gas Company*, 336 Or 93, 79 P3d 869 (2003), the Oregon Supreme Court upheld an order by the Oregon Energy Facility Siting Council approving a natural gas pipeline sited primarily within exclusive farm use (EFU) zones in Washington, Marion, and Clackamas Counties. The court sustained the council's determination that Northwest Natural had provided substantial evidence of the geological stability of the underlying lands. The court also held that various state land use rules regarding the siting of pipelines in EFU zones do not require a property-by-property analysis of alternatives and do not require pipelines to be sited entirely under roadways.

The council is an energy siting superagency composed of seven members appointed by the governor and confirmed by the state senate. It reviews applications for large power facilities and pipelines and can grant all necessary state and local permits, licenses, and approvals simultaneously. Appeals of council orders go directly to the state supreme court. *See generally* ORS ch. 469.

Northwest Natural proposed a new underground natural gas pipeline to link two of its stations in Washington and Clackamas Counties. The council conducted administrative proceedings and ultimately granted a site certificate for construction of the pipeline. The certificate allows Northwest Natural to construct a 24-inch-wide pipeline located between four and five feet below the ground and within an approximately 62-mile-long, 200-foot wide corridor. All but six of the 62 miles are located in EFU zones. Of the portions within EFU zones, 35 miles of the pipeline will be buried within, or adjacent to, existing road or highway rights of way.

This case consolidated two separate challenges to the pipeline. The first challenge was brought by Friends of Parrett Mountain (Friends) and three individuals. The second challenge was brought by the farm bureaus of all three counties along with eight other individuals and entities.

On appeal, Friends raised only one argument: that Northwest Natural had not adequately demonstrated the geological stability of the Parrett Mountain area, under which lies the Sherwood fault. OAR 345-022-0020(1)(h) required Northwest Natural to provide "information from reasonably available sources regarding the geological and soil stability of the site and vicinity." Both Northwest Natural and Friends hired geological experts, who disagreed over which studies of the local geology should be used and over whether landslide activity and soil creep had occurred in certain areas. Friends argued that the experts' conflicting conclusions resulted in "unfilled gaps" in Northwest Natural's demonstration of geological stability.

Presented with this classic instance of a battle of the experts, the court chose not to second-guess the council's determination that Northwest Natural had met its burden with substantial evidence. Citing *State v. Clark*, 286 Or 33, 40–41, 593 P2d 123 (1979), the court stated that the council may determine the probative weight to be accorded the testimony of expert witnesses. To the extent that the experts' conflicting conclusions did present any evidentiary gaps, Northwest Natural's experts had filled those gaps by reviewing the evidence proffered by Friends' expert and adequately rebutting them.

The court then turned to the farm bureaus' arguments. The first argument dealt with ORS 215.275(2), which required Northwest Natural to consider "reasonable alternatives" to using EFU-zoned land and demonstrate why various specified factors precluded those alternatives. The farm bureaus argued that "reasonable alternatives" means "alternatives that have some likelihood of success either initially or with modest refinement." The court rejected the farm bureaus' construction of this term, and favored instead the definition of "reasonable" in *Black's Law Dictionary*: "Fair, proper, just, moderate, suitable under the circumstances. . . . Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable."

The farm bureaus also argued that the council had erred by failing to require Northwest Natural to evaluate siting alternatives on each individual property within an EFU zone. The court disagreed, quoting ORS 215.275(2), which requires an applicant to show merely that a facility "must be sited in an exclusive farm use zone," and says nothing about discrete properties within such a zone.

Next, the farm bureaus argued that the siting alternatives analysis under ORS 215.275(2) required Northwest Natural to consider the use of roads and highway rights of way within EFU zones. The court again disagreed, stating that the statute distinguishes only between EFU lands and non-EFU lands. According to the court, roads in EFU zones cannot be alternatives to EFU zones because they are in fact part of the zones.

For those portions of the pipeline that *would* be located wholly within roads and highway rights of way, the council relied on ORS 215.283(1)(L), which allows "the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way" and does not require an alternatives analysis. The farm bureaus argued that this language required the pipeline to be located directly under the hard surface of the road. The court disagreed, stating that the phrase "along the public right of way" controls the rest of the language, and therefore pipelines approved under ORS 215.283(1)(L) need not be located under hard road surfaces so long as they are located within road rights of way.

In their last assignment of error, the farm bureaus offered a final reason why the pipeline should have been limited to roadways. They argued that ORS 217.275(5) required the council to either impose conditions requiring the pipeline to be located

under roadways wherever possible or to deny the application. ORS 217.275(5) states that the governing body must impose

> clear and objective conditions . . . to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.

In a somewhat confusing passage, the court apparently rejected the idea that the pipeline should be confined to roadways wherever possible. The court examined the meanings of the words "mitigate" and "minimize," relying on their definitions in *Webster's Dictionary*. According to the court, the use of the word "minimize" means that "some impact on EFU land is permissible." 336 Or at 115. The court concluded that the statute's use of the words "mitigate" and "minimize" together requires "the general reduction in the intensity and frequency of an impact, not, as Farm Bureau petitioners suggest, the absolute avoidance or elimination." *Id.*

This case will likely provide energy facility applicants with greater flexibility for selecting land within EFU zones once they have made it past the hurdle of demonstrating that reasonable non-EFU-zoned alternatives are unavailable. The court's construction of the word "minimize" in ORS 217.275(5) is disconcerting; under the dictionary definition used by the court, "minimize the impacts" should mean that if the impacts can be reduced to zero, they must be. The court's ultimate construction of ORS 217.275(5) is reasonable, however, given the appearance of the words "mitigate" and "minimize" side by side and the court's decision to construe them together.

Nathan Baker

Friends of Parrett Mtn. v. Northwest Natural Gas Co. (In re Application for a Site Certificate for Northwest Natural Gas Co.'s South Mist Pipeline Extension), 336 Or 93, 79 P3d 869 (2003).

Appellate Cases — Real Estate

PROPERTY DAMAGE CAP IN ORS 30.270(1)(a) APPLIES SEPARATELY TO TENANTS BY THE ENTIRETY

McCormick v. City of Portland, 191 Or App 383, 82 P3d 1043 (2004), arose from a landslide that occurred during the 1996 rains. The Spadas owned an unimproved lot next to a lot owned by the McCormicks. A landslide flowed over both lots. One set of owners sued the other, and both cross-claimed against the City of Portland for negligence, trespass, inverse condemnation, restitution, nuisance, and violation of federal civil rights. The claims against the city were based on the city's alleged failure to (1) build and maintain curbs, (2) enforce against the McCormicks various code provisions pertaining to curb construction, (3) adequately construct and maintain sewage and storm water management pipes on the McCormicks' property, and (4) adequately manage the storm drainage system in the general vicinity.

Ultimately, the court realigned the parties so that the Spadas were plaintiffs against Mr. McCormick and the city. Only the negligence and trespass claims survived summary judgment and directed verdict. On those claims, a jury found in favor of the Spadas and apportioned 63% of the fault to the city and 37% to McCormick. The court directed entry of an ORCP 67B judgment to the Spadas in the amount of $62,173.44 against the city and $36,514.56 against McCormick. The Spadas appealed but later settled with McCormick, leaving an appeal involving only the Spadas and the city.

The Spadas argued that the trial court erred by awarding only repair damage, and that, to be restored to their pre-landslide position, they needed to also recapture the loss in market value.

Based on the particular questions posed to the jury in the verdict form and the court's determination that the damages were temporary rather than permanent, the court explained that under Oregon law, damage to real property need not last "forever" to be considered permanent for purposes of damages. "It is enough that the injury be of a kind that makes it appropriate to consider the owner's loss in terms of the reduced value of the property rather than in terms of restoring it to its original condition." *Hudson v. Peavey Oil Company*, 279 Or 3, 10, 566 P2d 175 (1977). Temporary damage, by contrast, is "reasonably susceptible to repair." *Id.* The court held that, where the damage is temporary, the correct measure of damages is the cost of restoration.

The parties had stipulated that the trial court would be the fact finder on whether the damage was temporary or permanent, and the trial court found the damages to be temporary. The court of appeals upheld that finding because there was evidence to support it.

The Spadas argued that the trial court erred when it allocated damages by percentage of fault rather than entering a judgment against the city for 100 percent of the damages. The court of appeals disagreed. A plaintiff can recover full damages from one tortfeasor who is partially at fault only if the trial court concludes the judgment against the other tortfeasor is uncollectible. ORS 18.485(3). Here, the Spadas had not alleged the judgment against McCormick was uncollectible.

The Spadas assigned error to the court's failure to treat them as two claimants, each of whom was entitled to $31,086.72, half of the $62,173.44 judgment against the city. ORS 30.270(1)(a) limits to $50,000 the amount "any claimant" may receive from a public body for damage to property. If the Spadas were treated as a single "claimant," this statue would reduce the amount of their recovery. Because the Spadas owned their property as tenants by the entirety, the trial court refused to "individualize" the damages.

The court of appeals disagreed with the trial court. The court of appeals noted that, for example, tenants by the entirety are each entitled to half of the proceeds from the sale of their property, and likened tort action proceeds to sale proceeds. In addition, the court observed that each plaintiff has an individual claim against the city because in Oregon, a tenancy by the entirety is "for almost all purposes a species of tenancy in common." 191 Or App at 396. In prior cases, the Oregon Supreme Court and Oregon Court of Appeals had held that ORS 30.270(1)(b) (another part of the statute, which creates a $100,000 cap) applies to each claimant, regardless of the number of claimants associated in a single claim. In *McCormick*, even though the claim was styled as a single action brought by an "estate" (the tenancy by the entirety), the real parties in interest were the two co-ten-

ants. Thus, ORS 30.270(1)(a) applied separately to each of the Spadas.

Susan C. Glen

McCormick v. City of Portland, 191 Or App 383, 82 P3d 1043 (2004).

FRED MEYER WINS BATTLE TO BAR INITIATIVE PETITION SIGNATURE GATHERERS FROM STORE

In *Fred Meyer Stores, Inc. v. Garrett*, 191 Or App 582, 83 P3d 925 (2004), the Oregon Court of Appeals upheld an injunction that barred the defendants from soliciting signatures for initiative petitions at the Hawthorne Fred Meyer store in Portland. The court based its opinion on the facts of this particular case and left open the question of whether the free speech provision of the Oregon Constitution (Article I, section 8) could *ever* protect initiative petition signature gathering on private property.

In 1993, the Supreme Court of Oregon held that, under certain circumstances, petitioning activity on private property is protected under Article IV, section 1, which establishes the requirements for legislation by the initiative process. *Lloyd Corp. v. Whiffen*, 315 Or 500, 511–15, 849 P2d 446 (1993). The *Lloyd Corporation* court focused on the characteristics of the property and whether the property owners had invited the public to treat portions of its property as public property. The court found that there had been an invitation to the public to treat the substantial common areas in the Lloyd Center Mall as public property, thereby subjecting the owner to the statutory and constitutional rights and obligations that pertain to the use of public property, including those regarding initiative petitions.

In 2000, the Oregon Court of Appeals applied the *Whiffen* standard and declined to find that Fred Meyer had expressly or impliedly invited the public to use its Hawthorne store as a forum for public assembly. *Fred Meyer, Inc. v. Klein Campaigns, Inc.*, 168 Or App 259, 266, 5 P3d 1194 (2000).

Soon afterward, the Oregon Supreme Court overruled both prior cases and held that Article V, section 1, does not confer a right to solicit signatures for initiative petitions on private property over the objection of the property owner. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 58–66, 11 P3d 228 (2000). The court specifically declined to address the issue of whether petitioning activity on private property is protected by the free speech provisions contained in Article 1, section 8. *Id.* at 66 n 19.

In the instant case, the defendants contended that Article I, section 8 of the Oregon Constitution confers a right to solicit signatures on private property. Article I, section 8 provides that "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatsoever." The argument for extending free speech constitutional requirements onto private property was the same as in *Whiffen*: that if private property is used for public purposes, then the owner can be subject to the statutory and constitutional rights that pertain to the use of public property. The defendants argued that the standard applied in *Whiffen* and *Klein* should now be applied to find that Fred Meyer had invited the public to use a portion of its store for public purposes, which would mean that free speech activities, including signature gathering, could not be prohibited. In support of their argument, the defendants submitted evidence concerning the presence of a number of facilities at the Hawthorne store: two bulletin boards, a lottery ticket dispenser, mail and UPS boxes, ATMs, public phones, a seating area with tables in a delicatessen portion of the store, and a mechanical riding horse.

Although the defendants had submitted facts beyond those that were at issue in *Klein*, the court found that they had not established that the invitation that Fred Meyer extended to the public regarding the use of the Hawthorne store was different from the invitation in *Klein*. The court therefore found that there was no triable issue of fact in this case and declined to decide whether Article I, section 8 of the Oregon constitution confers a right to solicit petition signatures on private property. The court affirmed the trial court's decision to grant injunctive relief barring the defendants from soliciting signatures for initiative petitions at the store.

Overall, this decision does not add much to constitutional jurisprudence because the court declined to address the core question regarding free speech and private property rights. The fact that the Hawthorne Fred Meyer store was the same store scrutinized by the court in *Klein* and that the defendants asked the court to apply the same legal standard as in *Klein* made it easy for the court to avoid answering the hard constitutional question. This element of legal *déjà vu* is evident in the brevity of this opinion (eight paragraphs), the cursory analysis of the evidence, and the references to the *Klein* record. Whether or not Fred Meyer has won the ongoing war is yet to be seen, though future battles over this important constitutional issue probably will not involve the Hawthorne Fred Meyer store.

Raymond W. Greycloud

Fred Meyer Stores, Inc. v. Garrett, 191 Or App 582, 83 P3d 925 (2004).

Appellate Cases — Takings

NINTH CIRCUIT REAFFIRMS RIPENESS REQUIREMENT FOR REGULATORY TAKINGS

In a pair of recent decisions from California, the Ninth Circuit reaffirmed the requirement that regulatory taking claims must be "ripe" before federal courts will review them. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003), and *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004), both arose out of mobile home park rent control regulations. In each instance, the mobile home park owner filed an inverse condemnation claim in federal court under 42 U.S.C. § 1983, arguing that its Fifth Amendment protection from uncompensated takings had been abridged by the rent control ordinance. In *Hacienda Valley*, the mobile home park owner challenged an ordinance as an unconstitutional taking on its face. In *Carson Harbor*, by contrast, the owner challenged the application of an ordinance. The respective district courts dismissed both cases on the pleadings for lack of federal subject matter jurisdiction because they were "unripe." The Ninth Circuit affirmed both dismissals.

The ripeness requirement traces its origins to *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson County*, the U.S. Supreme Court erected two hurdles that an inverse condemnation claim arising out of state or local regulatory action must surmount before the claim can be brought in federal court. The Supreme Court reiterated those twin tests three years ago in *Palazzolo v. Rhode Island*, 533 US 606 (2001). Under the first prerequisite, a claimant must show that the local agency's decision on an application was final—including resolution of any variance requests. The rationale is that a court reviewing the agency's action will not be in a position to assess whether a taking has occurred until the court knows the full extent, if any, to which development would be permitted on the subject property. Under the second prerequisite, a claimant must show that he or she sought compensation for the asserted taking through the available procedures—typically an inverse condemnation case in state court—and was denied compensation. The rationale for this prong is that that the U.S. Constitution does not simply prohibit takings; rather, it prohibits takings without just compensation.

Neither *Hacienda Valley* nor *Carson Harbor* involved the first prong of the ripeness test—which is usually called the "finality" requirement. As the Ninth Circuit noted in *Hacienda Valley*, the Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992), excused facial challenges to ordinances from the *Williamson County* "finality" requirement because the regulation itself and not its application was claimed to be unconstitutional. In *Carson Harbor*, all parties conceded that the city's decision was final.

Rather, both *Hacienda Valley* and *Carson Harbor* concentrated on the second prong, which is usually called either the "state remedies" or the "exhaustion" requirement. The mobile home park owners in both cases contended that the available California state remedies were inadequate and, therefore, they should be excused from first seeking review in state court. The Ninth Circuit disagreed and affirmed the dismissal of both cases.

Hacienda Valley and *Carson Harbor* turn in large part on the adequacy of California's unique and largely untested remedial mechanisms, and, as such, those portions of the opinions will only be of passing interest to Oregon practitioners. At the same time, they both offer good summaries of the very important—but sometimes poorly explained—concept of ripeness in regulatory takings. For a ripeness saga closer to home, see *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.), *cert. denied*, 525 U.S. 923 (1998).

Mark J. Fucile

Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004).
Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651 (9th Cir. 2003).

Appellate Cases – Landlord/Tenant

LANDLORDS MAY RESERVE DISCRETION TO LATER CHARGE SEPARATELY FOR UTILITIES

In *Cornelius Manor Trailer Court, Inc. v. Esch*, 191 Or App 204, 81 P3d 727 (2003), the Oregon Court of Appeals decided that a landlord's exercise of a right to charge separately for utilities that had been explicitly reserved in the rental agreement was not a unilateral modification of the rental agreement.

The plaintiff landlord operated a mobile home park in which the defendants resided. According to a 1992 rental agreement, the rent included water and other utilities. However, the landlord reserved the right "to pass these costs to the [tenant] at a later date."

While the rental agreement was still in effect, ORS 90.510 (1991) was amended. The amendments added a provision that prohibited the unilateral amendment of a rental agreement unless required by changes in the law. In addition, the amended version of ORS 90.510 (1997) permitted landlords to charge for a utility or service charge that was billed to the landlord by a utility or service provider if the rental agreement provides for the charge. In 1998, the landlord gave the tenants notice that it would begin charging for water services rather than increase the rent.

The tenants argued and the trial court agreed that the landlord's reservation in the rental agreement did not constitute a mutual agreement allowing the landlord to unilaterally begin charging separately for water. The trial court decided that the landlord's change in policy was effectively an unlawful unilateral amendment to the agreement.

The court of appeals reversed and remanded, deciding that the landlord's reservation of rights was unambiguous and, by signing the agreement, the tenants had assented to the landlord's reservation. The court rejected the idea that the landlord's explicit reservation could not be enforced. The court concluded by citing ORS 90.510(8)(a) (1997), which allows landlords to require tenants to pay for utilities provided directly to the tenants' dwellings when a rental agreement provides for the charge. Thus, if a rental agreement provides the landlord with discretion to later charge for utility fees, the landlord may do so.

Glenn Fullilove

Cornelius Manor Trailer Court, Inc. v. Esch, 191 Or App 204, 81 P3d 727 (2003).

Cases from Other Jurisdictions

WASHINGTON'S EXACTIONS SAGA CONTINUES: THE COURT OF APPEALS FINDS MEANING FOR "REASONABLY RELATED TO" IN CHAPTER 82.02 RCW

In a dizzying flurry of propositions, observations, and legislative history, Division II of the Washington Court of Appeals in *City of Olympia v. Drebick*, 119 Wn. App. 774, 83 P.3d 443 (2004), has finally given meaning to the statutory requirement that impact fees be "reasonably related to" the impacts of new development. This decision adds yet another interpretation to the ongoing, slightly chaotic development of exaction law in the Washington courts.

The City of Olympia conditionally granted Drebick a building permit to construct a new commercial office building upon payment of a traffic impact fee. Under Olympia's traffic impact fee ordinance, the city estimated an average fee rate by dividing the cost of all roadway improvements associated with new development by the total projected square footage of commercial office buildings within city limits. Impact fees were then calculated by multiplying the square footage in Drebick's proposal (54,698 sq. ft.) by the average fee rate ($2.95/sq. ft.), resulting in a fee of $161,359. In contrast, Drebick argued that an individualized assessment of his project's impacts would have resulted in an impact fee totaling approximately $29,000.

Drebick challenged the impact fee before the city hearing examiner, who agreed that an individualized assessment was necessary to implement impact fee authority under Chapter 82.02 RCW. The superior court reversed, finding that impact fees need not bear a direct relationship to the impacts mitigated by the fees, because they are analogous to taxes. The court of appeals reversed the superior court and reinstated the hearing examiner's decision.

Before delving into the appellate court's analysis, it is worth noting the context of the superior court's understanding of the issue. The city's case was premised upon the distinction between a regulatory fee and a tax. Because taxes and regulatory fees are subject to different requirements limiting their applicability and calculation, the dichotomy is important in determining whether certain charges are authorized at a threshold level. Among the differences, "revenues from a fee are to be used exclusively for the purpose of financing the related regulation; revenues from a tax may be used for other purposes." *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 749, 966 P.2d 1232 (1998), *cert. denied*, 526 U.S. 1066 (1999). The tax/fee distinction is implemented by the *Covell* factors, which include an analysis of, among other things, "whether there is a direct relationship between the fee charged and [either] the service received by [or] the burden produced by the fee payer." *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995).

In *New Castle Investments v. City of LaCenter*, 98 Wn.App. 224, 989 P.2d 569 (1999), the court of appeals applied the *Covell* factors to determine whether Washington's vested rights doctrine applies to impact fees. Assuming that regulatory fees vest as land use controls (and that taxes do not vest), the *New Castle* court found a direct relationship missing from impact fee authority: "Although impact fees must be 'reasonably related' to the impact of new development on the public infrastructure, they are not individually calculated for each new development, but rather are based on a *general calculation* that applies to all new development." 98 Wn.App. at 234 (emphasis added). The *New Castle* court held that impact fees are neither land use ordinances nor taxes, but they have characteristics more akin to taxes.

In *Drebick*, the appellate court immediately accepted the superior court's characterization of impact fees as taxes. However, the appellate court recognized that the *Covell* factors do not alter the language in Chapter 82.02 RCW, which expressly applies to "any tax, fee or charge." RCW 82.02.020. Accordingly, the appellate court found the tax/fee distinction immaterial to the outcome of the case.

Once free of *New Castle* and the tax/fee distinction, the *Drebick* court looked to the requirements of RCW 82.02.050(3), which provides that impact fees (1) may be imposed "only . . . for system improvements that are reasonably related to the new development;" (2) "[s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and" (3) "[s]hall be used for system improvements that will reasonably benefit the new development." Importantly, the court found that RCW 82.02.050(3) "caps" the calculation of impact fees.

The appellate court focused its analysis on two potential ambiguities in the statute: first, whether "new development" refers to all new development or merely the project at issue; and second, whether the system improvements for which fees are charged must be "reasonably related to" the cumulative impacts of *all* new development, or just the impacts of the permittee's particular project.

To answer these questions, the court made three observations about legislative history and two additional observations of applicable law, and then discussed several propositions from exaction case law. Among the more notable are the observations that the state legislature had omitted language from the bill that would have required only a general relationship between impacts and impact fees, and that the legislature was well aware of exaction case law. The appellate court further found that *Nollan, Dolan*, and their Washington progeny inform the interpretation of "reasonably related to" and set the constitutional limits on development exactions. To keep impact fee authority within constitutional limits, the court construed Chapter 82.02 to require impact fees to be "reasonably related to" the individualized impacts of the specific development.

In a footnote, the *Drebick* court distinguished the "general calculation" language in *New Castle* as dicta, recognizing that the *New Castle* court was faced with a different question of law. The *Drebick* court further qualified the *New Castle* statement by finding it "consistent with today's ruling once it is understood that the 'general calculation' is made pursuant to RCW 82.02.060, and that RCW 82.02.060 is subject to the cap in RCW 83.03.050(3)." 83 P.3d at 452.

Keith Hirokawa

City of Olympia v. Drebick, 119 Wn. App. 774, 83 P.3d 443 (2004).

FLORIDA FEDERAL DISTRICT COURT UPHOLDS MIAMI SIGN REGULATIONS

In *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349 (S.D. Fla. 2003), the plaintiff billboard company, which provides both commercial and noncommercial billboards in the defendant city, appealed orders to remove signs allegedly maintained in violation of the city's regulations, and then filed this federal court action. The federal suit alleged that the city's regulations discriminate in violation of the First Amendment and the Equal Protection Clause and that the city's decision to remove the signs without further notice and proceedings violated the First Amendment and the Due Process Clause.

The plaintiffs subsequently moved for injunctive relief to prevent removal of the signs and further penalties. That motion was denied pending resolution of state and local appeals and other remedies. In an unpublished opinion, the Eleventh Circuit vacated that denial because state remedies were not available for the plaintiff.

The plaintiff then filed an amended complaint and a second suit regarding denial of certain permits requested in 2001 and 2002. The city's motion for summary judgment on these complaints was based on ripeness, standing, and mootness grounds, while the plaintiff's claims were based on ripeness, First Amendment injury, redressability by the trial court, and denial of mootness. The parties also moved for judgment on the merits.

The court began its analysis with a First Amendment review regarding the balance between free expression and the rights of society, noting a trend by outdoor advertising companies to undertake facial challenges to regulations. The court characterized this effort as turning the First Amendment shield "into a sword that assures their commercial well-being." 287 F. Supp. 2d at 1357.

Turning to the standing issue under Article III of the Constitution, which requires a case or controversy, the court said standing requires a showing of injury to a legally protected interest, a causal connection between the injury and the interest, and the availability of redress by the court. In addition, the injury must be concrete and particularized, rather than hypothetical. The court noted one exception to this rule: when there is a facial overbreadth claim under the First Amendment and the court must deal with potential claims of others not before the court. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 n.11 (1981). If the overbreadth claim involves conduct, rather than speech, the challenge must protect a substantial right and there must be a realistic danger that the challenged regulation will significantly compromise recognized First Amendment protections of parties not before the court.

Here, the plaintiff had at best a *de minimus* noncommercial interest; only two percent of its advertising fell within this category. The court found that the plaintiff had standing to challenge the regulation of commercial messages, but not noncommercial messages, because the city's zoning ordinance regulates conduct, rather than speech. The court noted that there had been no claim of overbreadth for the nearly 40 years that the city billboard regulations had been in effect, and found no realistic danger of any First Amendment rights being chilled. The court could not find an interest of the plaintiff that paralleled those of noncommercial speakers and said that it hesitated to invalidate a regulation duly adopted by an elected body based on speculation. Moreover, the court noted that four of the five challenges to the subject ordinance were on grounds that noncommercial speech was favored over commercial speech.

The court then turned to whether the challenged regulations were content-based, *i.e.*, favoring commercial over noncommercial messages or on-site over off-site speech. According to the court, if a regulation serves governmental purposes without reference to content, it is deemed neutral, despite incidental effects on some messages. The court also remarked that commercial speech is not accorded the same level of protection as noncommercial speech. Referencing *Metromedia*, the court found that the United States Supreme Court allows regulation of commercial speech if there are valid governmental interests (in *Metromedia* those interests were aesthetics and traffic safety), the regulations directly advance those interests, and the regulations are no greater than necessary to achieve the interests. The *Metromedia* Court found that prohibition of offsite advertising related directly to the stated governmental interests of traffic safety and aesthetics, regardless of the fact that some onsite advertising was allowed. The Supreme Court thus allowed some favoring of certain commercial messages over other commercial messages. Here, the city need not conduct extensive research to justify its aesthetic or traffic rationales. The city properly determined that commercial offsite signs are a threat without regard to their content and banned them (as in the *Metromedia* case), even though the city did not also ban onsite commercial messages.

The court then turned to the plaintiff's claims of discrimination against non-commercial speech notwithstanding its determination that the plaintiff lacked standing to raise them. The Eleventh Circuit has taken the position that all noncommercial messages are "onsite" messages. *Southlake Prop. Assocs, Ltd. v. City of Morrow*, 112 F.3d 1114, 1117–19 (11th Cir. 1997). They are thus free of the ban on offsite messages.

The court then turned to allegations that some noncommercial signs were favored over others because of the exemption of some signs from the permitting process and fees. The plaintiff relied on *Metromedia*, where the Supreme Court found unconstitutional San Diego's regulatory system of allowing twelve categories of noncommercial offsite signs but banning all others. In this case, however, Miami did not specifically ban any noncommercial speech, but rather limited the size, placement, and duration of certain sign structures. The court found that the challenged regulations passed muster.

Finally, the court dealt with the plaintiff's claims that the ordinance lacks adequate procedural safeguards and gives too much discretion to local officials. The court disagreed, finding "concrete and specific" requirements in the ordinance. 287 F. Supp. 2d at 1378. The ordinance provides for an appeal and a 45-day period in which a hearing must be held. Moreover, all actions on appeals must be based on findings.

> The court concluded by upholding the ordinance and stating, Once the dust surrounding National's First Amendment claims settles, it becomes clear that this case concerns one thing: National's commercial interest. This Court thinks that it would be counterintuitive to adopt National's position and issue a ruling intended to benefit and protect noncommercial speech, when its effect would actually be to benefit a billboard company whose sole interest and moti-

vation in initiating this litigation is to ensure its commercial well-being.

287 F. Supp. 2d at 1378.

This case brings together much of the billboard regulation law of the last quarter century. While the challenges were legion, the care the court took in resolving them should prove helpful to practitioners in this field.

Edward J. Sullivan

Nat'l Adver. Co. v. City of Miami, 287 F. Supp. 2d 1349 (S.D. Fla. 2003).

CONCURRENCY IS A REQUIREMENT, NOT MERELY A GOAL, UNDER WASHINGTON'S GROWTH MANAGEMENT ACT

In *City of Bellevue v. East Bellevue Community Municipal Corporation*, 119 Wn. App. 405, 81 P.3d 148 (2003), Division I of the Washington Court of Appeals reaffirmed the concurrency mandate in Washington's Growth Management Act (GMA), Chapter 36.70C RCW. At issue was Bellevue's concurrency ordinance, which exempted neighborhood shopping center redevelopment projects from concurrency regulation. The city attempted to justify the exemption by contending that such projects would decrease traffic generation and provide public benefits in goods and services. The city also claimed that invalidation of the exemption would cause a conflict with the GMA's housing goals. The Central Puget Sound Growth Management Hearings Board invalidated Bellevue's ordinance.

In reviewing the board's decision, the court of appeals recognized that the concurrency requirement arises within the greater context of the GMA, which was intended to "minimize threats that uncoordinated and unplanned growth pose to the environment, economic development, and public welfare." 81 P.3d at 151. Concurrency contributes to this purpose by requiring local governments planning under the GMA to establish level of service (LOS) standards for local streets and roads. Through LOS standards, local governments gauge the capacity of their transportation facilities relative to the volume of traffic using those facilities. Proposed development projects that would bring the level of service for public facilities below acceptable levels must be denied, unless a strategy to accommodate the new impacts is approved "concurrent" with the approval of the development. RCW 36.70A.070(6)(b).

The court denied the existence of a conflict between the provisions of the GMA. In addition, according to the court, concurrency "is not a goal, it is a requirement." 81 P.3d at 153. Hence, even if there were a conflict, the city should resolve it, rather than implementing other GMA goals at the expense of concurrency by simply creating an exemption.

The court closed its decision with a peculiar discussion of the character of testimony offered by the city. In defense of the exemption, the city produced testimony that community shopping center redevelopment projects would decrease overall congestion. This testimony was apparently offered in response to the fact that the city's own traffic models showed that such projects would increase congestion, which the city attributed to limitations in the models. The appellate court rejected the notion that an inadequate traffic model could justify creating an exemption from concurrency. It recommended that the city fix its methodologies for calculating traffic LOSs or employ alternative, legislative means to meet its own concurrency standards, including "changing the relevant LOS, modifying traffic patterns so as to reduce nonresident commuter traffic congestion, or creatively addressing traffic mitigation expenses." 81 P.3d at 153.

Keith Hirokawa

City of Bellevue v. East Bellevue Cmty. Mun. Corp., 119 Wn. App. 405, 81 P.3d 148 (2003).

URBAN GROWTH AREAS UNDER WASHINGTON'S GMA ARE DESIGNATED BY EXISTING, RATHER THAN PROBABLE, URBAN GROWTH

In *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 119 Wn. App. 562, 81 P.3d 918 (2003), the Washington Court of Appeals again dealt with the ongoing struggle over King County's urban growth area (UGA) designation for the rural area known as "Bear Creek island." The conflict began with King County's adoption of its comprehensive plan in 1994 pursuant to the Growth Management Act (GMA), and has since made several visits to the Central Puget Sound Growth Management Hearings Board, superior court, and the Washington appellate and supreme courts.

As a general principle, Washington's GMA does not permit urban growth outside of an established UGA. The GMA allows UGAs to be located "outside of a city only if such territory already is characterized by urban growth . . . or is adjacent to territory already characterized by urban growth, or is a designated fully contained community [FCC]." RCW 36.70A.110(1).

In the initial adoption of King County's comprehensive plan, King County included the Bear Creek island area within the UGA to foster future development. During the pendency of appeals, King County also identified the area for future growth as an FCC. The UGA designation was ultimately remanded to the board for further justification.

On remand, the board found that the Bear Creek island UGA designation did not satisfy the exception for areas "already . . . characterized by urban growth," and was not "adjacent to" such an area. The board seemed to assume that the present tense of the requirement—"already characterized by urban growth"—implied that UGA designations were limited to existing, completed development.

The superior court reversed the board's decision, finding that probable future development must be considered in determining whether an area is "already characterized by urban growth." King County and Quadrant argued that approvals in 1988 and 1995 for single-family home development (2,000 and 3,500 homes, respectively) should be considered in characterizing the area as urban, even if the homes were not yet constructed. The argument was supported by publications from the Department of Community, Trade and Economic Development (CTED), which recommended that areas for which commitments to development have been made be treated similarly to areas already developed.

As recognized in the dissenting opinion, CTED was formed for the purpose of providing guidance to local governments in the planning process. CTED adopted regulations implementing the GMA directives and serves as the agency with planning expertise in Washington. Nonetheless, the appellate court found that CTED's non-regulatory publications are not entitled to deference as a matter of law. In contrast, the appellate court found the board's interpretation to be reasonable and within their area of expertise, and affirmed the board's ruling that lands "already characterized by urban growth" must be urban in fact at the time of the UGA designation.

Although Friends won the battle over the UGA designation, they undoubtedly lost the war over maintaining a rural character in the Bear Creek island. The GMA allows counties to adopt ordinances for allowing FCC designations as an alternative means of planning for urban growth in areas that are well-suited for such growth but do not meet the criteria for UGA designation. The appellate court affirmed the board's approval of the FCC delineation upon finding that the county had adequately justified the delineation.

The minimum standards for an FCC ordinance are set forth in nine specific and stringent criteria, which are designed to ensure that development within such areas are planned as communities. RCW 36.70A.350. FCC delineations must provide a mix of uses, affordable housing, infrastructure, and transit-oriented planning, and protection of natural resource and critical areas. In addition, an FCC delineation must require buffers between the urban development and surrounding rural areas, and must ensure that "urban growth will not occur in adjacent nonurban areas." RCW 36.70A.350(1)(g).

In reviewing the board's approval of the FCC designation, the superior court recognized that the GMA goals of reducing sprawl and encouraging urban growth in areas efficiently served by public facilities and services could conflict with the FCC process for allowing urban growth in completely rural areas. The superior court interpreted the GMA goals to require proposed FCC areas to be "fully-contained in fact."

The appellate court rejected the superior court's reading of the GMA, finding that the goals were intended only to "guide" local planning, and that "there is nothing in the general goals section requiring that an FCC be 'fully-contained in fact.'" 81 P.3d at 925, 926. Hence, the appellate court held that the "generalized goals" of the GMA do not supersede the FCC requirements. *Id.* at 926. Because King County's FCC delineation process met the "more stringent, specific requirements" for an FCC by (among other things) providing a buffer between the FCC and rural lands, limiting sewer service solely to areas within the FCC boundaries, and requiring rural zoning on adjacent land to be maintained, the board's decision on the FCC delineation was upheld. *Id.* at 927.

Keith Hirokawa

Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 119 Wn. App. 562, 81 P.3d 918 (2003).

PENNSYLVANIA SUPREME COURT FINDS NO PUBLIC MEETINGS VIOLATIONS IN INFORMAL DELIBERATIONS DURING RECESS OF LAND USE CASE

In *Kennedy v. Upper Milford Township Zoning Hearing Board*, 575 Pa. 105, 834 A.2d 1104 (Pa. 2003), the Pennsylvania Supreme Court addressed the relationship between the statutory requirements for open meetings under Pennsylvania's Sunshine Act and the quasi-judicial deliberations of local governments hearing land use cases.

The Pennsylvania Turnpike Commission (PTC) applied for a communications tower in excess of the 120-foot height limitation and was ultimately granted a 175-foot-high tower. The plaintiffs, neighboring property owners, appealed the grant. The trial court remanded the decision, after which the PTC again persuaded the township's zoning hearings board (ZHB) to grant the application. The plaintiffs again appealed and filed a declaratory judgment action contending, *inter alia*, that certain ZHB members had violated the Sunshine Act by participating in informal discussions following the close of oral argument and before deliberations and a vote. The trial court denied relief, noting that the plaintiffs neither took depositions nor subpoenaed ZHB members to make its case. The commonwealth court, an intermediate appellate court tribunal, reversed the trial court, stating that the ZHB deliberations were quasi-judicial and the decision void because of the the Sunshine Act violations.

The state supreme court said that the ZHB had conducted deliberations in a quasi-judicial context during the recess and noted that such boards are prohibited from having ex parte contacts or considering evidence outside the record. However, the court noted that the Sunshine Act allows executive sessions "[t]o review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law in quasi judicial deliberations." 65 Pa. Cons. Stat. § 708(a)(5). The court construed this provision as follows:

> The subjects to which zoning boards must apply their statutory authority increase the necessity both of collegiality and privacy. Disputes between neighboring property owners, adjoining homeowners, long-term residents and erstwhile newcomers, citizens' groups and developers, residents and the owners of existing and proposed incompatible neighboring commercial, industrial, and institutional uses of land—these are the regular fare of zoning boards. Emotional rancor of great intensity typically accompanies disputes of these types. Members of the local zoning board are charged by law to arbitrate these embroilments without passion or prejudice. They are expected and required to resist the intense pressure to which they are subjected from all sides and to decide the issues on their legal merits without regard for the identity or influence of the parties. The legal merits frequently turn on the credibility of and weight to be accorded to the testimony of witnesses appearing before the board; often including public officials and community leaders. Frequently, zoning boards

> must choose between unpalatable alternatives. Under these circumstances, it is simply not possible for zoning board members frankly to exchange their views in a public forum. The deliberation of matters so charged with emotion and political signification must be cloaked with the protection of privacy if it is to assist the board in carrying out its weighty decisional responsibilities.

834 A.2d at 1115–16 (footnote omitted).

Thus, the court indicated it valued frank internal discussion, which it felt would be tempered and frustrated by having those discussions made in public. The court cited case law involving federal agency deliberations as well as 1984 and 1997 reports of the Administrative Conference of the United States that said that Sunshine Acts diminished the quality of collective decision making. Just as the judicial decision-making process is not subject to public scrutiny, neither should the quasi-judicial administrative process be, according to the court.

The court declined to follow the commonwealth court's limitation on executive sessions to matters involving privileged subjects. Rather, the court found that deliberations by a quasi-judicial body on a pending contested appeal were a proper subject for an executive session from which the public may be excluded. Using inferences, the court rejected the notion that the board made up its mind during the recess and placed the burden of proof and persuasion on plaintiffs. The court also found that even if the Sunshine Act had applied, the plaintiffs had failed to take depositions or subpoena ZHB members, and had failed to overcome the presumption of regularity and legality attending local proceedings. Finally, the court cast doubt on whether the legislative remedy of invalidation was always appropriate for Sunshine Act violations. The commonwealth court decision was thus reversed.

The statute in question appears to allow executive sessions only for matters of privilege or confidentiality protected by law. Unfortunately, the court seemed to be motivated by a culture of secrecy and a desire to protect the public from itself. Thankfully, that culture is not present in most of the West.

Edward J. Sullivan

Kennedy v. Upper Milford Township Zoning Hearing Bd., 575 Pa. 105, 834 A.2d 1104 (Pa. 2003).

LUBA Cases

EFU ZONES

In *Perkins v. Umatilla County*, 45 LUBA 445 (2003), LUBA addressed two questions: "(1) whether ORS 215.263(7) allows the county to 'legalize' a parcel that was previously created without required local government approval; and (2) if not, whether tax lot 501 resulted from, or was created by, the 1994 lien foreclosure rather than the 1984 [partition] actions." 45 Or LUBA at 453.

At issue in *Perkins* was a county order legalizing a seven-acre parcel zoned for exclusive farm use (EFU). This parcel was created in 1984 when a 10-acre parcel was partitioned into two lots known as tax lots 501 (the subject seven-acre parcel) and 507 (a three-acre parcel owned by the petitioner). The partition was accomplished by deed without county review and approval. The county foreclosed a tax lien on tax lot 501 in 1994 and sold it to the intervenor in 1996. Following the petitioner's refusal to allow access to tax lot 501 across his property and the county's refusal to grant a way of necessity, the intervenor applied to legalize tax lot 501. The county held a hearing and approved an order recognizing tax lot 501 as a legal lot. In doing so, the county agreed with the intervenor that the lot resulted from the lien foreclosure and was exempt under ORS 215.263(7) from the requirement that divisions of EFU-zoned land must be reviewed and approved by the county.

LUBA first addressed the intervenor's jurisdictional challenge to the appeal. The intervenor argued that the county's order was not a statutory land use decision because it does not apply a statewide planning goal, comprehensive plan provision, or land use regulation. In the alternative, the intervenor contended that the order was exempt from LUBA review because it was made under land use standards that do not require interpretation or the exercise of policy or judgment. LUBA disagreed with both arguments.

According to LUBA, the county's order was a land use decision because ORS 215.263(7) applies directly to the county's land use processes under ORS 197.646. The latter statute requires local governments to amend their land use regulations to implement new or amended statutes and makes the new or amended statutes directly applicable to local land use decisions if the local government fails to do so. The county had not amended its regulations to incorporate ORS 215.263(7). Nevertheless, LUBA stated, "[w]e do not think the legislature intended that direct application of a 'land use statute' under ORS 197.646(3) results in something other than a 'land use decision' subject to our review." 45 Or LUBA at 451. LUBA also concluded that the county's determination concerning the application of ORS 215.263(7) involved interpretation and the exercise of legal judgment and, therefore, the exemption from LUBA jurisdiction did not apply.

On the merits, LUBA agreed with the petitioner that ORS 215.263(7) allows the creation of a new parcel as a result of a lien foreclosure, but does not allow after-the-fact legalization of an illegally created parcel that was subject to foreclosure after it was created. In other words, "[t]he text of ORS 215.263(7) is plainly concerned with the 'division of land,' not legalization of existing

units of land." 45 Or LUBA at 451. As a result, LUBA held that the county had erred in construing the statute to authorize the legalization of an existing, illegally created parcel. LUBA declined to address the second issue—whether tax lot 501 was created or came into existence as a result of the 1994 foreclosure action—because this issue was not addressed in the county's decision nor in the record. Based on the county's incorrect interpretation of ORS 215.263(7), LUBA reversed the county's decision.

LUBA JURISDICTION

LUBA's decision in *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003), is notable because LUBA distinguished *Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000), and concluded that an appealed building permit was both a land use decision and a discretionary permit.

The petitioner in *Frymark* appealed the county's administrative approval of a building permit to build several signs advertising or identifying a recreational vehicle park and marina. The RV park is zoned Residential Manufactured Dwelling (NT-RMD). Signs "other than off-site advertising signs" are allowed in that zone.

On appeal, the county argued that ORS 197.010(10)(b)(B) exempted the building permit approval from LUBA review because it was "issued under clear and objective land use standards." The county also faulted the petitioners for failing to show that any of the land use standards the county applied are unclear, ambiguous, or susceptible to alternative interpretations, unlike the applicable city regulations discussed in *Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000). LUBA disagreed with the county's argument, noting that a central issue in the case was whether the challenged signs were allowed in the NT-RMD zone, and observing that "the applicable criteria cited to us are neither clear nor objective, as applied to the facts in this case." 45 Or LUBA at 490–91. LUBA also disagreed with the county's argument that *Tirumali* requires the petitioner to identify alternative plausible interpretations of terms in the applicable approval criteria. Accordingly, LUBA held that it had jurisdiction and declined to dismiss the appeal.

The petitioner also argued that the building permit was a "discretionary permit" under ORS 215.402 and that the county had therefore erred by failing to provide notice and an opportunity for a hearing. LUBA acknowledged that in its decision on remand in *Tirumali v. City of Portland*, 41 Or LUBA 231, *aff'd*, 180 Or App 613, 45 P3d 519, *rev den*, 334 Or 632 (2002), it concluded that some, but not all, building permits are both land use decisions and discretionary permits within the meaning of the statute. In *Tirumali*, LUBA drew a distinction between a building permit for a use that is unquestionably allowed in the underlying zone and a building permit for a use where there is a question about the nature of the use or whether the use is allowed in the zone. The latter type of building permit is what LUBA has held to be a discretionary permit. *See, e.g., Hollywood Neighborhood Ass'n v. City of Portland*, 22 Or LUBA 789 (1991); *Pienovi v. City of Canby*, 16 Or LUBA 604 (1988); *Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986). LUBA concluded that the issuance of the building permit appealed here involved the exercise of discretion regarding whether the signs were allowed in the zone. Accordingly, LUBA held that the county's building permit was a discretionary permit within the meaning of ORS 215.402(4). LUBA remanded the county's decision because the county had failed to provide notice of the permit application, an opportunity for hearing, and a decision supported by findings as the statute requires.

LUBA PROCEDURE

Consolidation

LUBA's orders in two recent appeals offer useful reminders to practitioners about the meaning and effect of consolidation of appeals. In *Leach v. Lane County*, 45 Or LUBA 733 (2003), LUBA consolidated two appeals of a decision verifying a racetrack as a nonconforming use. One appeal was filed by the Leaches (the applicants), and one was filed by the Okrays (opponents of the racetrack). Both sets of petitioners filed petitions for review and the Okrays also filed a response brief in the Leaches' appeal. The Okrays argued that consolidation meant that the two appeals had become one combined appeal and that it was unnecessary for them to intervene in the Leaches' appeal in order to file their response brief.

LUBA granted the Leaches' motion to strike the Okrays' response brief and disagreed with the Okrays about the effect of consolidation, stating, "Consolidation of separate appeals under our rules is a matter of administrative convenience for the parties and the Board and does not affect the legal relations of the parties to each other or to the matters appealed." 45 Or LUBA at 735. LUBA underscored that consolidation does not allow a person who is not a party in one of the appeals to file a brief in that appeal without first moving to intervene.

In a similar vein, LUBA granted the city's motion to clarify the parties' status in two consolidated appeals in *Oien v. City of Beaverton*, (LUBA Nos. 2002-075 & 2002-076, Oct. 27, 2003) (unpublished order). Citing the *Leach* case, LUBA first clarified the effect of consolidation:

> [W]e here clarify that consolidation of appeals at LUBA is a tool that is employed for the administrative convenience of the Board and the parties. It is designed to facilitate and minimize duplication in preparing and filing the record, briefing, oral argument and issuance of the Board's final opinion and order. Consolidation is not intended to extend to parties substantive rights that they would not otherwise enjoy if the appeals had not been consolidated.

(Order at 1). The remainder of LUBA's order clarified which parties were petitioners and intervenors in each of the appeals.

Record

In resolving record objections in *Oien v. City of Beaverton*, 45 Or LUBA 722 (2003), LUBA addressed whether and when a local government must supply color copies of a document as part of the record.

Petitioner Kane objected to the city's inclusion in the record of black and white copies of a PowerPoint presentation that was originally presented in color. He argued that color copies were necessary for LUBA to understand the information.

LUBA noted that generally it does not require a local government to supply color copies of color originals in the record. A local government may file black and white copies with the record and bring the color originals to oral argument. Where, as here, the local government does not intend to bring the color originals to oral argument, a record objection is appropriate for situations "where material information is actually lost in the black and white copy that is provided to LUBA and the parties." 45 Or LUBA at 727. LUBA read its rules to implicitly require the record filed with LUBA to be "of a kind and quality that captures and conveys the material information that resides in the original record." *Id.* In this case, LUBA granted the record objection and ordered the city to provide the requested color copies.

LOCAL PROCEDURE

LUBA's substantive decision in *Oien v. City of Beaverton*, (LUBA Nos. 2002-075 & 2002-076, Dec. 30, 2003) is noteworthy for its analysis of ORS 197.522, which addresses conditions of approval. Specifically, the statute requires a local government either to approve outright a permit or land division application or to approve it with "reasonable conditions" necessary to make the proposed activity consistent with the local comprehensive plan and land use regulations. If a local government cannot fashion conditions that will make the application consistent with the comprehensive plan and land use regulations, it may deny the application.

The petitioners in *Oien* appealed the city's denial of the Beaverton School District's design review application for a proposed transit support center. On appeal, the school district argued that the city had failed to consider whether the application could be approved with reasonable conditions under ORS 197.522. Traditionally, local governments had great discretion to decide whether to impose conditions of approval as an alternative to denial. The district argued that the statute altered the traditional rule and imposed an affirmative obligation on the city to consider whether the district's application could be approved with reasonable conditions, and if so, to propose conditions. The city argued that, assuming that the statute applied, it was the district's responsibility to propose conditions for the city to consider and the district had failed to do so.

Like the city, LUBA assumed that ORS 197.522 was potentially applicable to the appealed decision and rejected the district's premise that the statute obligates the city to propose conditions of approval as an alternative to denial, stating,

> Placing that initial burden on the local government poses a number of pragmatic difficulties that are avoided if that initial burden belongs to the applicant. The applicant is more likely to have the resources and motivation to develop conditions of approval or modifications to the proposal to make it consistent with applicable criteria. Conditions developed and proposed by the applicant are likely to be acceptable to the applicant, and thus probably, if not presumptively, reasonable. Further, requiring the applicant to develop such conditions along with any necessary supporting evidence as to their efficacy, and present them during the evidentiary proceeding, allows other interested parties to object to such conditions and present opposing evidence. Under the District's view, a local government contemplating denial during its deliberations would either have to develop conditions on its own after the evidentiary proceedings are closed or re-open the proceedings to allow evidence from the applicant or opponents.

(Slip op at 17).

LUBA also rejected the district's argument that the city had failed to give the district some warning that a denial was forthcoming and an opportunity to propose reasonable conditions to address the city's concerns. LUBA agreed with the general proposition that a local government must provide an opportunity for an applicant to propose reasonable conditions under ORS 197.522. In this case, however, the district had that opportunity during the city's evidentiary hearings. The district could have proposed conditions to address those concerns either at the hearings or in its final legal argument, as an alternative to denial of its application.

LUBA acknowledged that requiring the district to propose conditions without making its proposal infeasible placed the district in an awkward position. However, this was no more awkward than requiring the city to revise the district's application by proposing conditions. Under the latter circumstance, the city might have no idea whether the district supported the conditions, and the conditions could have "dramatic unanticipated consequences that would render the proposal economically infeasible." (Slip op at 18). Because the need for conditions would be determined only after the closing of the evidentiary hearings, it would be difficult for the city to determine the efficacy of the conditions or to hold additional evidentiary hearings on the conditions within the 120-day deadline for processing the application. As a result, LUBA declined to read ORS 197.522 in the manner advocated by the district argued and affirmed the city's decision.

RLUIPA

In *1000 Friends of Oregon v. Clackamas County*, (LUBA No. 2003-129, Feb. 5, 2004), LUBA remanded Clackamas County's determination that under the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, development of a church on EFU-zoned property was a permitted use, even though state and local regulations prohibited a church on that property.

Molalla Christian Church, the intervenor, proposed to build a new 14,500-square-foot building, parking areas, and athletic facilities on the property in order to accommodate projected growth in its congregation. The subject parcel of roughly 10 acres is located less than a mile from Molalla's urban growth boundary (UGB) and contains predominantly high-value farmland soils. The church is currently located within the City of Molalla and draws its members primarily from the city, although some members come from nearby rural areas and rural communities.

The church asked the county to determine whether the county code allowed construction of a new church on the proposed property. Under the county's code, a church is prohibited on an EFU-zoned parcel that is predominantly composed of high-value farmland or within three miles of a UGB. The code implements a state administrative rule, OAR 660-033-0120, that prohibits new churches on high-value farmland, but allows expansion of existing churches. The rule also prohibits new churches on parcels located within three miles of UGBs and not composed of predominantly high-value farmland, unless an exception is

approved.

The county planning director determined that the code prohibited the new church because the proposed site is high-value farmland and within three miles of the UGB. The director also concluded that his determination did not violate RLUIPA.

On appeal, the county hearings officer affirmed the planning director's interpretation. With respect to RLUIPA, he concluded that the code prohibition against churches imposed a "substantial burden" on the church, but that the state and county had a compelling interest in restricting uses on agricultural land, particularly high-value farmland. He also determined that prohibiting churches on high-value farmland is the least restrictive means of serving that compelling interest.

At the church's request, the board of county commissioners reviewed and reversed the hearings officer's determination. The board concluded that RLUIPA and the First Amendment required it to treat the proposed church as a permitted use on the property.

Compliance with applicable standards

At the outset of its opinion, LUBA briefly reviewed the substantive provisions of RLUIPA and addressed a preliminary issue raised by the petitioner: whether the county had acted properly in ruling that the church was a permitted use without first determining whether it complied with all applicable requirements. The petitioner argued that the church could demonstrate a substantial burden under RLUIPA only if it had first exhausted all available and necessary exceptions and variances.

In the petitioner's view, Goal 3 and Goal 14 exceptions were necessary to site the church on the proposed EFU-zoned parcel. LUBA declined to address the issue of whether goal exceptions were required because it had not been raised with sufficient specificity during the county's proceedings.

The petitioner also argued that the county had failed to consider whether the proposed church complied with all applicable site design standards. The church disputed the notion that it needed to comply with these standards and asserted that once the county concluded that the proposed church was a permitted use, no further review was required. LUBA disagreed. Even if the county code's prohibition on churches was a substantial burden, nothing in RLUIPA suggests that the county must also excuse the church from complying with land use standards, such as site design review, that do not impose a substantial burden. However, because the county's decision was merely an interpretation of the county code rather than a decision on an actual application and did not declare that the church was excused from complying with any site design standards, LUBA denied this assignment of error. LUBA stated that the applicability of site design standards could be addressed if and when the church filed a specific application.

Equal terms and nondiscrimination provisions of RLUIPA

Turning to one of the principal substantive issues, LUBA considered whether the county had erred in concluding that the code's prohibition on churches violates the free exercise clause of the First Amendment to the federal Constitution and the "discrimination and exclusion" clauses of RLUIPA. LUBA determined that it need not analyze compliance with the free exercise clause and RLUIPA separately, because RLUIPA requires more rigorous scrutiny than does a free exercise analysis. In other words, "[i]f a land use regulation survives under RLUIPA, it will also necessarily survive free exercise scrutiny under current judicial tests." (Slip op at 14). Therefore, LUBA focused its analysis on RLUIPA.

RLUIPA prohibits local governments from treating religious assemblies on less than equal terms with nonreligious assemblies and from discriminating on the basis of religion. 42 U.S.C. § 2000cc(b)(1), (2). The county evaluated its code prohibition under the "equal terms" and "nondiscrimination" clauses of RLUIPA by comparing the proposed church with uses allowed or conditionally allowed in EFU zones. The county concluded that allowed farm uses and structures, such as barns, wineries, farm stands, and farm-related commercial uses, may cover as much high-value soil as the proposed church and, therefore, the code prohibition treats churches unequally and discriminates against them. LUBA disagreed, observing that the allowed farm uses and structures are necessarily supportive of agricultural uses and lands. Churches and associated parking and recreational facilities have nothing to do with agricultural uses. LUBA concluded that "[p]rohibiting uses that are inconsistent with agriculture on high-value farmland while allowing agricultural-supportive structures on high-value farmland is rational and neither treats religious assemblies on unequal terms nor discriminates against assemblies on the basis of religion." (Slip op at 19).

LUBA also faulted the county's comparison of the proposed church with existing non-agricultural uses on EFU lands that are permitted to expand. The county reasoned that there is no rational basis under RLUIPA for allowing an existing church or golf course to expand, but disallowing a new church from locating on EFU-zoned land. In LUBA's view, the code treats churches and golf courses the same: establishing a new church or golf course on high-value farmland is prohibited, while expanding an existing church or golf course is allowed. As a result, LUBA concluded that the code does not result in unequal treatment of churches as compared to other non-agricultural uses.

Finally, LUBA rejected the county's determination that the code's allowance of community centers on high-value farmland, but not churches, treats the church unequally or discriminates against it. Community centers are allowed if they are operated primarily by and for residents of the local rural community. The county portrayed the church's membership as an "indisputably rural congregation." LUBA agreed with the petitioner that the evidentiary record did not support that characterization. The church's membership is primarily drawn from Molalla, an incorporated city, which is not considered to be rural under the statewide planning goals. Returning to its earlier line of reasoning, LUBA found that the prohibition on churches and schools within three miles of a UGB is intended to preserve Goal 14's urban-rural boundary and to limit urban uses on rural lands close to UGBs. Because these fringe lands are less expensive to buy and develop, LUBA concluded that absent the prohibition, some schools and churches that serve an urban population would choose to locate outside the UGB in a manner inconsistent with Goal 14. Again, LUBA found that the prohibition did not violate RLUIPA's equal terms and nondiscrimination provisions.

Substantial burden under RLUIPA

LUBA also addressed the petitioner's claim that the county had erred when it determined that its code prohibition violated RLUIPA's general rule. That general rule prohibits the county from applying its land use regulations in a way that imposes a "substantial burden" on religious exercise. 42 U.S.C. § 2000cc(a). In the petitioner's view, this general rule is triggered only under limited circumstances, including (1) a local government's implementation of a land use regulation in a way that requires an individualized assessment of the proposed uses for the affected property, (2) the receipt of federal funding for a program that imposes a substantial burden, and (3) a substantial burden that affects interstate commerce. Focusing on the first trigger, the petitioner argued that the generalized code prohibition on churches on high-value farmland did not require the county to make an individualized assessment of the proposed church.

LUBA acknowledged the plausibility of the petitioner's argument that a flat zoning code prohibition is not the type of land use regulation that requires the county to make an individualized assessment. But even assuming this to be true, LUBA concluded that it could not reverse or remand the county's decision on this basis alone, because the county found *all three* aforementioned triggers present, and the petitioner had not challenged that finding with regard to the second and third triggers. LUBA expressed some doubt that the "federal financial assistance" and "commerce" triggers were applicable, but felt bound by the county's unchallenged finding.

The main dispute between the parties was whether the code prohibition on churches in EFU zones or within three miles of a UGB was in fact a substantial burden on the church's religious exercise. According to the petitioner, the evidentiary record boiled down to the church's claim that it could not afford a parcel of the size and characteristics it wanted within the UGB. The petitioner asserted that affordability was insufficient to establish a substantial burden on religious exercise. LUBA agreed, noting that most courts have held that financial difficulties in acquiring property are insufficient to establish a substantial burden on religious exercise.

LUBA also rejected the church's argument that the code prohibition is *per se* a substantial burden on religious exercise. In LUBA's view, the church's argument went "far beyond free exercise jurisprudence" and found no support in RLUIPA. (Slip op at 20). RLUIPA's language includes no suggestion that Congress intended to require a local government to allow churches in all zones within its jurisdiction. Additionally, LUBA observed that "the more RLUIPA is interpreted to depart from free exercise jurisprudence and to mandate preferential treatment for religious uses, the more likely RLUIPA is to run afoul of First Amendment establishment clause . . . and other limitations on Congressional authority." (Slip op at 32).

Turning to the term "substantial burden," LUBA noted that most federal court decisions addressing this term have looked to free exercise jurisprudence to determine its meaning. Under those cases, a zoning prohibition on church-owned property imposes a substantial burden if evidence shows that the zoning scheme does not provide adequate opportunity to site a church within the jurisdiction. The church's financial condition or its financial ability to buy land is not relevant to this determination. Other market-based factors that apply equally to religious and non-religious institutions, such as the burden and cost of looking for and buying suitable land, are also irrelevant. LUBA summarized its conclusions as follows:

> [U]nder traditional free exercise jurisprudence and RLUIPA, the fact that intervenor may have to compete in the market place with other potential developers of land within or outside the UGB, and that intervenor may have to pay more than it might wish for such land, or obtain a less than ideal property due to its financial circumstances, has no particular bearing on the question of whether a zoning prohibition on churches has a substantial burden on intervenor's religious exercise. As explained, the proper question is whether the zoning scheme as a whole provides an adequate opportunity to site a religious assembly within the pertinent jurisdiction. Similarly, that intervenor has already bought the subject property and might have to sell it if it cannot develop the land for a church is not a proper consideration. That is a consequence of intervenor's choice. Additionally, the fact that an otherwise suitable property is or is not listed for sale at the time intervenor made its purchase or at the time the county made its decision has no bearing on the question.

(Slip op at 33). LUBA characterized as "deficient and misguided" the evidentiary basis for the county's finding that its code imposed a substantial burden on the church's free exercise. *Id.* Most of the evidence in the record identified parcels of property the church had rejected over time based on cost. Nothing in the record addressed Molalla's zoning scheme or the supply of land within the UGB that could be developed or redeveloped with churches.

Based on its determination that the county's decision contained several interpretational errors and lacked crucial evidentiary support, LUBA remanded the decision.

Editors' Note: *LUBA's decision in* 1000 Friends of Oregon v. Clackamas County *was appealed to the Oregon Court of Appeals. Oral argument is scheduled to take place on April 19, 2004.*

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