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LUBA CASE REVIEW (AUGUST 2012 – JULY 2013)

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I. ADMINISTRATIVE LAW (LUBA HN# 1)

A. Denials (LUBA HN# 1.2)

1. Burden to Challenge; Evidence to Support (LUBA HN#s 1.2.3 and 1.2.4)

Vest v. City of Molalla, ___ Or LUBA ___ (LUBA No. 2012-009, August 23, 2012)

LUBA affirms a City decision denying petitioner's request for a comprehensive plan map and zone map amendment, conditional use, design review and partition. Petitioner's request would have changed the designation and zoning from Light Industrial to Commercial and allowed a 164 unit apartment building. Much of the support for petitioner's proposal came from the "Downtown Plan" which was a document incorporated into the City's new comprehensive plan. However, the new comprehensive plan contained an urban reserve area which had to be approved by the County and therefore contained a provision delaying its effective date until the County adopts an ordinance amending its comprehensive plan to reflect the urban reserve. The County never adopted an ordinance and, in fact, adopted an order denying the urban reserve designation.

The City denied petitioner's applications on the basis of testimony from industrial business owners that siting high density residential uses adjacent to a heavily used truck route would cause traffic safety conflicts and was not in the public interest. Petitioner argued that conclusion was not based on substantial evidence and that the evidence in the record demonstrates the Downtown Plan identified this property for redevelopment and in-fill. LUBA agreed with the City that the Downtown Plan was not effective and ruled that given the subjectivity of the criterion requiring that the proposal be in the public interest, a reasonable person could rely on the testimony of the industrial businesses that high density residential along the heavily used truck route could create safety conflicts supporting the finding that the change was not in the public interest. Because a denial need have only one adequate basis to support it, LUBA declined to address petitioner's remaining challenges to the City's additional bases for denial.

II. CONSTITUTIONAL LAW (LUBA HN# 2)

A. U.S. Constitution (LUBA HN# 2.2)

1. Nonprocedural Issues (LUBA HN# 2.2.2)

Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (U.S. 2013)

[*Also relates to LUBA HN# 2.1.2*]

The U.S. Supreme Court once again took up the issue of government exactions and ruled the government must not demand more than the Constitution allows when it either demands things as a condition of granting a development permit or where it denies the permit because the owner would not agree to excessive demands. The Court took a second look at its prior decision in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d. 304 (1994), and confirmed that the "rough proportionality" standard from *Dolan* applies to situations where the government demands that a property owner spend money on infrastructure or mitigation to offset the impacts of development.

The *Dolan* case involved the A-Boy plumbing store in the City of Tigard, Oregon. The City had demanded a dedication of land for a floodplain and a bike path as a condition of an application to expand the plumbing store. The U.S. Supreme Court adopted a rule of reason, holding that such demands, termed "exactions," must be "roughly proportional to the impacts of the development." This placed reasonable limitations on the government's ability to demand mitigation for impacts of development.

The *Dolan* case was a landmark decision because it attempted to place the Fifth Amendment takings clause on equal footing with the rest of the Bill of Rights. Chief Justice Rehnquist famously stated in the *Dolan* opinion that "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First or Fourth Amendment, should be relegated to the status of a poor relation . . . ."

From 1994 through 2010, it was generally understood in Oregon that the *Dolan* "rough proportionality" rule applied to situations where the government demanded a real property dedication and to situations where the government demanded the property owner spend money to mitigate impacts through the creation of infrastructure such as street improvements, sewer or water pipes, wetlands mitigation, etc.

However, all that changed when the Oregon Supreme Court decided the *West Linn Corporate Park v. City of West Linn*, 349 Or 58, 240 P3d 29 (Or, 2010), case in 2010. In that case, the Oregon Supreme Court held as a matter of state law that the *Dolan* rule applies only to dedications of real property and not to the much more common situation where the government demands that a property owner spend money on mitigation. According to the *West Linn* decision, the only limitation on the ability of the government to demand a property owner spend money on mitigation is that the cost of the mitigation cannot exceed the underlying value of the property itself. The Ninth Circuit Court of Appeals reached the same result as a matter of federal law in its companion decision in the *West Linn Corporate Park* case in 2011. *West Linn Corporate Park L.L.C. v. City of West Linn*, 428 Fed. Appx. 700 (9th Cir. Or. 2011).

This landmark 2013 decision overrules the *West Linn Corporate Park* case and establishes that the United States Constitution protects property owners from unreasonable government demands for mitigation, regardless of whether that mitigation is in the form of a real property dedication or a requirement to construct public infrastructure or other types of mitigation.

The Court also reaffirmed that the burden to show that the demanded mitigation is on the government and that the government cannot escape its obligations to show "rough proportionality" by simply denying the application.

III. EFU STATUTE/ORDINANCES (see also 7.1 to 7.7) (LUBA HN# 3)

A. Farm Uses (LUBA HN# 3.2)

1. Other Uses (LUBA HN# 3.2.3)

Greenfield v. Multnomah County, ___ Or LUBA ___ (LUBA Nos. 2012-102 and 2012-103, June 19, 2013)

LUBA remands a County decision approving modifications to a previously approved permit for a farm stand on Sauvie Island. The issues in this appeal involve statutory, administrative rule and zoning code interpretations involving ORS 215.283(1)(o), OAR 660-033-0130(23) and local code, all of which authorize farm stands in the EFU zone. The central questions are whether "farm to plate dinners," "food carts," and "fee based small gatherings" all of which are authorized by the County decision are permissible under the statute, administrative rule and local code as a farm stand use.

LUBA's focus was on the language in OAR 660-033-0130(23), known as the "farm stand rule," which elaborates slightly on the statute but is otherwise identical. Relying on the text, context and legislative history, LUBA interpreted the farm stand rule to prohibit the farm to plate dinners (up to 22 events per year with up to 75 dinners), which could accurately be described as banquets (a use expressly prohibited by the rule). LUBA likewise ruled the broad authorization of food carts in the hearings officer decision was not permissible under the rule. With regard to allowable structures, LUBA remanded for findings on whether "tents" and a corn maze structure qualify as structures "designed and used for the sale of farm crops and livestock grown on the farm operation" which it found to be the only type of structures authorized by the farm stand rule. Finally, LUBA found no absolute prohibition on concessions by third parties beyond the 25% rule and found no error in the County's imposition of the 25% rule (no more than 25% of total sales can come from incidental retail) with conditions requiring detailed accounting and annual reports.

B. Nonfarm Uses (LUBA HN# 3.3)

1. Compatibility Standard (LUBA HN# 3.3.4)

Hood River Valley Parks and Recreation District v. Hood River County, ___ Or LUBA ___ (LUBA No. 2012-073, May 14, 2013)

[*Also relates to LUBA HN# 3.3.6*]

Petitioner appealed a county decision denying a conditional use permit application to site a public park on a 31-acre parcel zoned for exclusive farm use. LUBA remanded.

The subject property contains mostly Class II agricultural soils rated high value. In 2007 petitioner purchased the parcel after conducting a search to locate property to ameliorate a need for a public park in the area. In 2012 petitioner applied to the county for conditional use approval under ORS 215.283(2)(d) to develop the entire parcel as a public park, which would include play fields requiring extensive cut, picnic shelters, restrooms, etc. After the county planning commission approved the conditional use application, intervenors appealed to the county commission, arguing that the proposed park does not comply with ORS 215.296, which requires that non-farm conditional uses in an EFU zone not significantly impact or significantly

increase the cost of farm practices on surrounding lands ("significant change/increase standard"). The commissioners held a hearing limited to the evidentiary record before the planning commission and reversed the planning commission decision on the basis of non-compliance with the statute.

The Hood River Zoning Ordinance (HRZO) provides that if a local appeal hearing is not *de novo*, the board of commissioners "shall not substitute its judgment for that of the initial hearings body as to any issue of fact, and no additional evidence shall be received." The basis of reversal or remand must be a finding that the planning commission's order is "unlawful in substance," not "supported by reliable, probative and substantial evidence in the whole record," or not "supported by sufficient probative and substantial findings of fact." In case of reversal, HRZO 61.10(G) requires the board of commissioners to make special findings of fact based upon evidence in the record and conclusions of law indicating clearly all respects in which the initial hearings body's order is erroneous.

The board of commissioners reversed the planning commission decision because (1) the planning commission erred in applying the "significant change/increase standard" only to lands adjacent to the proposed park instead of to the entirety of EFU land in the county; (2) the planning commission erred in failing to apply the standard to the subject property itself; and (3) the applicant failed to submit sufficient evidence regarding the farm practices on adjacent properties.

LUBA agreed with petitioners that the county erred in applying the "significant change/increase standard" to all 29,000 acres (45 square miles) of EFU land in the county. LUBA rejected the county's explanation that the loss of farm land attributable to the park would financially affect farm operations in the entire county, because the fixed costs in the farm economy (e.g., for packing houses) would have to be shared among fewer growers, increasing costs for the remaining orchardists. LUBA noted that ORS 215.296(1) is not concerned with the fate of soils occupied by a conditional use on EFU land or with generalized impacts to the local farm economy from displaced agricultural production. LUBA pointed out that many conditional uses result in a conversion and loss of farm land from farm use to non-farm use, and it is impossible to do a county-wide analysis each time a conditional use is proposed. The county must focus on nearby lands that are affected by the externalities or sensitivities of the proposed use.

In response to the commissioners' requirement that the planning commission evaluate the impact of the proposed park on farm practices on the subject property itself, LUBA noted that nothing in ORS 215.296(1) or relevant case law requires the applicant for a conditional use in the EFU zone to address impacts of the proposed use on farm practices on the subject property, or to demonstrate that the proposed use will not irrevocably commit the *subject property* to non-agricultural use. Rather, the focus must be on *surrounding lands*. Any other conclusion would effectively prohibit numerous conditional uses permitted by ORS 215.283(2) and implementing county regulations.

LUBA agreed with intervenors that petitioner (the applicant) fell short in presenting information concerning farm practices on adjacent farm lands. The only farm practice identified was "pesticide spraying." LUBA noted that *some* description of farm practices on surrounding lands, or at least a general description of farm practices on commercial orchards of the type near the subject property, should have been provided. Nevertheless, LUBA found the commissioners

erred in reversing (rather than remanding) the planning commission's decision, since doing so made it impossible for the planning commission to make additional findings.

In evaluating whether the proposed cut and fill would render the subject property incapable of future agricultural use, the board of commissioners relied not just on testimony in the record, but also "on the Board's own knowledge that 'dirt is not dirt.'" Petitioner argued that relying upon personal knowledge in this way was procedural (if not substantive) error. The county responded that it relied on common sense, not uniquely held information. Nevertheless, LUBA agreed with petitioner that the commissioners erred to the extent they relied in part upon evidence outside the record because "the effect of topsoil removal and replacement on future agricultural productivity is an arcane subject to most laypersons."

IV. GOAL 2 – LAND USE PLANNING LUBA HN# 6)

A. Generally (LUBA HN# 6.1)

Shamrock Homes LLC v. City of Springfield, ___ Or LUBA ___ (LUBA Nos. 2012-077/078/079, July 12, 2013)

[*Also relates to LUBA HN# 9.5, 14, 15, 16 and 19*]

Petitioner appealed a city ordinance and two concurring county ordinances that adopted amendments to a refinement plan for the Glenwood neighborhood. LUBA remanded.

The property under consideration includes 267 acres of the city's Glenwood neighborhood, which totals about 620 acres and is subject to the acknowledged Glenwood Refinement Plan (GRP). A refinement plan is subject to the Metro Plan, which is the overarching comprehensive plan for the Eugene/Springfield region. The existing GRP includes a riverfront site of approximately 52 acres that is designated for "nodal development," a type of mixed-use pedestrian-friendly development pattern.

In its sweeping challenge to the city/county decision, petitioner assigned error under Goal 5; the Springfield 2030 Refinement Plan; Goals 2 and 9; Goal 10; Goal 11; Goal 12; Goal 15; the city's "Engineering Design Standards and Procedures Manual" (EDSPM); and a newly adopted "peer review" ordinance (Springfield Development Code 3.3-230). With respect to Goal 5 and the Goal 5 Rule, petitioner contended that Glenwood Phase 1 triggered application of Goal 5 under OAR 660-023-0250(3), which governs the applicability of Goal 5 review to post-acknowledgment plan amendments, because it both (1) amends the city's program to protect the Willamette River riparian area, and (2) allows new uses that could be conflicting uses with the riparian area. Petitioner argued that because Glenwood Phase 1 modified the regulations that protect the Willamette River riparian area, and rezoned riverfront property to allow new uses, Goal 5 was triggered, and the city erred in failing to conduct a Goal 5 analysis. LUBA noted that the extent to which a local government must revisit the substantive steps of the Goal 5 process, including the economic, social, environmental and energy (ESEE) and program development processes set out in OAR 660-018-0040 and 660-018-0050, depends on the nature of the amendments, the existing acknowledged program, the particular Goal 5 resource and the conflicting use at issue. In LUBA's view, the only change to the regulatory program identified by petitioner – preservation of existing native riparian vegetation within an existing 75-foot setback – was consistent with the Goal 5 safe harbor provisions for riparian areas, which apply in

lieu of the standard ESEE process. Similarly, the new uses identified by petitioner all appeared to be the kind of public facilities that are allowed in riparian areas under the safe harbor provisions of the rule (allowing streets, roads, paths, drainage facilities, etc., in riparian areas).

One way for a city to address the requirements of Goal 9 when changing the plan designation of land in excess of two acres from an industrial or employment use designation to a non-industrial or other designation is to demonstrate that the proposed amendment is consistent with its most recent economic opportunities analysis (EOA) and relevant parts of its *acknowledged* comprehensive plan. Petitioner contended that the city violated Goals 2 and 9 by relying upon an unacknowledged EOA, adopted in 2010, to conclude that the new plan designations adopted under the Glenwood Phase 1 are consistent with Goal 9. The city responded that the city relied upon the EOA in adopting the city's UGB in 2010, which was adopted pursuant to the post-acknowledgment plan amendment process. LUBA concluded the reliance described did not make the EOA an acknowledged planning document and sided with petitioner. LUBA rejected petitioner's argument that lands included in a local government's Goal 9 inventory of buildable lands for commercial and industrial development (as opposed to the development of needed housing) may not be subject to discretionary permit approval standards. The proper question was whether the amendment affects one or more of the assumptions that underlie the Goal 9 inventory so that the Goal 9 inventory may be rendered inadequate.

Petitioner contended that notwithstanding stated policies to conserve affordable housing, the city's findings instead demonstrated that Glenwood Phase 1 would reduce existing affordable housing, by making petitioner's manufactured dwelling park and similar developments nonconforming uses in the new zones, and encouraging the redevelopment of existing manufactured dwelling parks into employment and high-density residential uses. Respondents argued that the city is required to balance the need for affordable housing with the community goal of maintaining a compact urban form and that there is no evidence that leaving the existing parks zoned for low density residential development would change the eventual fate of any manufactured dwelling park, given the economic and other disincentives to their long-term existence. LUBA agreed with respondents in principle, but found the city had not explained adequately how it is balancing different policies with the affordable housing policy.

ORS 197.307(6) provides that a local government may apply standards that are not clear and objective to regulate the appearance and aesthetics of needed housing if the land owner has the option to proceed under clear and objective standards. Petitioner and respondents disagreed about the meaning of "clear and objective," which LUBA interpreted to preclude a planning director from imposing any conditions deemed necessary to mitigate the impacts of development on surrounding properties.

Petitioner challenged the city's findings that Glenwood Phase 1 compiles with Goal 11 and the Goal 11 rule with respect to transportation, stormwater and wastewater facilities. LUBA noted that the general Goal 11 requirement to provide "timely, orderly and efficient arrangements of public facilities and services" added little to the many specific Goal 12 (Transportation) planning requirements. LUBA agreed with the city that consideration of future transportation projects related to Glenwood Phase I, which are included in the city's transportation system plan (TSP) as future projects not likely to be constructed within the 20-year planning period, did not require the TSP be updated concurrently with Glenwood Phase 1. Petitioner's wastewater and stormwater

arguments were deemed to be a collateral attack on the acknowledged status of Metro's regional facilities plan. LUBA rejected petitioner's wastewater plan arguments on the basis that the small wastewater lines contemplated were not regulated by the plan.

Where an amendment changes the plan or zoning designation, an initial question in addressing the Transportation Planning Rule (TRP), OAR 660-012-0060(1)(c), is whether the amendment allows uses with greater traffic-generation capacity compared to the previous plan or zone designations. If not, there may be no need for further inquiry under the TPR. Although the city claimed that development under the proposed zoning will generate less traffic than development under the existing zoning, petitioner argued there was no basis in the record for the city's assumption that land under the current zoning will be fully developed, while land under proposed zoning will only partially develop within the planning period. LUBA agreed with petitioner.

Petitioner contended that a 75-foot setback from the Willamette River adopted in the challenged decisions was not adopted in accordance with Statewide Planning Goal 15 (Willamette River Greenway). In the 1980s, the city and other jurisdictions adopted a Goal 15 program as part of the Metro Plan, and that program was acknowledged. Petitioner argued that a provision in the city's Goal 15 program requires that the setback be based upon the Goal 15 *inventory* of resources, uses and rights, not the convenience of using an already existing setback, or the assumption that that existing setback includes inventoried or un-inventoried Goal 15 resources to be protected. In LUBA's view, the city's findings did not make it clear that the city considered the acknowledged *Greenway* inventory in adopting the 75-foot Greenway setback. The 75-foot setback was apparently chosen because it coincided with a separate 75-foot setback adopted to comply with other laws. LUBA found this inadequate.

Petitioner argued that some of the uses allowed by a newly adopted code provision would not be water-dependent or water-related, as required by the code provision because they could be sited anywhere and did not need to be adjacent to water. LUBA disagreed. The test under the Goal 15 definition of water-related uses is not whether the use can be sited elsewhere, but whether the use provides "goods or services that are directly associated with water-dependent land or waterway use, and which, if not located adjacent to water, would result in a public loss of quality in the goods or services offered." LUBA considered that definition broad enough to include waterfront paths, boardwalks and similar facilities that provide public access to and along the waterfront. It is also broad enough to include interpretative and educational displays that concern the waterfront, and picnic areas, overlooks and viewpoints for public enjoyment of the waterfront.

The city council adopted a document (EDSPM) prepared by the Public Works Department, which contains design standards and procedures. Petitioner complained that the EDSPM was not adopted as an ordinance, pursuant to the post-acknowledgment plan amendment procedures required for adopting a land use ordinance, and hence is not an acknowledged land use regulation. LUBA rejected petitioner's argument, noting that while this may constitute a problem for the city in adopting or applying the EDSPM, Goal 2 does not prohibit the city from adopting *plan amendments* that reference unacknowledged existing or future land use regulations.

The city adopted a new requirement for a "peer review" process when an applicant seeks a "major modification" to the Glenwood Riverfront Mixed-Use Plan District, building design

standards or an amendment to the GRP. Petitioner's last argument was that the peer review requirement violates the needed housing statute at ORS 197.307(4), because it unreasonably delays the provision of needed housing. Petitioner also contended that the requirement for the applicant to pay for pre-application peer review violates ORS 227.175(1), which authorizes a governing body to establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service.

LUBA observed that ORS 197.307(4) requires that standards, conditions and procedures regulating the approval or denial of needed housing allowed as a permitted use be clear and objective, and not have the effect of discouraging needed housing through unreasonable cost and delay. The statute does not apply when an applicant seeks to *modify or vary* one of the applicable needed housing standards. Because a needed housing applicant can always choose to comply with needed housing standards without seeking a major modification, LUBA concluded the peer review process is not subject to the ORS 197.307(4) prohibition on unreasonable cost or delay. Nor does requiring peer review violate ORS 227.175(1), since the purpose is to provide the city with technical and other information necessary to process the permit. LUBA compared it to requiring a traffic study and found it is covered by the ORS 227.151(1) grant of authority to cities to prescribe the forms and "manner" in which applications are made.

V. GOAL 3 – AGRICULTURAL LANDS/GOAL 3 RULE (see also 3.1 to 3.6) (LUBA HN# 7)

A. Nonfarm Use (LUBA HN# 7.8)

Friends of Yamhill County v. Yamhill County, ___ Or LUBA ___ (LUBA No. 2012-005, September 18, 2012)

[*Also relates to LUBA HN# 3.3.9*]

Petitioners appealed a county decision granting conditional use and site design approval for (1) additions to the Stoller Vineyard and Winery and (2) an expansion of the number and types of events that may occur at the winery, which is located on EFU land. The decision granted approval for a new wine "tasting room, a commercial kitchen, storage and staff offices." In addition, the decision authorized up to 44 events per year. LUBA affirmed.

LUBA recited a lengthy history of the statutory and case history related to vineyards and wineries, in particular the LUBA, Court of Appeals and Oregon Supreme Court decisions that culminated with *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989). In *Craven*, the county approved the construction of a winery that was to purchase grapes from offsite vineyards before an onsite vineyard was planted and productive. The winery could also sell typical souvenir items, such as corkscrews, posters, T-shirts and wine books. The approval was pursuant to ORS 215.283(2)(a) which allows, as a *conditional* use, "[c]ommercial activities that are in conjunction with farm use" (CA/FU).

Contemporaneously with the decision in *Craven*, the legislature adopted ORS 215.452, which legislative history demonstrates was intended as an *alternative* way to seek approval for a winery, a limited safe harbor for certain wineries. Legislation adopted in 2011 limits the number of private events per year on ORS 215.452 wineries to 25, but also creates ORS 215.453, which allows larger wineries, subject to additional standards: Counties must find that the proposal

(1) complies with ORS 215.296, (2) is incidental and subordinate to retail sale of wine, and (3) will not materially alter the stability of the land use pattern in the area. Pursuant to the safe harbors provided in ORS 215.452 and 215.453, counties are able to approve defined categories of wineries as a *permitted* use, subject only to the limitations set out in the statutes. Wineries that do not qualify for the safe harbors are free to continue to seek approval as CA/FU wineries.

The proposed expansion of the winery, which had originally been approved under ORS 215.452, would convert it to a CA/FU winery, meaning it would have to meet the conditional use standards in the county code, as well as those in ORS 215.296. Petitioners argued it did not meet those standards for five reasons, all of which LUBA rejected. Petitioners' most significant argument was that with the proposed expansion, the tail will wag the dog, because the building that will house a wine tasting room and a commercial kitchen authorized to function as a restaurant at as many as 44 annual events, will be too substantial to qualify as an incidental and secondary aspect of the winery.

LUBA found that the numerous limitations placed on the use of the kitchen made it acceptable. LUBA concluded that the activities and kitchen authorized by the challenged decision will reinforce the profitability of operations at the vineyard and the likelihood that agricultural use of the land will continue, as was the case with the winery in *Craven*. LUBA concluded further that the approved activities and kitchen, as limited, are not so substantial that they cannot be considered "incidental" and "secondary" under *Craven*, but cautioned that they are approaching the point where they may be too substantial to meet that test.

APPEAL:

Friends of Yamhill County v. Yamhill County, 255 Or App 636, 298 P3d 586 (2013)

The Court of Appeals affirmed LUBA's decision. On appeal, petitioners argued (1) the approved commercial activity—in particular, the "events venue and commercial food service facility"—is a new use that cannot be considered to be "in conjunction with farm use" under ORS 215.283(2)(a); and (2) even if it is, the level of activity exceeds the "incidental" limitation imposed on such activity under the applicable law.

The court first quoted ORS 215.243, which states a policy of protecting open land used for agricultural use. The court then traced the history of ORS 215.283(2)(a), which was enacted in 1983 and has not been altered since. The court discussed (in greater detail than LUBA) the history of the interaction between ORS 215.283(1), ORS 215.283(2), and ORS 215.452, and the *Craven* opinions, and, like LUBA, concluded that the legislature intended to preserve the conditional use pathway to approval of a winery while adding a simpler means for certain types of wineries to gain approval. The court agreed with LUBA that the county correctly decided that its approval of the conditional use permit application converted the Stoller Vineyard and Winery from a permitted-use winery under ORS 215.283(1)(n) and ORS 215.452 to a conditional-use winery under ORS 215.283(2)(a). Then, based on the analysis in the *Craven* decisions, the court rejected petitioners' contention that a tasting facility and associated wine-marketing activities *categorically* may not be considered to be "in conjunction with farm use" because such activities are in conjunction with a winery rather than a viticulture farm use.

After noting the stated requirement in the *Craven* cases that incidental and secondary wine activities cannot become "the tail that wags the dog" and must, as always, promote the policy of preserving farm land for farm use, the court acknowledged that the county's approval of 44 events annually and a commercial kitchen comes very close to allowing the events and food service overtake the primary activity of processing and selling wine. Nevertheless, the court agreed with LUBA that the conditions the county imposed on its conditional use approval are sufficient to ensure that the primary activity remains primary. The court agreed further that the secondary activities will reinforce the profitability of operations and the likelihood that agricultural use of the land will continue.

VI. GOAL 5 – OPEN SPACES AND NATURAL RESOURCES / GOAL 5 RULE (LUBA HN# 9)

A. Generally (LUBA HN# 9.1)

Poto v. Linn County, ___ Or LUBA ___ (LUBA No. 2012-065, March 12, 2013)

[***Also relates to LUBA HN# 9.3and 28.6.1***]

Petitioners appealed a county decision that approved a plan amendment and zone change to allow an expansion of a gravel mining operation. LUBA remanded.

The subject property is an 84.11-acre parcel zoned Exclusive Farm Use, on which there is an existing 33-acre quarry. A planted vineyard is located approximately 2,000 feet to the north. The quarry site was included in the county's inventory of significant aggregate sites under Statewide Planning Goal 5 as a "Significant Site without Conflicting Uses." A 1981 permit approved mining on 25 acres of the site and authorized a temporary portable asphalt batching plant on seven acres south of the approved mining area. A 1997 decision approved modifications to the 1981 permit.

Intervenors applied to add an additional 4.1 acres adjacent to the existing quarry to the county's Goal 5 inventory of significant aggregate sites, amend the Goal 5 inventory designation of the entire 37.1 acre site to "Significant Site with all Conflicts Minimized," and amend the zoning map to apply an Aggregate Resource Overlay to the site. Intervenors proposed to mine, crush and process aggregate into asphalt cement in an onsite batching plant.

In 2011 the county approved the applications. Petitioners appealed to LUBA, and the county sought a voluntary remand, which LUBA granted. After proceedings on remand, the county again approved the application.

OAR 660-023-0180 requires a county that is considering a post-acknowledgment plan amendment for gravel mining to (1) determine an impact or study area, (2) identify any conflicts with certain uses within that impact area, and (3) determine reasonable and practicable measures that would minimize any identified conflicts. On land zoned exclusive farm use, ORS 215.283(2)(b)(B) and (C) and ORS 215.298 conditionally allow the batching of aggregate into asphalt cement in connection with gravel mining on the land. However, ORS 215.301 prohibits the county from approving an application for batching of aggregate into asphalt cement within two miles of a planted vineyard, except for batching operations "under a local land use approval on October 3, 1989, or a subsequent renewal of an existing approval."

The county adopted findings concluding that the batching plant authorized by the 1981 permit on seven acres of the originally approved 33-acre mining site is exempt from the statutory prohibition on batching operations within two miles of a planted vineyard. The findings provided further that because there was insufficient information to perform the conflicts analysis required by OAR 660-023-0180(5)(b), that analysis would be deferred to a subsequent process with a full opportunity for public participation. Petitioners contended that the exemption in ORS 215.301(2) for batch plants "approved by a local governing body on October 3, 1989 or a subsequent renewal of an existing permit" does not apply in this case because of the 1997 modification of the 1981 permit, which did not list batching as a primary processing activity allowed on the site. The county's findings did not address petitioners' concerns. However, intervenors argued on appeal that the county's conclusion that ORS 215.301 was not an impediment to batching authorized under the 1981 permit is non-binding and that these concerns would be addressed during the subsequent process at the same time as the conflicts analysis was presented. LUBA disagreed, observing that the county's findings with respect to 215.301 were intended to be conclusive, notwithstanding the need for a subsequent conflicts analysis: the two issues must be addressed and resolved independently.

OAR 660-023-0180(5)(a) requires the county to determine an impact area, when identifying conflicts with proposed mining and processing activities, that is limited to 1,500 feet from the boundaries of the mining area, except where factual information indicates significant potential conflicts beyond 1,500 feet. Petitioners argued that because local residents presented factual information below, the county was obliged to expand the 1,500 foot distance. LUBA disagreed, saying that the county was able to rely upon what it deemed more reliable evidence that there will not be significant potential conflicts beyond 1,500 feet, and if it did so, it was not required to expand the distance. LUBA also disagreed with petitioners that ORS 215.301 and the location of a planted vineyard 2,000 feet from the subject property are "*per se* adequate factual information" that indicates significant potential conflicts beyond 1,500 feet from the subject property. LUBA explained that ORS 215.301 is a law, and cannot reasonably be understood to be the "factual information" addressed by OAR 660-023-0180(5)(a).

Certain of petitioners' assignments of error raised issues that could have been, but were not, raised in the proceedings prior to the voluntary remand to the county. After intervenors asked LUBA not to consider these arguments on the basis of *Beck v. Tillamook County*, LUBA noted that it has decided in previous opinions that an issue that could have been, but was not, raised in an *initial* petition for review may not be raised in a subsequent petition for review after remand proceedings, whether those proceedings result from a LUBA final order on the merits or a voluntary remand.

B. Resource Inventory (LUBA HN# 9.2)

Protect Grand Island Farms v. Yamhill County, 249 Or App 223 (2012)

[*Also relates to LUBA HN# 1.6.5, 9.3 and 29.2.3*]

The Court of Appeals affirms LUBA's decision affirming the County's finding of a significant aggregate resource under OAR 660-023-0180. Aggregate is a resource regulated by Goal 5 and its administrative rules. In an effort to balance the value of farmland with aggregate mining, LCDC adopted rules that limit mining of aggregate material to areas where the resource is found in sufficiently thick deposits to warrant the removal of topsoil and other non-aggregate

overburden. Specifically, an aggregate resource is not "significant," and therefore eligible for being listed on the Goal 5 inventory and potentially mined, unless "the average thickness of the aggregate layer" exceeds 25 feet. OAR 660-023-0180(3)(a). In this case, no individual layer of aggregate averaged 25 feet, but the combined thickness of the two aggregate layers (which were separated by clay) exceeds 40 feet. The critical issue in the case was if the administrate rule requires a single layer to average 25 feet, or if the layers of aggregate can be combined to achieve the 25 foot thickness threshold. The court noted that both interpretations were plausible, and ultimately affirmed the County's approval, finding that all layers of mineable aggregate are added together to determine whether a site is eligible to be listed as a significant aggregate resource. After acknowledging that the purpose of the rule is to balance the protection of farmland against the need for local sources of aggregate, the court concluded, as LUBA had, that since the purpose of the rule is to balance the protection of farmland against the need for local sources of aggregate, since mining the top layer will destroy farmland, and since mining the lower layer will not destroy additional farmland, the purpose of the rule is satisfied.

The next phase of this case is the County's decision approving a PAPA and zoning map amendment to allow gravel mining on the site, which was remanded by LUBA in *Protect Grand Island Farms v. Yamhill County*, ___ Or LUBA ___ (LUBA No. 2012-047, October 9, 2012). The lengthy opinion evaluates the three elements in OAR 660-023-0180, which allows a PAPA to allow gravel mining only once the county (1) determines the impact or study area, (2) identifies conflicts with certain uses within that impact area, and (3) determine reasonable and practicable measures that would minimize identified conflicts. The case is very fact dependent, but is instructive for a practitioner involved in a gravel case.

APPEAL ON REMAND:

Protect Grand Island Farms v. Yamhill County, ___ Or LUBA ___ (LUBA No. 2012-100, April 23, 2013)

LUBA affirms the County decision approving the PAPA to allow gravel mining. This is the County's decision on remand from LUBA No. 2012-047, referred to as "PGIF I." In PGIF I, LUBA remanded on several bases, one of which was inadequate findings on County ordinance provisions regulating floodplain development where the project included construction of several berms in the floodway. On remand, the County issued additional findings interpreting many of the provisions cited by petitioners to not apply to the development. Using the *Siporen* deferential standard, LUBA found the County's interpretation to be plausible, not inconsistent with the express landscape or with any policy or provision being interpreted and was therefore required to be affirmed under *Siporen* and ORS 147.829(1)(a)-(c). LUBA likewise rejected petitioner's substantial evidence challenge to the County's findings supporting a condition of approval allowing the applicant to meet noise standards by the construction of the proposed noise berm or other reasonable and practical measures that achieve compliance with DEQ standards.

VII. GOAL 10 – HOUSING/ GOAL 10 RULE (LUBA HN# 14)

Southeast Neighbors Neighborhood Association v. City of Eugene, ___ Or LUBA ___ (LUBA No. 2013-004, July 12, 2013)

[*Also relates to LUBA HN# 28.6.2*]

Petitioner appealed a decision approving a tentative planned unit development application. LUBA affirmed.

Intervenor applied for tentative planned unit development (PUD) approval to create 75 residential lots on an approximately 26-acre property located in the South Hills area of the city.

The property is sloped. Eugene Code (EC) 9.8325(5) provides the tentative PUD approval criteria for "needed housing," as that term is used in ORS 197.303(1) (housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels). EC 9.8325(5) prohibits grading on portions of a development site that meet or exceed 20 percent slope.

West Creek first submitted a slope map that measured average slopes on the property. Subsequently, as required by the city application form, West Creek submitted a slope map of the property measuring slope using 5-foot contour intervals. Slopes on most of the eastern portion of the property exceed 20 percent. Staff recommended denial of the 75-lot proposal on that basis, but, as an alternative, recommended a condition of approval to limit the PUD to 47 lots located only on the western portion of the property. West Creek then submitted a site plan that sought approval for just the 47 lots.

Before the hearings officer, petitioner submitted a slope map prepared by expert Matthews (Matthews Slope Map), which measured slopes on the property using 5-foot contour intervals and showed more areas of the eastern portion of the property, as well as some areas on the western portion of the property, as meeting or exceeding 20 percent slope. Intervenor then submitted a slope map that measured slope using 20-foot intervals. The hearings officer relied on the Matthews Slope Map and denied both the 47- and 75-lot proposals. On appeal, the planning commission relied on the slope map prepared by staff (as opposed to the one prepared by Matthews) and approved the application for 47 lots.

Intervenor argued that the city used West Creek's initial failure to submit a map based on 5-foot intervals as a justification to deny the application, and complained that the city should not have used intervenor's failure to provide the information required by the application form or the code as a basis to deny the application. LUBA agreed with the stated principle, but pointed out that there had been no denial on the basis stated by intervenor. Rather, the city weighed the evidence before it, choosing to believe some evidence over other evidence.

Intervenor next contended that EC 9.8235(5) is not a "clear and objective standard," as ORS 197.303 requires for "needed housing" code criteria. LUBA disagreed, pointing out that the city application form specifies how the city will measure slope, leaving little or no room for subjectivity. Finally, intervenor argued that the method of measuring slope must be included in the development ordinance itself to avoid subjectivity. LUBA again disagreed, pointing out that

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the fact that the city preferred a particular way of measuring slope did not convert the results of that measurement into a subjective decision.

Before the planning commission, the parties disputed whether the Matthews Slope Map and intervenor's arguments regarding slope had first been presented to the hearings officer and whether that evidence could be presented for the first time to the planning commission. The planning commission interpreted an EC provision to say that the code requirement that an *issue* must be raised first at the hearings officer level does not mean that an appealing party must have raised all *arguments* in connection with that issue at the hearings officer level in order to make those arguments to the planning commission. Since petitioner did not challenge the planning commission's interpretation on appeal or the planning commission's assessment of what was new evidence, LUBA accepted both. LUBA rejected petitioner's argument that, notwithstanding the code prohibition of new evidence at the planning commission, since intervenor was allowed to introduce new evidence (LUBA found it wasn't), petitioner should have been allowed to introduce new evidence as well. LUBA noted that when evidence is improperly introduced, the proper next step is for an opponent to object, not flood the decision maker with still more improperly introduced evidence.

Both petitioner and intervenor filed local appeals of the hearings officer's decision. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), holds that a disputed issue must be raised on appeal before the final local decision maker in order for that issue to be preserved for appeal to LUBA. *Olstedt v. Clatsop County*, 62 Or LUBA 131, 139-40 (2012), holds that when one party obtains a desired result from a hearings officer, it has no reason to appeal locally, and in such situations, it is not required to raise an issue on which it did not prevail during the local appeal of the opposing party in order to preserve the issue for appeal to LUBA. In this case, LUBA addressed a third situation: the preservation question in the context of a local appeal from *each* of the opposing parties. LUBA concluded that the prevailing party at the lowest level of local approval who *cross-appeals* to a higher local decision maker (e.g., a planning commission) *does* have an obligation at least to alert the higher-level decision maker to an issue where it did not prevail at the first level, in order to preserve the issue for appeal to LUBA.

Petitioner argued that the planning commission's approval of modifications to the lot dimension and solar lot standards in the EC misconstrued ORS 197.307(4)'s mandate that the city may only apply "clear and objective standards" to a proposal for needed housing. Petitioner contended that the factors that the city must consider in a request for a modification under EC 9.8325(11) or a request for an exception to the solar lot standards under EC 9.2790 require the city to apply standards that are not "clear and objective." LUBA objected that petitioner was seeking to use the needed housing statute's mandate to apply only "clear and objective standards" as a sword to prevent applicants for needed housing from gaining approval of needed housing projects under discretionary standards. LUBA agreed with intervenor that the needed housing statute protects an applicant for a permit for needed housing from the city's imposition of discretionary standards without its agreement, but that an applicant may agree to be bound by discretionary standards without running afoul of the statute.

VIII. GOAL 11 – PUBLIC FACILITIES AND SERVICES/ GOAL 11 RULE (LUBA HN# 15)

Central Oregon Landwatch v. City of Bend, ___ Or LUBA ___ (LUBA No. 2012-043, November 29, 2012)

[*Also relates to LUBA HN# 18.3 and 6.2*]

Petitioner appealed a city decision adopting amendments to Chapter 8 of the city's comprehensive plan and adopting a water public facilities plan. LUBA remanded.

In 2009 the city adopted amendments to the city's UGB, concurrent amendments to Chapter 8 of the Bend Area General Plan (BGP), and a Goal 11 public facilities plan (2009 PFP) for public facilities and services within the expanded UGB. LCDC remanded the city's decision because the 2009 PFP proposed to provide public sewer and water service to land uses outside of the city's then-existing UGB. The city then separated the UGB expansion effort from the public facilities planning effort. As part of the latter, the city adopted amendments to chapter 8 of the BGP and another public facilities plan (2012 PFP). The city relied on studies and reports prepared in advance of the 2009 decision, including a 2007 Water System Master Plan, and on additional reports prepared after LCDC's remand. Petitioner disputed a project called the Surface Water Improvement Project (SWIP), which proposes a new water intake facility on Bridge Creek, a new water treatment facility and a new, larger and relocated pipeline between them.

In adopting the 2012 PFP, the city adopted the September 2011 version of the BGP and incorporated by reference a Goal 11 Water Public Facility Plan. Petitioner pointed out several places where the city erred by mislabeling a supporting document or failing to adequately integrate supporting documents. LUBA treated these concerns as minor.

Goal 2 requires that city, county, state and federal agency and special district plans and actions related to land use be "coordinated" with the comprehensive plans of cities and counties and with regional plans. Under ORS 197.015(5), comprehensive plans are coordinated when the needs of all levels of government have been considered and accommodated as much as possible. Petitioner maintained the city failed to coordinate with the county on several issues, but LUBA disagreed, finding that the city did engage in an exchange of information with the county as required by the city/county urban growth management agreement. LUBA rejected petitioner's argument that the city failed to fulfill its coordination obligations under Goal 2 and Goal 11 by failing to consider the impacts of the SWIP on Tumalo Creek, which is identified as a Statewide Planning Goal 5. LUBA pointed out that the county was given an opportunity to and did not raise any concerns about these impacts. LUBA also rejected petitioner's contention that the city failed to coordinate with the two suppliers of additional water, Avion and Roats, or that the city erred in incorporating planning documents furnished by Avion and Roats.

Goal 2's purpose is, in relevant part, "[t]o assure an adequate factual base for [all decisions and actions related to use of land]." OAR 660-011-0010(1)(a) and (b) require the city to include in its public facilities plan an inventory of existing systems, and a description of future public facilities projects. Petitioner argued that the record did not include an adequate factual base for the BGP amendments and the 2012 PFP in several respects. Petitioner contended that certain documents and studies upon which the city relied are outdated. LUBA rejected the argument,

pointing out that the new documents and studies updated the earlier ones and noting that because petitioner failed to identify specifically where the older studies were inadequate, there was no basis for reversal or remand.

OAR 660-011-0010(1)(b) requires the city's public facility plan to include "[a] list of the significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan" and "public facility project descriptions or specifications of these projects as necessary." LUBA agreed with petitioner that the city erred by including in the 2012 PFP additional water service, required by contract, to the Tetherow Resort, which is outside the city's UGB. Without an exception, contract or not, the Goal 11 rule forbids residential development of land outside urban growth boundaries at a density higher than authorized without service from such a water system. (That raises the question, not addressed by LUBA, of whether the destination resort statutes allowing residential development on resource lands without an exception do not, at least arguably, also allow the extension of a water system without an exception to support that development.)

IX. GOAL 12 – TRANSPORTATION/ GOAL 12 RULE (LUBA HN# 16)

Storm v. Yamhill County, ___ Or LUBA ___ (LUBA No. 2012-066, December 27, 2012)

LUBA affirms the County's ordinance amending the County's comprehensive plan and zoning code and adopting exceptions to Statewide Planning Goals 3, 11 and 14 to authorize construction of a temporary interchange for the Newberg Dundee Bypass. Petitioner owns property approximately a half mile from the bypass route and testified at the local hearing to an alternative interchange which could be located at the site of an existing approved overpass (which was also approved by a goal exception).

The central issue in the first assignment of error is whether the County erred under OAR 660-012-0070(5) and (6) in rejecting the alternative proposed by petitioner. ODOT's primary response is that OAR 660-012-0070(5) and (6) apply only to alternatives that do not require a new exception and that because petitioner's proposed alternative would require a new exception, the standards for evaluating that alternative are found at OAR 660-012-0070(7), which petitioner did not invoke.

LUBA reasoned that factually a new exception was likely required for petitioner's suggested alternative because the exception area for the overpass was relatively narrow and not designed for an interchange of two major highways with necessary loops and ramps. More importantly, however, LUBA agreed with ODOT that a new exception would be required as a matter of law under OAR 660-012-0070(10) which specifically provides that uses authorized in exceptions are limited to those uses and additional or different uses require a new exception. Turning to the merits, LUBA affirmed because almost all arguments were dependent on the wrong standards under OAR 66-012-0070(5) and (6).

Lastly, LUBA rejected petitioner's substantial evidence challenge to the County's findings of "need" or "reasons" under Goal 2, Part II(c)(1) and OAR 660-012-0070(4) related to the temporary interchange on the basis that it will actually be permanent and the court must justify reasons for a permanent interchange or include evidence of some guarantee that it will be

removed. LUBA found the challenged exception authorizes only a temporary interchange and any attempt to convert it to a permanent one will require a new or modified exception.

X. GOAL 15 – WILLAMETTE RIVER GREENWAY (LUBA HN# 19)

Gunderson, LLC v. City of Portland, ___ Or LUBA ___ (LUBA Nos. 2010-039, 2010-040, 2010-041, April 26, 2013)

This matter is the subject of many appeals (*Gunderson I, II and III*) which are summarized in the opinion but this appeal concerns a single issue on remand from the Court of Appeals regarding the adequacy of the City's Goal 15 inventory. Goal 15, Paragraph B requires the City to collect and maintain information and data to determine the nature and extent of resource uses and rights associated directly with the Willamette River Greenway. The inventories are required to include land currently committed to industrial, commercial and residential uses. The City adopted its initial Goal 15 inventory in 1984 and updated it in 1987. Petitioners are industrial users and property owners within the area covered by the North Reach River Plan (NRRP), which was adopted by the City in 2009 and amends the boundary to include lands owned by petitioners not previously included in the boundaries and is the subject of *Gunderson I, II, and III*. Relevant to the present appeal, petitioners argued, and LUBA agreed, the City could not rely on its 1984/87 inventory to satisfy the Goal 15 requirements when adopting the amendment adding additional land to the NRRP. At a minimum, petitioners argued the City must prepare an inventory of all land currently committed to industrial, commercial and residential uses to properly determine which land should be included in the boundaries. LUBA agreed and remanded for the City to prepare the inventories or issue findings explaining why the existing Goal 15 inventories are sufficient and do not require updating.

Willamette Oaks, LLC v. City of Eugene, ___ Or LUBA ___ (LUBA No. 2012-091, May 23, 2013)

Petitioner appealed a city decision approving intervenor Goodpasture Partners, LLC's application for a Willamette Greenway Permit to construct off-site transportation improvements that were required by the city's approval of intervenor's planned unit development. LUBA affirmed.

The challenged decision was the city's decision on remand from *Willamette Oaks, LLC v. City of Eugene*, 64 Or LUBA 328 (2011), *aff'd* 250 Or App 144, 281 P3d 685 (2012) 23 (*Greenway I*). That decision approved intervenor's application for a zone change and planned unit development on its 23-acre property located in an area of the city known as Goodpasture Island. The city required intervenor to construct off-site transportation improvements to widen the existing Goodpasture Island Road bridge over Delta Highway and construct a new bridge over Delta Highway northeast of the existing bridge. LUBA remanded the city's decision with instructions to the city to determine whether the Delta Ponds/Debrick Slough area is a "channel" of the Willamette River under Goal 15. On remand, the city determined that the Delta Ponds/Debrick Slough is not a "channel" of the Willamette River and again approved intervenor's greenway permit without applying Eugene Code (EC) provisions that restrict development within the greenway setback.

Petitioner's assignments of error were based on a complicated factual dispute. The area where the transportation improvements must be constructed is located within the city's adopted Willamette River Greenway boundary. The boundary runs adjacent to the main channel of the Willamette River from north to south on the westernmost boundary of Goodpasture Island, curves to the east around the south end of Goodpasture Island, and runs along the east and west sides of a pond system known as Delta Ponds, the east and west sides of Delta Highway, and the east and west sides of Debrick Slough. Water from Debrick Slough flows into the main channel of the Willamette River approximately .85 miles north of the existing bridge over Delta Highway. The fundamental issue in this case, which was the subject of LUBA's earlier remand, was whether the Delta Ponds/Debrick Slough area is a "channel" of the Willamette River under Goal 15. The city found it is not.

Petitioner argued the city's 1976 decision to include the ponds and slough area within Willamette River Greenway boundary meant that, as a matter of law, the ponds and slough area are not a "channel" of the Willamette River, as "channel" is defined in ORS 390.310(1) and (3)). That definition includes the following language: "as including . . . any channel that flows water at ordinary low water." However, language in the city's findings, as well as the city's adopted Goal 15 inventory, suggested that the ponds and slough area were included for their value as natural and open space areas rather than because they were a channel of the Willamette River. They had important natural features and potential for future use in a city-wide water recreation system.

ORS 390.310(1) provides that the Willamette River includes "any channel that flows water at ordinary low water." The parties agreed that in order to be a channel of the Willamette River, water must flow both into the channel from the main river stem and flow out of the channel back into the river downstream. However, they did not agree on the meaning of "flows water at ordinary low water." The city interpreted the phrase to refer only to the flow of *surface* water. LUBA looked at ORS 274.0005(3), which was adopted in the same year as ORS 390.310, and which defines "line of ordinary low water" for purposes of determining the state's title to submersible and submerged lands as the "line on the bank or shore to which the water ordinarily recedes annually in season." Notwithstanding a second definition of "groundwater" in ORS 537.515, for purposes of laws governing water appropriation, as water "beneath the land surface or beneath the bed of any stream, lake, reservoir or other body of surface water," LUBA chose the ORS 274.0005(3) definition, which coincides with the plain meaning of the word "flow."

LUBA often applied the "substantial evidence in the whole record" standard when evaluating petitioner's arguments. Experts for each side of the dispute disagreed over whether, at times of ordinary low water, there is water flowing from the main channel of the river through the gravel and rocks of a man-made weir (called "hyporheic flow"). LUBA deferred to the city's weighing of the evidence and added that even if the evidence in the record conclusively *had* demonstrated the existence of a hyporheic flow of water, this flow from the river to the ponds and slough area would not fall within the ORS 390.310(1) description of "flows water at ordinary low water."

XI. STANDING (LUBA HN# 24)

A. Before LUBA (LUBA HN# 24.2)

1. Requirement to Establish (LUBA HN# 24.2.2)

Warren v. Josephine County, ___ Or LUBA ___ (LUBA No. 2012-028, January 31, 2013)

[*Also relates to LUBA HN# 25.6.3*]

Petitioners Hart and Warren appealed a board of county commissioners' decision that denied an application for a comprehensive plan amendment and zoning map amendments. LUBA remanded.

The appeal presented a standing question that LUBA resolved at the outset. The petitioners were not represented by an attorney. Hart, a planning consultant, was initially designated as the "lead petitioner" under OAR 661-010-0015(3)(f)(A). However, Horsely (intervenor) challenged Hart's standing, since he appeared below as a planning consultant on behalf of the applicants, rather than in his personal capacity. Hart claimed to have appeared on his own behalf in order to be better able to represent his clients' interests. LUBA concluded that this did not constitute the appearance necessary for standing required by ORS 197.830(2)(b), since Hart was actually appearing in a representative capacity and had no personal interest in the application. LUBA therefore dismissed Hart as a petitioner and promoted Warren to lead petitioner.

The challenged decision of denial was based on a tie vote by the two county commissioners who voted. (The third commissioner chose not to participate based on "time" considerations and "family issues.") The two remaining commissioners could not agree on two issues: whether the "adequate carrying capacity" criterion for comprehensive plan amendments was met with regard to an adequate potable water supply; and whether the requirement that the proposed map amendment be "consistent with the character of the surrounding area" was satisfied. On appeal petitioner did not attempt to demonstrate the criteria were met, but instead focused his challenge on alleged procedural errors. LUBA recognized that a remand on the basis of the procedural errors might result in a different outcome.

Petitioner contended the county erred in characterizing the challenged decision as legislative rather than quasi-judicial. LUBA stated that as long as the decision complied with all relevant criteria and the county committed no procedural errors that prejudiced the petitioner's substantial rights, there was no basis for reversal or remand.

Much of the opinion discussed the procedures the county followed after ending the initial hearing and then continuing it. As required by ORS 197.763(a), (b) and (c), the county left the record open for seven days to allow the submission of additional evidence and then closed the record. After an opponent requested that the record be reopened to allow him to respond to documents submitted prior to the first closing of the record, the county agreed to reopen the record a week later for an additional seven days. While objecting, the applicant submitted new testimony and evidence in response. The county then proceeded with the continued hearing and reopened the record again. The interaction between hearings, new evidence, open records and closed records became increasingly involved and unclear. The county applied the procedural rules applicable to the open record following the initial evidentiary hearing to the open-record periods following subsequent hearings.

LUBA noted that while the actions authorized and required by ORS 197.763(a), (b) and (c) must be applied at the initial evidentiary hearing only, in practice local governments frequently do grant continuances and open record periods during hearings that follow the initial evidentiary hearing, if they believe doing so is warranted by circumstances. In this case, the county ordinance specifically allowed doing so. LUBA found the petitioner had not demonstrated his rights were substantially prejudiced by the process the county followed.

The balance of the lengthy opinion resolved issues that arose only because the petitioner was so confused that he appealed issues on which he had already prevailed or made arguments that were based on a misunderstanding of the facts.

XII. LOCAL GOVERNMENT PROCEDURES (LUBA HN# 25)

A. Hearings (LUBA HN# 25.6)

1. Limitations on Presentations (LUBA HN# 25.6.2)

Purtzer v. Jackson County, ___ Or LUBA ___ (LUBA No. 2012-090, March 26, 2013)

Petitioner appealed a hearings officer's decision approving a dwelling in a rural residential zone. LUBA affirmed.

Petitioner contended that the hearings officer improperly disregarded her final argument, to which she understood she (like the applicant) was entitled under ORS 197.763(6)(e). LUBA pointed out that had the hearings officer considered her final argument, he would have violated the applicable procedures, which limit final argument to the applicant. Petitioner's other arguments were not based on facts in the record or were dependent upon misunderstandings of the zoning ordinance provisions, and LUBA rejected them as well.

2. Impartial Tribunal (LUBA HN# 25.6.5)

Wal-Mart Stores, Inc. v. City of Hood River, ___ Or LUBA ___ (LUBA No. 2013-009, May 21, 2013)

Petitioner appealed a city council decision that applied nonconforming use standards in the city's zoning ordinance to determine that petitioner had lost its vested right to expand its existing Wal-Mart store. LUBA remanded.

This appeal followed a decision by the city on remand concerning whether Wal-Mart had lost its right to an expansion based on the discontinuance of a nonconforming use. The dispositive issue in this appeal was not the discontinuance issue discussed in LUBA's earlier opinion, but rather whether remand of the city's most recent decision was required because one of the city councilors (city councilor McBride) failed to disclose ex parte contacts, and the city failed to give all parties an adequate opportunity to rebut any such ex parte contacts. A related issue concerned whether McBride should have participated, under the "rule of necessity," in the city's decision following LUBA's remand.

Before the city's initial decision, McBride was the city's planning commission chair. As such, she chose not to participate as a decision maker in the planning commission's proceedings on Wal-Mart's application; in fact, she actively opposed the application "as a citizen." Prior to

LUBA's first remand, McBride was appointed to join the city council. Before the city council's meetings on the application following the remand, McBride submitted a memorandum in which she took the position that under applicable nonconforming use rules in the city zoning ordinance, petitioner had lost any vested right it might have had to expand its existing city store. At the first city council meeting on the application, when the city councilors were asked to disclose any ex parte contacts, McBride declined to participate on the basis of her longstanding opposition to the Wal-Mart application. She did not disclose any ex parte contacts.

In its deliberations following the remand hearing, the city council decided 6-0 that the city's zoning ordinance standards governing nonconforming uses, including the requirement that a nonconforming use not be resumed after it is discontinued for one year, applied to vested rights as well nonconforming uses. However, it deadlocked 3-3 on the issue of whether petitioner had lost its vested right to construct the expansion under those nonconforming use rules. Because four votes were required under the city charter to take action, the city was unable to take action to respond to LUBA's remand.

Over the objections of petitioner, who wanted a continuance in order to prepare a memorandum detailing McBride's ex parte communications, the city invoked the "rule of necessity" to allow McBride to participate in the decision. She stated that she could make an unbiased decision, that she had all of the materials and had commented on the materials she had read. McBride orally reviewed the position she previously took in an earlier memorandum, in which she argued that under a correct application of the city zoning ordinance, nonconforming use rules, petitioner lost its vested right by discontinuing construction for more than one year. She then voted with three other council members to deny the application.

Petitioner argued, based on two city code provisions, that the city should have required McBride to disclose her ex parte communication and to afford petitioner a reasonable opportunity to inquire about, respond to, and rebut those communications. LUBA rejected petitioner's argument that had she continued to recuse herself, McBride would nevertheless have been required to disclose her ex parte contacts. However, once she changed her position and elected to participate as a decision maker, she was obligated to (1) disclose the substance of any ex parte communications she had in this matter as soon as possible after making that election and (2) give all parties an adequate opportunity to respond to and rebut the substance of those communications. LUBA was not persuaded by intervenors' "raise it or waive it" argument that petitioner's counsel was given an ample opportunity to object to McBride's ex parte contacts, but instead focused on her possible biases. LUBA noted that McBride's decision to participate came at the very end of the council's deliberations, after the record was nominally closed, and decided she had an *affirmative* obligation to disclose her ex parte contacts. LUBA observed that under earlier case law, the obligation of a decision maker to disclose ex parte contacts is a substantive, not merely procedural, error.

On the question of whether McBride should have participated in decision making at all, LUBA noted that the relevant standard is not whether a decision maker has had ex parte contacts but whether the evidence shows that she is actually biased. As explained in *Eastgate Theatre* 13 *v. Bd. of County Comm's*, 37 Or App 745, 754, 588 P2d 640 (1978), disqualification of a member of a tribunal can be a drastic step, particularly when it might have the effect of denying the parties their entitlement to any tribunal at all. If there is no tribunal, partiality and impartiality

become irrelevant. Nevertheless, where a potential decision maker participates as an advocate in her personal capacity in the very case she is now being asked to decide, it is inappropriate for her to step forward and participate on the same panel before which she took a position. LUBA concluded McBride's claim that she could decide the matter objectively was not supported by substantial evidence.

LUBA then discussed the rule of necessity, which means that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available. LUBA suggested that the tie vote at the city council might have been resolved by a changed vote if McBride's participation had not made it unnecessary. LUBA rejected petitioner's suggestion that the matter be sent back to the planning commission for a vote, since any planning commission decision would be appealable to the city council.

The rule of necessity operates on the principle that a biased judge is better than no judge at all. LUBA found that disqualification could not be allowed to render impotent the only tribunal vested with the power to act. The fact that McBride's disqualification was for bias did not preclude the city from invoking the rule of necessity. LUBA added that under ORS 244.120(2)(b)(B), the scope of her participation had to be limited to a vote and not include participation during the hearings process.

B. Action After Remand (LUBA HN# 25.11)

Poe v. City of Warrenton, ___ Or LUBA ___ (LUBA No. 2012-029, August 16, 2012)

LUBA remands, for a third time, the City's approval of a conditional use and site design permit for a two-story mixed use building in the commercial zone. In the remand proceedings, the City conducted a hearing on the 90th day after the date the applicant initiated the remand under ORS 227.181 and the applicant submitted new evidence addressing one of the outstanding issues, adequacy of fire services. Petitioners asked for an opportunity to respond to this evidence but were denied because the City believed it was statutorily required to take action on the 90th day.

LUBA agreed with the petitioner that the City erred in failing to give them an opportunity to respond to the applicant's evidentiary submittal. In LUBA's view, "the fact that the City believed it was making a decision on the last day allowed by ORS 227.181 for such a decision does not absolve the City from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing." LUBA identified potential alternative courses of action available to the City under the circumstances presented here; these included rejecting the applicant's new evidence or leaving the record open so petitioners could respond to the evidence. LUBA observed there is no mandamus remedy available under ORS 227.181 when a local government fails to comply with the 90-day time limit for taking action on remand. As a result, exceeding this time limit creates minimal risk for the City. Given the City's procedural error, LUBA again remanded the decision to the City.

XIII. LUBA JURISDICTION (LUBA HN# 26)

A. Land Use Decisions: Statutory Test (HN# 26.2)

1. Generally (LUBA HN# 26.2.1)

Conte v. City of Eugene, ___ Or LUBA ___ (LUBA No. 2012-041, August 14, 2012)

LUBA dismisses an appeal for lack of jurisdiction under one of the rarely used "fiscal exceptions" from LUBA's review jurisdiction for ordinances establishing tax or fiscal policies. The City resolution at issue in this appeal approved a property tax exemption for a multi-family housing project under ORS 307.618(1) and City code. Relying on the "fiscal exemption" first articulated in *State Housing Council v. City of Lake Oswego*, 48 Or App 525, 616 P2d 655 (1980) *rev. dismissed*, 291 Or 878, 635 P2d 647 (1981), LUBA agreed with the City that it lacked authority to review the decision even though both state law and the City code required a finding that the project will be "in conformance with all local plans and planning regulations" in order to approve the tax exemption.

LUBA characterized the statutorily required determination that the proposed project "is or will be" in conformance with City land use plans and regulations as a "broad-brush, tentative evaluation" rather than a focused determination of compliance with applicable land use approval criteria. Additionally, LUBA found the City's decision merely approves a tax exemption; it does not approve or purport to approve actual development and, as a result, has only "incidental impacts" on land use. Lacking jurisdiction to review the City's resolution, LUBA dismissed the appeal.

Grabhorn, Inc. v. Washington County, 255 Or App 369 (2013)

The Court of Appeals affirms the trial court's dismissal of plaintiff's claims for declaratory and injunctive relief on grounds the claims sought a land use decision over which the court lacked jurisdiction.

The dispute centers around the issuance of a Land Use Compatibility Statement (LUCS) for plaintiff's nonconforming use. The LUCS was issued by the County when the plaintiff applied for renewal of its solid waste disposal permits from DEQ in 1991. At the time the 1991 LUCS was issued, there were no standards in the County's code defining or regulating "composting operations." The word "composting" does not appear in the 1991 LUCS, but findings in the attachment mention that a peripheral component of plaintiff's landfill business was "turning demolition debris into useable mulch and wood chips." Sometime between 1991 and 2010, plaintiff stopped accepting solid waste for landfill as part of its business and expanded its recycling operations to the north to accommodate composting activity that extended into what was formerly a filbert orchard. By 2010, plaintiff was exclusively a composting operation.

DEQ issued plaintiff's 1991 solid waste disposal permit based, in part, on the County's LUCS. DEQ also issued plaintiff a composting permit in 1999 based in part on the 1991 LUCS. In 2007, DEQ notified plaintiff that it must renew its permit. In 2009, as part of the permit-renewal process, DEQ instructed plaintiff to apply for an "environmental risk screening," which required submission of a LUCS. Plaintiff resubmitted the 1991 LUCS. DEQ advised that the County had to confirm that the 1991 LUCS covered plaintiff's 2010 exclusive composting operation. The

County refused to send the requested letter and sent a letter in which it took the position, like DEQ, that the change in plaintiff's business required a land use permit (either as a new use, an alteration of a nonconforming use or verification that it was part of the historical nonconforming use).

Plaintiff then filed a complaint with the Circuit Court asking for a declaratory and injunctive relief to declare that the 1991 LUCS established plaintiff's composting operation as a legal nonconforming use. The trial court dismissed concluding plaintiff sought a land use decision over which LUBA had exclusive jurisdiction. After plaintiff appealed the trial court's decision, the County approved plaintiff's composting operation as a lawful nonconforming use. That decision was appealed to LUBA and was still pending at the time of this opinion.

Because of the pending appeal, the Court rejected the County's argument that the appeal was moot. The Court then turned to the definition of land use decision and concluded, under ORS 197.015, plaintiff's request that the Court make a decision about whether the current operation is permitted clearly involves the application of a land use regulation and is therefore a land use decision subject to LUBA's exclusive jurisdiction.

Oregon Aviation Watch v. City of Hillsboro, ___ Or LUBA ___ (LUBA No. 2012-098, April 17, 2013)

LUBA dismisses petitioner's appeal of an ordinance that repeals a subchapter of the City's code adopted to regulate the operation of aircraft over the City. The ordinance contained aircraft height limitations, prohibited acrobatics and dropping of items and provided a process to approve airports. Finding that petitioners failed to establish the City's repeal of its ordinance was a land use decision under either the statutory definition or the significant impacts test, LUBA ruled the aircraft regulation ordinance did not implement any comprehensive plan provisions and did not appear to have been acknowledged in the 1984 LCDC acknowledgment order, which listed the documents the City submitted to LCDC for review. LUBA likewise ruled the decision to repeal the aircraft regulation ordinance did not concern the application of comprehensive plan provisions and there were no plan provisions providing applicable approval criteria. And finally, LUBA rejected petitioners argument that even if it was not a statutory land use decision, it was nonetheless subject to LUBA's jurisdiction under the significant impact test finding the City's decision to no longer directly regulate airspace to have no impact at all on land uses and the elimination of the process to site an airport was replaced elsewhere in the zoning code.

2. Final Decisions (LUBA HN# 26.2.2)

Central Oregon Landwatch v. City of Bend, ___ Or LUBA ___ (LUBA Nos. 2012-024 and 2012-032, August 16, 2012)

LUBA dismisses petitioner's consolidated appeals of a City resolution regarding the construction of improvements to the City's surface water supply facility and a decision authorizing an amendment to the construction contract for that facility. LUBA ruled neither decision was a final land use decision as defined in ORS 197.015(10)(a)(A). Both the resolution and the amended construction contract were based on the Surface Water Improvement Project (SWIP) identified in the City's Water Public Facilities Plan (PFP) adopted pursuant to OAR 660-011-

0045 as a part of the City's comprehensive plan in 2008. The PFP was appealed to the Land Conservation and Development Commission (LCDC) and subsequently remanded to the City. Approximately two months after adoption of the resolution and one month after the contract amendment which are the subject of this appeal, the City adopted a revised PFP that includes the SWIP. Petitioner appealed that decision in LUBA No. 2012-043.

In ruling that neither the resolution nor the contract amendment were final land use decisions, LUBA agreed with the City that those actions were part of a multi-year, multi-step process the culmination of which was the adoption of the 2012 PFP, which was the final land use decision on this matter and will be decided in LUBA No. 2012-043. With regard to the contract, however, LUBA cautioned, "this is not a case where a City entered into a contract to construct a public facility that was not authorized by its acknowledged PFP and proceeded to actually construct the facility, while contemporaneously proceeding to amend its PFP to include the public facility. Such a circumstance might provide a basis for a different conclusion about whether a contract to construct a public facility is a final decision and a land use decision."

Kaiser Permanente v. City of Portland, ___ Or LUBA ___ (LUBA No. 2012-087, February 13, 2013)

LUBA dismisses petitioner's appeal of a letter from a City planner concluding that a previously approved master plan for petitioner's properties had expired. LUBA concluded the letter was not a reviewable land use decision. Portland offers an Early Assistance process in which a potential applicant can meet with city planners to review the zoning code requirements, procedures, and land use reviews necessary for proposed development. Following a meeting with representatives of Kaiser to discuss the status of its approved 1989 master plan for its medical campus, City staff sent Kaiser a letter stating that the master plan had expired. Kaiser appealed the letter to LUBA and, in response to the City's motion to dismiss, argued the letter presented the City's final decision concerning the master plan's expiration. The City asserted the letter was merely an advisory opinion by a city planner and no final decision concerning the master plan's status would be issued until Kaiser applied for a development project under the plan. LUBA agreed with the City and dismissed the appeal, ruling the letter was a nonbinding staff advisory opinion and not a final land use decision.

3. Ministerial Exception (LUBA HN# 26.2.6)

Keith v. Washington County, ___ Or LUBA ___ (LUBA No. 2011-104, August 8, 2012)

LUBA remands County approval of a building permit to change the use of an existing structure on a parcel in the Exclusive Farm Use (EFU) zone to a farm stand. The property at issue in this appeal is the same property in *Wilson v. Washington County*, 63 Or LUBA 314 (2011) and a brief history of that decision is necessary for an understanding of this case. The property consists of two parcels totaling 70 acres, with approximately 40 acres zoned EFU and 30 acres zoned Exclusive Forest Conservation (EFC). The sole access to the EFU parcel is from a driveway located on the EFC parcel connecting to the public right of way. In *Wilson*, LUBA upheld the hearings officer's conclusion that a proposed winery on the EFU parcel could not be allowed where the sole access to it was via the driveway on the EFC zoned parcel where wineries were not permitted in that zone. In the present appeal, petitioner argues the farm stand

cannot be allowed on the EFU property because the driveway to access it is on the EFC property and farm stands are not listed as a permitted use in the EFC zone. Significantly, the County's code did not list farm stands as uses permitted in either the EFU or the EFC zone, but contained provisions permitting such uses in each district and excluding them from permitting in specified zones (including the EFU and EFC zones) if they met certain described characteristics.

LUBA never reached the merits of the seemingly conflicting code language because it remanded for failure to follow the statutory required notice and opportunity for hearing requirements for permit decisions and for failure to adopt a decision supported by findings as required by ORS 215.416(9). LUBA rejected the County's argument that the building permit was excluded from the definition of a land use decision under ORS 197.015(10)(b)(A) because it was an outright permitted use and made under standards that did not require the exercise of policy or legal judgment. LUBA likewise rejected the County's alternative argument that even if it was a land use decision under ORS 197.015(10)(b)(A), it was excluded from the definition by ORS 197.015(10)(b)(B) because it was issued under clear and objective standards. Finally, LUBA also rejected the County's novel argument under *Brentman v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995) that because farm stands are uses allowed in the EFU zone pursuant to ORS 215.213(1)(8), the County may not subject them to additional regulation and therefore a decision to allow a use under subsection 1 of ORS 215.213 is not a land use decision. LUBA reasoned that interpreting the applicable code provisions to determine whether farm stands are permitted uses in the particular zones requires the exercise of legal judgment and that the local and statutory farm stand criteria require the exercise of discretion and are not clear and objective. LUBA concluded the building permit decision was a "permit" as defined in ORS 215.402(4) and remanded to require the County to provide notice and adopt adequate findings as required by ORS 215.416.

Lazarus v. City of Milwaukie, ___ Or LUBA ___ (LUBA No. 2012-080, March 28, 2013)

[*Also relates to LUBA HN# 27.5*]

Petitioners appealed a September 2012 decision by the city approving the removal of trees by Tri-Met along a pedestrian and bicycle trail (the Trolley Trail) that was to be located pursuant to a 2011 modification in the alignment of the proposed light rail line. LUBA transferred the case to circuit court on the basis that it has no jurisdiction under the "ministerial exception" stated in ORS 197.015(10)(b)(A), which applies to decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment."

The city and Tri-Met (intervenors) argued that the ministerial exception applied for two reasons: (1) the city relied on the underlying 2011 decision and did not itself apply any land use regulations; and (2) a 1996 statute requires local governments affected by the light rail project to issue "the appropriate development approvals, permits, licenses, and certificates necessary for construction of the project or project extension, consistent with a land use final order." LUBA noted that the regulations upon which petitioners relied are not part of the city zoning ordinance and are apparently not land use regulations.

The Milwaukie Municipal Code (MMC) 19.1001.6(A) provides that a land use application may be initiated by an agency with statutory rights of eminent domain for projects they have the authority to construct. Petitioners argued that TriMet's rights of eminent domain under ORS

267.200(2) are complicated by another statute, ORS 451.550(3), which grants county service districts similar condemnation authority. Petitioners maintained that the alleged conflict between the two statutes required the city to interpret the statutes, and that meant the city's decision was not subject to the ministerial exception. LUBA disagreed, pointing out that MMC 19.1001.6(A) is an application submittal requirement, not a "land use standard" within the meaning of ORS 197.015(10)(b)(A). LUBA observed further that even if the two statutes, when read together, are ambiguous, MMC 19.1001.6(A) itself is not ambiguous. There was no dispute that Tri-Met possesses statutory rights of eminent domain.

Having concluded that the ministerial exception applied because the decision did not apply any land use regulations, LUBA did not reach intervenors' argument concerning the 1996 statute.

B. Land Use Decision: Exclusions (LUBA HN# 26.4)

Richmond Neighbors for Responsible Growth v. City of Portland, ___ Or LUBA ___ (LUBA No. 2012-061, February 20, 2013)

LUBA reverses City issuance of a building permit for a 52,000 square foot, four-story apartment building with 3,000 square feet of commercial space on the ground floor. LUBA concluded the building permit decision was, in fact, a land use decision subject to its jurisdiction and was not excluded by ORS 197.015(10)(b)(B) because it involved the exercise of discretion to interpret code ambiguities. However, LUBA rejected petitioner's argument under *Tirumali v. City of Portland*, 41 Or LUBA 231, *aff'd* 180 Or App 613, 45 P3d 519 (2002) that the decision was "statutory permit" requiring a public hearing, notice and an opportunity for a local appeal with a *de novo* hearing. In rejecting the argument, LUBA distinguished *Tirumali* because the ambiguity and therefore the discretion exercised in that case involved circumstances where there was a question of whether the use was even allowed in the zone. LUBA explained, "the question of whether a decision that applies ambiguous land use regulations constitutes a statutory permit under our reasoning in *Tirumali* turns on whether the ambiguity concerns the nature of the proposed use or whether the use is among the uses that are identified as permitted. If it does, then the decision is correctly viewed as a statutory permit, notwithstanding that the applicable comprehensive plan and land use regulations treat it as a ministerial decision that requires neither a public hearing nor notice and an opportunity for a *de novo* local appeal."

There was no question in this case that the use was allowed outright in the zone and therefore the building permit decision, while subject to LUBA review, was not a "statutory permit." LUBA also rejected petitioner's arguments regarding traffic impacts and height limits as providing no basis for reversal or remand. LUBA reversed, however, because it found the development did not comply with the main entrance standard in the code. LUBA rejected the City's contention that the main entrance standard applied only to the nonresidential uses reasoning that limiting language would have to be impermissibly inserted into the code for it to have the meaning the City contended it had. Citing ORS 174.010, LUBA confirmed it could not "insert what has been omitted." At petitioner's request and with no position taken by respondent, LUBA reversed, rather than remanded, reasoning that remand would be appropriate if compliance could be demonstrated on remand without significant changes to the proposed development. In this case, LUBA found it was more likely compliance with the main entrance requirement will require

either a new application or more than insignificant changes to the existing one. Therefore LUBA reversed the City's decision.

McPhillips Farm, Inc. v. Yamhill County, ___ Or LUBA ___ (LUBA No. 2012-027, October 30, 2012)

Relying on the newest statutory exception to a "land use decision," the state agency compatibility action exception (ORS 197.015(10)(b)(H), LUBA dismissed petitioners' appeal of a Land Use Compatibility Statement (LUCS) that concluded that a proposed expansion of an existing landfill in the county's Public Works/Safety zone is compatible with the county's comprehensive plan and land use regulation.

The state agency action exception applies only if the local government determines that the proposed agency action is *compatible* with its plan and regulations because it (1) was authorized in a prior decision, (2) does not require review, or (3) is required to undergo future land use review. Based upon the facts of this case, LUBA determined that the LUCS qualified for the exemption.

At the outset, LUBA noted that the jurisdictional question can be resolved only if LUBA determines that the local government correctly concluded that the agency action is compatible for one of the reasons listed in the statue, which in turn entails resolving the likely merits of the appeal. LUBA speculates in a footnote that because the exclusions at ORS 197.015(10)(b)(H) apply only when compatibility is found, a LUCS decision that a state agency action is not compatible with the local government's plan or land use regulation would not fall within the exception, and such a decision presumably would be subject to LUBA's review. LUBA editorialized that, "it is not clear to us why the legislature would wish some LUCS decision to be subject to review in circuit court, and other LUCS decisions to be subject to LUBA's review, but that is the apparent effect of the statue."

APPEAL:

McPhillips Farm v. Yamhill County, 256 Or App 402, 300 P3d 299 (January 31, 2013)

The Court of Appeals affirms LUBA's dismissal of review of a Land Use Compatibility Statement (LUCS) issued by the County certifying that a proposed state agency permit to construct a landfill berm was compatible with County land use laws. LUBA concluded it lacked jurisdiction to review the LUCA because it was not a "land use decision" as defined by ORS 197.015(10).

Relying on the exclusion at ORS 197.015(10)(b)(H), the Court of Appeals agreed with LUBA that the LUCS was properly and completely based on a past land use decision (prior Goal 2 exception and comprehensive plan amendment authorizing the landfill). Appellants agreed the berm was not authorized in the prior decision and facilitated a physically larger and more intense use than authorized in the initial approval. LUBA disagreed and the Court of Appeals affirmed holding LUBA correctly dismissed the appeal for lack of jurisdiction because the prior land use decision authorized berms and the County correctly concluded no further land use review was required.

C. Mootness (LUBA HN# 26.6)

Friends of Douglas County v. Douglas County, ___ Or LUBA ___ (LUBA No. 2012-053, January 8, 2013)

Petitioners appealed a decision by the county approving an application for a forest template dwelling, allegedly without providing proper notice and an opportunity for a hearing. After the county approved the dwelling, the applicant withdrew the application, which rendered it null and void under the county code. The county sought dismissal on the basis that a decision by LUBA on the merits of the appeal of a void decision would have no practical effect. LUBA agreed and dismissed.

LUBA noted that with limited exceptions, it will dismiss appeals if they become moot, since LUBA's review would have no practical effect. One exception is the situation where a decision is "capable of repetition yet evading review." The challenged decision did not fall within the exception, since it would be necessary to seek a new decision to approve a forest template dwelling on that particular property. That new decision could be appealed, meaning that it would not "evade review." LUBA rejected the contention that it could find the failure to give notice and an opportunity for a hearing fell into the "capable of repetition yet evading review" category, since that could be challenged during the review of the new decision.

XIV. LUBA PROCEDURES/RULES (LUBA HN# 27)

A. Perfecting an Appeal (LUBA HN# 27.2)

1. Generally (LUBA HN# 27.2.1)

Brodersen v. City of Ashland, ___ Or LUBA ___ (LUBA No. 2012-056, November 8, 2012)

Petitioner appealed a decision approving an encroachment permit to construct a private driveway in a city right-of-way. LUBA dismissed on the basis that it lacked jurisdiction because the appeal was not timely filed.

LUBA's discussion indicated a struggle to figure out which document was the city's actual decision, whether a local appeal was available, what certain recorded dates meant, and other details that were not clear from the record. LUBA reaffirmed the principle that if a party is in doubt whether a local appeal from a city decision is possible, the party should file a precautionary appeal both locally and at LUBA in order to avoid missing the jurisdictional deadline in both places.

B. Withdrawal of Decision (LUBA HN# 27.16)

State ex rel Oregon Pipeline Company, LLC v. Clatsop County, ___Or App ___ (A148770, October 24, 2012)

The five-member Clatsop County Board of Commissioners approved Oregon Pipeline Company's conditional use permit and geologic hazard permit to construct a natural gas pipeline 266 days after the applications had been deemed complete, and less than a week after a slate of three candidates that opposed the pipeline were elected (they did not take office until mid-January). Columbia Riverkeeper appealed the county's decision to LUBA. Prior to when the

record was originally due, the County requested an extension to the deadline for filing the record, explaining that additional time was needed because of the volume of the record. No parties opposed, and the deadline for submitting the record was extended. Two days prior to when the record was due, under the leadership of the newly inaugurated slate or county commissioners, the County sought permission from LUBA to withdraw its decision for reconsideration pursuant to ORS 197.830(13)(b). The applicant opposed the withdrawal, arguing that the original date that the record was due was the deadline for the purposes of a voluntary withdrawal for reconsideration, and in the alternative, questioning the motives of the County for the previous request to extend the deadline for submitting the record. In *Columbia Riverkeeper v. Clatsop County*, 63 Or LUBA 509 (2011), LUBA rejected both arguments and held that where LUBA grants an uncontested request to extend the deadline for filing the record, the extended deadline for filing the record becomes the "date set for filing the record," within the meaning of ORS 197.830(13)(b), and a local government has a unilateral right to withdraw a decision on appeal to LUBA for reconsideration prior to the record deadline.

Once the decision was back at the County, but prior to when the County issued a decision, the applicant filed a petition for a writ of mandamus in which it asked the circuit court to compel the county to approve its land use application. Applicant argued that, because the county had withdrawn its decision, the county had failed, for the purposes of ORS 215.429, to take "final action" on the application within 150 days of when the application was deemed complete. The mandamus action was filed 382 days after the application had been deemed complete.

The Court of Appeals held that the circuit court properly dismissed the mandamus petition for lack of jurisdiction. The Court reasoned that the County made a final decision when it initially approved the application. But, when the decision was appealed to LUBA, LUBA acquired exclusive jurisdiction over the decision and the county's withdrawal of the decision under ORS 197.830(13)(b) did not divest LUBA of that exclusive jurisdiction. Accordingly, when the applicant filed its mandamus petition following the county's withdrawal of the decision, jurisdiction over the decision was still exclusively with LUBA.

Stay tuned, the applicant intends to file a petition for review with the Oregon Supreme Court.

XV. LUBA SCOPE OF REVIEW (LUBA HN# 28)

A. Generally (LUBA HN# 28.1)

Clatsop Residents Against Wal-Mart v. City of Warrenton, ___ Or LUBA ___ (LUBA No. 2012-099, April 23, 2013)

LUBA remands a City decision approving a site plan and variance for a 153,000 square foot Wal-Mart store on a 17 acre parcel zoned commercial along Highway 101. The decision was made by the Planning Commission, which adopted two staff reports, as its findings. Review was declined by the City commission and the Planning Commission decision is the final City decision.

One issue common to all three assignments of error was the standard of review for interpretations of local law and the parties' disagreement about whether the staff interpretations incorporated into the planning commission decision could be properly imputed to the City

commission. Based on the decisions in *Derry v. Douglas County*, 132 Or App 386, 391, 888 P2d 588 (1995) (governing body's decision which adopts or affirms a lower body's decision entitled to deference) and *Gutoski v. Lance County*, 141 Or App 265, 268, 917 P2d 1048 (1996) (governing body's decision to decline review, without adopting or affirming lower body's decision, not entitled to deference), LUBA concluded the interpretations were not entitled to deference because the City's merely declined review as allowed by its code without expressly affirming or adopting the lower body's decision.

The merits of the appeal involve challenges to local code interpretations as to when a fill permit is required and where loading docks are prohibited as well as an inadequate findings challenge on the hardship required for a variance. LUBA remanded on all three bases.

B. Waiver of Issues (LUBA HN# 28.6)

1. Failure to Raise in Prior LUBA Appeal (LUBA HN# 28.6.1)

Hatley v. Umatilla County, ___ Or LUBA ___ (LUBA Nos. 2012-017, 2012-018 and 2012-030, October 4, 2012)

The decisions on appeal relate to the County's amendment to the code regarding wind energy facilities, and are ordinances adopted following LUBA's remand in *Cosner v. Umatilla County*, ___ Or LUBA ___ (LUBA Nos. 2011-070, 2011-071 and 2011-072, January 12, 2012). On remand, the County revised the text of the code amendments and adopted new findings, which was appealed to LUBA in *Hatley*.

The issue that is of general interest in *Hatley* is LUBA provides a detailed analysis of *Beck v. City of Tillamook*, 313 Or 148 (1992) and the waiver doctrine. LUBA rejected petitioner's argument that in order for an issue to be subject to the waiver doctrine, the issue must have been raised and resolved by LUBA. Instead, LUBA re-affirmed the 20-year line of cases following *Beck*, and explained that failure to raise an issue in the initial appeal that could have been raised precludes a party from raising that issue at a later step in the process. LUBA emphasized the policy reason for the waiver doctrine, that "time is of the essence in reaching final decisions in matters involving land use," and that the waiver doctrine avoids a situation where issues are raised piecemeal throughout the course of appellate review. ORS 197.805.

LUBA confirmed that *Beck* applies to both legislative and quasi-judicial decisions, and that the waiver doctrine applies to parties that had the opportunity to participate in the first appeal but did not, meaning parties that are new to a proceeding on remand may not raise issues that could have been raised in the initial proceeding, even though they did not participate in the initial proceeding.

APPEAL:

Hatley v. Umatilla County, 256 Or App 91, 301 P3d 920 (2013)

Rejecting petitioner's assertion that a county must comply with Goal 5 if an ordinance creates or amends a land use regulation that indirectly affects a small subset of a Goal 5 resources, the Court of Appeals upheld LUBA's finding that an ordinance's reference to "sensitive streams" does not trigger the application of Goal 5. The court looked at the county's *intent*. On remand

from LUBA, the county deleted all references to Goal 5 in the challenged ordinance. Its clearly stated intent was to protect "federally listed threatened and endangered species" and "highly erodible soils," neither of which are Goal 5 resources.

The Court of Appeals reversed LUBA's determination that petitioner had waived his argument that a two-mile setback provision in an ordinance was preempted by state statutes regarding renewable energy. LUBA relied on the "invited error" and "law of the case" doctrines. Under the "invited error" doctrine, a party who was actively instrumental in bringing about an alleged error cannot be heard to complain. In this case, after petitioner objected to the setback requirement, the county adopted an absolute standard. The court reasoned that because the county could have chosen different approaches to remand, petitioner was not barred from challenging the approach the county did take.

For three reasons, the court rejected LUBA's conclusion that the "law of the case" doctrine stated in *Beck* applies to legislative decisions. First, the ordinance appealed in this case is not the same as in the case LUBA remanded. Second, by virtue of the statement in ORS 197.835(11) of LUBA's scope of review, the parties to quasi-judicial or limited land use proceedings may only raise new, unresolved issues that relate to the basis of LUBA's remand. There is no equivalent statute that limits legislative proceedings on remand. Third, the motivation behind *Beck* is to avoid redundant proceedings and move things forward as quickly as possible. When LUBA remands a quasi-judicial decision, the issues narrow. The "law of the case" doctrine promotes finality with respect to a particular decision. In the legislative process, by contrast, the local government has a broad scope of authority on remand; it may adopt new ordinances or choose not to adopt any ordinance.

C. Grounds for Reversal/Remand (LUBA HN# 28.8)

1. Noncompliance with Applicable Law (LUBA HN# 28.8.5)

ODFW v. Klamath County, ___ Or LUBA ___ (LUBA No. 2012-037, August 13, 2012)

LUBA reverses the County decision approving a partition of a 40 acre parcel in the Non-Resource (NR) zone into two 20 acre parcels finding it is prohibited as a matter of law. The minimum lot size in the NR zone is 20 acres, however, the property is also within the County's deer winter range, which has a minimum lot size of 80 acres. The County planning department originally denied the partition due to the minimum lot size restriction in the deer winter range but the County Board of Commissioners reversed that decision and approved the partition reasoning that a condition restricting the number of dwellings to the same number as would have been allowed prior to the partition maintained the same density and therefore met the intent of the winter range overlay zone. LUBA disagreed finding the number of dwellings to be irrelevant in the parcel size determination and further finding that the County failed to address the minimum parcel size and the criterion requiring compliance with it. Concluding the partition was prohibited as a matter of law, LUBA declined to address the remaining assignment of error related to noncompliance with various comprehensive plan provisions.

Willamette Oaks v. City of Eugene, ___ Or LUBA ___ (LUBA No. 2012-064, January 17, 2013)

This is one in a long line of related appeals resulting from the multi-stage development proposal for a planned unit development that will include ten apartment buildings, one assisted living/age restricted building, one commercial building, two club houses, open space and associated infrastructure on its 23-acre property adjacent to petitioner's retirement living facility. LUBA remanded in response to one assignment of error.

The basis for the remand was that the city hearings officer failed to interpret and apply properly a Eugene Code (EC) provision involving public health and safety standards. The property has loose, organic rich soils that could pose significant safety risks. Although the developer proposed mitigation for the proposed buildings, it did not do so for roads, sewers and electrical and water lines. The EC provision could be interpreted to require mitigation throughout the property regardless of proposed use, and if that is the proper interpretation, the developer has failed to comply.

2. Unsupported by Substantial Evidence (LUBA HN# 28.8.7)

Teen Challenge International Pacific Northwest Centers v. Lane County, ___ Or LUBA ___ (LUBA No. 2012-088, May 7, 2013)

[*Also relates to LUBA HN# 28.9*]

Petitioner appealed a county hearings officer's decision denying its application for a special use permit to operate a group care home (Hannah's House).

In its assignments of error, petitioner took on the almost impossible task of (1) overcoming a denial, and (2) persuading LUBA that the findings of the hearings officer were not supported by substantial evidence in the whole record. Most of LUBA's opinion was a thorough examination of the evidence, followed by a decision to defer to the evidence evaluation of the hearings officer.

To obtain a special use permit to operate a proposed group home and to avoid having to obtain a Water Pollution Control System (WPCS) permit from the Oregon Department of Environmental Quality (DEQ), the applicant had to show that the waste water from Hannah's House would not exceed "residential strength." In concluding petitioner had not carried its burden of proof, the hearings officer noted that while petitioner's expert testified Hannah's House would not produce excessive waste water, he also testified no one can know for sure whether that is the case until the facility is expanded and in operation. The opponent's expert testified the waste water would exceed residential strength based on evidence from a similar facility, which he could not identify. Although questioning the strength of the opponent's testimony, the hearings officer took the position that the most reliable way to establish that Hannah's House would produce residential strength waste water would be to obtain samples from a facility of similar size and operating characteristics. Additional evidence involved samples taken from Hannah's House, but there were technical questions surrounding the samples. Still more evidence concerned the "Orenco AdvanTex pretreatment system," which would be required if a new drainfield were to be constructed on the Hannah's House property.

Petitioner's first argued that it was established in earlier appeals that petitioner could make its case by providing either effluent data from Hannah's House or from a similar facility elsewhere. Petitioner maintained that the hearings officer mistakenly demanded data from a similar facility. LUBA rejected petitioner's account of what happened, stating that the hearings officer found that the evidence that petitioner submitted was not sufficient to carry its burden of proof. In addition, after summarizing the "law of the case" principles as they are relevant in LUBA proceedings, LUBA concluded the holdings in earlier appeals did not preclude the hearings officer's approach to the evidence. LUBA also rejected petitioner's efforts to assert the equitable doctrine of judicial estoppel, under which a party may be precluded from taking a position in one judicial proceeding that is inconsistent with the position that the same party successfully asserted in a different judicial proceeding.

Oregon Constitution, Article II, section 1 prevents an officer in one branch of government from exercising power constitutionally assigned to a different branch. Petitioner's second argument was that the county sanitarian acts on behalf of DEQ, which is an agency of the executive branch, and the hearings officer acts in a quasi-judicial capacity and is, therefore, a member of the judicial branch. Petitioner argued that the hearings officer – supposedly exercising the powers assigned to the sanitarian – cannot make a finding that contradicts the views of the sanitarian without violating the Oregon Constitution. LUBA called the argument "without merit."

3. Other (LUBA HN# 28.8.9)

Dexter Lost Valley Community Association v. Lane County, ___ Or LUBA ___ (LUBA No. 2012-044, October 16, 2012)

LUBA grants a voluntary remand of a County decision which authorizes construction of a bridge in a forest zone. This matter is related to alternative access for the aggregate mining proposal in *Lost Creek Products v. Lane County*, ___ Or LUBA ___ (LUBA No. 2012-075, February 6, 2013) involving site plan approval for an aggregate mining operation. Petitioner objected to the voluntary remand requested by the County on the basis that once the record was filed it was too late to withdraw the challenged decision. LUBA noted the distinction between a unilateral right to withdraw a decision for reconsideration under ORS 197.830(13)(b) which must be granted if timely filed from the right to move for voluntary remand, which is conditional, and only granted if the local government agrees to consider all of the issues raised in the petition for review. In declining to overrule *Mulholland v. City of Roseburg*, 24 Or LUBA 240, 241 (1992), LUBA found no evidence the County's request was designed to wear petition out or for any other reason than to adopt a defensible response to the issues raised in the petition for review.

XVI. COMPREHENSIVE PLANS (LUBA HN# 29)

A. Amendment (LUBA HN# 29.2)

1. Generally (LUBA HN# 29.2.1)

Devin Oil Co. v. Morrow County, ___ Or LUBA ___ (LUBA No. 2011-107, March 7, 2012)

This case came to LUBA on remand from the Court of Appeals. Petitioner appealed two county decisions that approved comprehensive plan text and map amendments, a zone map amendment and a conditional use permit for a travel center. LUBA affirmed.

The first assignment of error concerned the application of Morrow County Zoning Ordinance (MCZO) 3.110(A), which sets out three criteria. The county uses a Limited Use (LU) overlay zone to limit uses permitted in an existing zone in order to bring the uses into conformance with an exception taken to Goals 3 and 14. If there is an existing zone that accomplishes the same thing, then there is no need for the LU zone overlay to be applied. LUBA rejected a series of arguments made by petitioner to the effect that the county has misapplied MCZO 3.110(A) by applying the LU zone incorrectly and by choosing the Tourist Commercial (TC) zone as the base zone, when another zone would have been better suited for the proposed travel center.

In the second assignment of error, petitioner challenged a condition that was imposed by the county prior to the first appeal to LUBA and then not appealed. LUBA did not consider the challenge, reasoning, notwithstanding the protests of petitioner, that the challenge was waived under the law of the case doctrine described in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

Petitioner's third assignment of error was fundamentally an evidentiary challenge. One interesting side issue was whether the MCZO, like the Transportation Planning Rule, requires consideration of traffic that might be generated by a development that has been permitted but not developed. The county contended it does not, and LUBA agreed.

APPEAL:

Devin Oil Co. v. Morrow County, 252 Or App 101, 286 P3d 925 (Or Ct App 2012)

The Court of Appeals affirmed LUBA's opinion. The court rejected petitioner's argument that the county erred when it interpreted MCZO 3.110(A)(3) to require consideration of all applicable statewide planning goal requirements, including Goal 12, not merely Goals 3 and 14, for which a reasons exception had been taken. The court noted that the county specifically relied on the requirement in OAR 660-004-0018(1), which is part of the "exception" rule, that "[e]xception[s] to one goal or a portion of one goal do not relieve a jurisdiction from remaining goal requirements and do not authorize uses, densities, public facilities and services, or activities other than those recognized or justified by the applicable exception." The court observed further that petitioner had changed positions on the issue between its first appeal to LUBA and the present appeal.

Petitioner argued next that the evidence in the record compelled the conclusion that the developer could comply with Goal 12 and the TPR by making the transportation improvements

identified by its traffic engineer. According to petitioner, if that were possible, it would not be necessary to apply the LU overlay zone. The court noted that MCZO 3.110(A)(3) is concerned with whether the LU overlay zone is required by the exception rule to "limit the uses permitted in the proposed zone." Making transportation improvements in an unrestricted TC zone would not accomplish that objective.

What was a condition of approval in the county's original decision ("This zone change is conditioned to allow only the construction of a travel center or other use of similar density, configuration and type") became a statement of the scope of the LU overlay in the county's decision on remand ("This Limited Use overlay authorizes only the construction of a travel center or other use of similar density, configuration or type.") Petitioner argued that the law of the case principle in *Beck* did not preclude an appeal of an LU overlay limitation identical to the earlier condition that was not appealed, because LUBA's first opinion required the county to "invalidate the zone change condition" (petitioner's words) and place the limitation in the LU overlay. The court held that there was no doubt that the adequacy of the limitation could have been challenged in the first appeal and commented that the fact that the same limitation was applied through a different mechanism does not alter the analysis.

B. Applicability (LUBA HN# 29.3)

1. As Decision Criteria (LUBA HN# 29.3.2)

Cassidy v. City of Glendale, ___ Or LUBA ___ (LUBA No. 2012-033, October 10, 2012)

LUBA affirms a City legislative decision amending the City's zoning ordinance to eliminate multi-family housing as a permitted use in the commercial zone. Petitioners argued the ordinance was so unclear and flawed as to require reversal or remand. LUBA acknowledged the ordinance was poorly drafted but disagreed it required reversal or remand. Rejecting petitioner's claims that the title and legislative history could not be used to clarify the City's intent, LUBA disagreed and found the text, including the title (relying on *Goose Hollow Foothills League v. City of Portland*, 616 Or App 920, 925 n. 5, 676 P2d 897 (1984) (titles may have value in determining legislative intent) and the legislative history (relying on *Stare v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (LUBA is free to consider any legislative history it considers useful) all support the City's position that the ordinance was intended and should be interpreted to remove multi-family housing as a permitted use in the commercial zone.

LUBA likewise rejected petitioner's argument that the ordinance was not consistent with the City's comprehensive plan and that the City's findings of consistency were inadequate. Relying on comprehensive plan elements (more general issue identification sections), petitioners argued the plan language identifying the need for multi-family housing was not adequately addressed in the findings and in fact was violated by this ordinance because the elimination of multi-family housing in the commercial zone resulted in the elimination of this use as an outright permitted use in any zone. The only zone where multi-family housing remained an allowed use was as a conditional use in the residential zone. LUBA agreed with the City that detailed findings are not needed for legislative decisions and that the elements sections upon which petitioners rely were not mandatory or regulatory parts of the comprehensive plan.

Friends of the Hood River Waterfront v. City of Hood River, ___ Or LUBA ___ (LUBA No. 2012-050, March 13, 2013)

[*Also relates to LUBA HN# 25.3.4*]

Petitioners appealed a city council decision that affirmed a planning commission decision granting conditional use and preliminary site plan approval for (1) a 45,000 square foot, four-story, 88-room hotel, (2) a 20,000 square foot, two-story office building, and (3) parking for both the hotel and office building. LUBA remanded.

Many of petitioner's challenges arose from city comprehensive plan provisions addressing flooding and water quality that petitioner contends are mandatory approval criteria. The city found that these standards have been implemented legislatively through the zoning ordinance and other development standards. The city distinguished between the use of the word "consistency" and the word "compliance," finding that the former is less exacting than the latter. LUBA disagreed, pointing out that while "consistency" is used in the zoning ordinance, "compliance" is used in ORS 197.175(2)(d). LUBA decided that both requirements apply.

LUBA discussed the difficulty that frequently attends an effort to clarify the role comprehensive plan provisions play as approval standards. LUBA observed that in practice, comprehensive plans and land use regulations rarely exclude the comprehensive plan as a potential source of approval criteria for permit decisions and, in fact, often suggest the plan does contain applicable provisions. LUBA concluded that the statement in the zoning ordinance that a proposed conditional use "shall be consistent with the Comprehensive Plan" means the comprehensive plan criteria apply in at least some circumstances. The city's interpretation that comprehensive plan criteria apply only when they contain mandatory language is consistent with many LUBA decisions that have considered the issue.

LUBA quoted at length from *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 209-10 (2004), which contains a comprehensive discussion of comprehensive plan provisions as approval criteria. Focusing on certain comprehensive plan provisions in the city's Goal 7, LUBA noted that the city's findings appeared to address Statewide Planning Goal 7, but not the city's Goal 7. Unfortunately, the petition for review also failed to address the city's Goal 7 provisions and made almost no effort to explain why their language makes them mandatory approval criteria. LUBA decided that on remand the city must directly address the question of whether the Goal 7 provisions viewed in context are mandatory approval criteria or considerations.

LUBA's opinion contains a detailed discussion of ORS 197.763(6)(a), which gives any participant the chance to request, prior to the conclusion of the initial evidentiary hearing, an opportunity to present additional evidence, arguments or testimony regarding the application. If the request is made, the local hearings authority must either continue the public hearing or leave the record open. In this case, the city held the record open for seven days, and the applicant submitted three new documents. Petitioners requested an opportunity to respond pursuant to ORS 197.763(6)(c), which states that if a participant files a written request for an opportunity to respond to new evidence submitted during the period the record was left open, the hearings authority *shall reopen the record* pursuant to ORS 197.763(7). The city denied the request on the premise that ORS 197.763(6)(c) does not give the opponents "an endless unilateral opportunity to submit new evidence during an open record period and then demand additional

opportunities to 'respond' to the evidence they submitted during the previous open record period."

While agreeing with the city's premise, LUBA concluded that an "endless" opportunity was not at issue. The city was effectively substituting the more restrictive term "rebut," found in ORS 197.763(6)(b), for "respond," which is used in ORS 197.763(6)(c) and (7). LUBA pointed out that the words are used in different subsections of the same statutes and presumably do not mean the same thing. Consequently, LUBA held that the new evidence to which a party has a right to respond under ORS 197.763(6)(c) and (7) cannot be limited to the evidence that the decision maker believes are adverse to that party. Before rejecting evidence submitted following the seven-day period that the record is held open, the city must at least examine the evidence to determine if it "responds" to evidence submitted during the seven-day period.

XVII. ZONING ORDINANCES (LUBA HN# 30)

A. Amendment (LUBA HN# 30.2)

1. Map Amendment: Standards (LUBA HN# 30.2.5)

Save Downtown Canby v. City of Canby, ___ Or LUBA ___ (LUBA No. 2012-097, June 4, 2013)

LUBA remands a City ordinance approving a text and zoning map amendment from one commercial zone to another to facilitate approval of a six unit fuel station at an existing Fred Meyer store.

LUBA denied a motion to dismiss on the basis the ordinance was not a final decision because the consolidated applications of the text and map amendment and of site design had been separated and site design was not yet final. Noting the consolidation procedures at ORS 227.175(2) are at the option of the applicant and the applicant consented to the separation of the applications at the Planning Commission level, LUBA found nothing in the statute to suggest an otherwise final decision would not be final until all consolidated applications were finally decided.

LUBA remanded for failure to address the impacts to the Transportation Planning Rule (TPR) because even though the two zones allow the exact same uses, LUBA found the design standards in the old zone contain much smaller maximum building footprint size and were designed to foster smaller scale commercial uses compared to the standards in the new zone which foster larger-scale commercial uses. LUBA also remanded based on inadequate findings addressing the impact on a future pedestrian crossing identified in the City's TSP.

XVIII. PERMITS (LUBA HN# 31)

A. Approval Standards (LUBA HN# 31.1)

1. Use of Conditions (LUBA HN# 31.1.4)

Conte v. City of Eugene, ___ Or LUBA ___ (LUBA No. 2012-039, October 11, 2013)

LUBA remands a City ordinance approving vacation of a right of way. The portion of the right of way at issue functions as an alley and is heavily used by bicycles and pedestrians traveling east-west. The vacation was sought to facilitate construction of a 230 unit apartment building,

with 725 bedrooms intended for student housing. The project is the same one at issue in *Conte v. City of Eugene*, ____ Or LUBA ___ (LUBA No. 2012-041, August 14, 2012, review pending CA152352) where the City approved a property tax exemption of the development and LUBA dismissed the appeal for lack of jurisdiction.

LUBA first ruled it had jurisdiction over the vacation decision, distinguishing *Bohrenkemp v. Clackamas County*, 56 Or LUBA 17 (2008), because the City's vacation standards were codified in the City's land use code and processed as land use decisions. LUBA rejected petitioner's procedural arguments that withdrawal of a portion of the vacation request constituted new evidence, but nevertheless remanded because petitioner had a right to present new evidence to respond to the withdrawal but was prevented from doing so. Much of the decision focuses on whether the City was required to impose a condition requiring the dedication and construction of a new bicycle and pedestrian pathway to replace the existing alley. The City concluded the vacation met the public interest standard based largely on the fact that the applicant proposed to dedicate and construct the pathway but the decision did not contain an express condition requiring it. LUBA distinguished *Neste Resins Corp v. City of Eugene*, 23 Or LUBA 55, 67 (1992) (cannot rely on non-binding expressions of intent from the applicant to ensure compliance with approval standards) and *Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008) (applicant's statement of intent to limit housing to elderly to reduce traffic impacts and avoid needed mitigation is insufficient) to conclude the City did not merely rely on the applicant's unsupported assurances but rather several independent measures to ensure the replacement path would be developed. Those measures included: 1) the tax exemption approval for the project required dedication and construction of the pathway and the City's vacation decision contained an unchallenged finding that the tax exemption decision was essential to the development; 2) the vacation ordinance was expressly effective only upon building approval for the proposed development; and 3) the ordinance contains a finding that the applicant will dedicate and improve the path, demonstrating the City views the path as an essential element of the development and would not approve a building permit without it. In that context, LUBA concluded the City adopted adequate measures to ensure the replacement path would be developed and an express condition of approval was not necessary.

B. Types (LUBA HN# 31.2)

1. Other (LUBA HN# 31.2.4)

Willamette Oaks v. City of Eugene, ___ Or LUBA ___ (LUBA No. 2012-081, January 22, 2013)

[*Also relates to LUBA HN# 34*]

Petitioner appealed a city hearings officer's denial of its request for a sign permit. LUBA remanded.

In 1986 petitioner was granted a sign permit and variance to locate a sign of greater size than otherwise permissible under the Eugene Code (EC) on property that belonged to the Sisters of St. Joseph. Goodpasture Partners, LLC (intervenor) now owns the property. The sign was constructed, but it was subsequently removed at the city's prompting because it was located in a street right of way. Petitioner then sought a sign permit in order to install a replacement sign at the location approved by the 1986 sign permit and variance.

Petitioner contended it has an irrevocable license or a right through adverse possession to site the disputed sign on intervenor's property. Intervenor disagreed. Petitioner's contention has not been adjudicated in circuit court. Under the EC, it is possible for a non-property owner to apply for a land use approval. Petitioner sought a sign permit before ascertaining whether it actually had the property right to locate the sign on intervenor's property over intervenor's objection. LUBA concluded, therefore, that it does not matter for the purposes of a land use application whether the owner of the property opposes the application. Granting the disputed sign permit would not have any effects on the rights of the record property owner. It would mean only that the city believed that the application complies with all relevant sign permit approval standards.

The hearings offer found that a change in facts since 1986 – the property on which the sign would be located is no longer part of a common development site – means that the sign can never exist. LUBA disagreed with this conclusion and the underlying rationale, determining that nothing in the EC supports the notion that a change in the facts that justified the variance in 1986 necessarily means that the 1986 variance is now legally ineffective.

The hearings officer found that petitioner was required to show that a new sign could not be constructed in full compliance with the current city code. LUBA disagreed, saying the hearings officer did not cite anything in the EC that would require an applicant that seeks to construct a sign of a size that was approved in a 1986 variance first demonstrate that it is not possible to construct a sign that complies with current standards.

C. Particular Uses (LUBA HN# 31.3)

1. Mineral and Aggregate (LUBA HN# 31.3.4)

Lost Creek Products v. Lane County,___ Or LUBA ___ (LUBA No. 2012-075, February 6, 2013)

LUBA remands hearings officer site review approval for an aggregate mining operation approximately 20 miles southeast of the cities of Eugene and Springfield on State Highway 58. Both the applicant, Lost Creek and the opponent, Dexter Lost Valley Community Association (DLVCA) appeal the decision and the appeals were consolidated at LUBA.

The parties have different views about whether the current mining on the subject property requires site review and, if site review is required, the scope of that required site review. In addition to the present consolidated appeal, that dispute has led to two other appeals.

First, the County enforcement appeal, LUBA No. 2012-031, arose out of a County enforcement process where the County took the position site review was required to operate the mine. The hearings officer initially agreed with Lost Creek and dismissed the Notice of Failure to Comply, concluding that Lost Creek's mining operation does not require site review. But the hearings official subsequently reconsidered that initial decision concluding that a portion of Lost Creek's mining operation that occurs within the 200-foot setback does require site review and that Lost Creek's failure to secure that site review approval has resulted in a violation of the Lane County Code. The County disagreed with aspects of its hearings official's decision on reconsideration and appealed to LUBA. That appeal is LUBA No. 2012-031. Lost Creek also disagreed with the hearings official's decision on reconsideration and filed a writ of review in Lane County Circuit

Court to challenge the hearings official's decision. With the writ of review proceeding and the application for site plan review pending, LUBA determined that it should not proceed with the County's appeal of the hearings official's decision on reconsideration, because the pending decision on the site review application might render that appeal moot and, further contemporaneous challenges in LUBA and Lane County Circuit Court would present jurisdictional questions and could result in inconsistent rulings by LUBA and the Lane County Circuit Court. Over DLVCA's objection, LUBA issued an order suspending the County's LUBA appeal challenging the hearings official's enforcement action decision. *Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No. 2012-131, Order Suspending Appeal, July 11, 2012).

The second separate but related appeal involves an attempt to obtain alternate access by building a bridge, which required a riparian modification and flood plain development permit. Those applications were approved and appealed in LUBA No. 2012-044, which was voluntarily remanded over DLVCA's objection.

In the present appeal, one aspect of the dispute centered on whether truck traffic on the public road traversing the property was part of the mining use. The hearings officer ruled that it was and that site review as required for it. In the absence of a local governing body interpretation which would have been entitled to deference, LUBA correctly framed the interpretive question as whether the hearings officer's view is legally correct. Viewed in context and relying on the principles if not the holding in *Wilson v. Washington County*, 63 Or LUBA 314 (2011), LUBA concluded the hearings officer was incorrect.

Wilson simply stands for the proposition that a driveway that is located on the same lot or parcel as the use that it serves, or is located on other private property rather than a public right-of-way, is properly viewed as part of the use. In that circumstance the driveway is necessary to provide access to a public right-of-way and properly viewed as part of the use. *Wilson*, 63 Or LUBA at 318-19 (citing *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984) and *Roth v. Jackson County*, 38 Or LUBA 894 (2000)). By contrast, existing or extended public rights-of-way that provide access to the property or properties where a use is to be developed are not properly viewed as part of the use. *Wilson*, 63 Or LUBA at 318 (citing *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008)). LUBA recognized those cases concern whether the driveways or rights-of-ways were properly zoned for the proposed use, but found the principle at issue here to be quite similar, *i.e.*, whether the driveway or right-of-way (or more precisely the truck traffic on that driveway or right-of-way) must be viewed as part of the use and thus subject to site review. Applying the principles described in *Wilson*, LUBA concluded that truck traffic is a part of the mining use only until it enters the public roadway but at the point "it crosses onto the first public roadway that connects the property to the larger public road system" it ceases to be a part of the mining use and no longer subject to the zoning in which that public roadway is located.

LUBA rejected the remaining assignments of error, all of which related to application of the site review criteria, which LUBA found was not required.

Kerns Neighbors for Rational Growth v. City of Portland, ___ Or LUBA ___ (LUBA No. 2012-085, February 26, 2013)

LUBA affirms City issuance of a building permit for a 50 unit, four-story apartment building. This appeal has many similarities with *Richmond Neighbors v. City of Portland* (LUBA No. 2012-061, February 20, 2013). LUBA ruled the building permits issued in both cases were land use decisions because they required the exercise of discretion but rejected identical arguments in both appeals that the building permits were "statutory permits" under ORS 227.175 requiring notice and an opportunity for a *de novo* hearing. LUBA clarified its decision in *Tiramali v. City of Portland*, 41 Or LUBA 231, 240 *aff'd* 180 Or App 613, 45 P3d 519 (2002) to stand for the question of whether a decision that applies ambiguous land use regulations constitutes a statutory permit under our reasoning in *Tirumali* turns on whether the ambiguity concerns the nature of the proposed use or whether the use is among the uses that are identified as permitted. If it does, then the decision is correctly viewed as a statutory permit, notwithstanding that the applicable comprehensive plan and land use regulations treat it as a ministerial decision that requires neither a public hearing nor notice and an opportunity for a *de novo* local appeal.

Because there was no dispute the use was allowed outright, the building permit was not a statutory permit despite the exercise of discretion and the conclusion it was a land use permit. LUBA rejected all petitioner's arguments that the City erred in issuing the permit and affirmed the City decision.

2. Power Generators (LUBA HN# 31.3.6)

Iberdrola Renewables, LLC v. Umatilla County / Hatley v. Umatilla County, *___ Or LUBA ___ (LUBA Nos. 2012-082, 2012-083, February 28, 2013)*

LUBA remands, for the second time, County ordinances amending the County land use regulations to establish conditional use standards and approval criteria for siting wind energy facilities. The ordinances required a facility to be set back two miles from a rural residence unless the residential landowner recorded a waiver for a lesser setback to be determined at the landowner's sole discretion. The County would then apply the agreed-upon setback in its conditional use review of a proposed wind energy facility. On appeal, LUBA held the County's ordinances constituted an unlawful delegation of the County's legislative authority and violated the Delegation Clause of Article I, Section 21 of the Oregon Constitution because it allowed a rural residential owner, rather than the County board, to establish a reduced setback. *Cosner v. Umatilla County*, LUBA Nos. 2011-070, 2011-071, 2011-072 (January 12, 2012).

On remand, the County adopted ordinances deleting the constitutionally impermissible waiver provision and amending its development ordinance to allow a wind facility applicant to apply for an adjustment (variance) to the two-mile setback. The amended ordinance included a requirement that the rural residential owner involved in the adjusted setback must sign an adjustment application. On appeal to LUBA, the petitioner in *Iberdrola* argued the County once again violated Article I, Section 21 by effectively giving the affected residential owner the ability to veto an adjustment application by refusing to sign it. Although the County argued the ordinance did not allow the residential owner the ability to approve or deny adjustment, it conceded the County would not process an adjustment application without the affected

residential owner's signature. LUBA agreed with the petitioner that this amounted to giving the affected owner a constitutionally impermissible veto power over the adjustment application and violated Article I, Section 21 of the Oregon Constitution.

Petitioner also argued that a section of the County's ordinance was preempted by statutes governing the Energy Facility Siting Council's (EFSC) approval of a site certificate for wind energy facilities as prescribed by ORS 469.300 *et seq.* The challenged section purported to bind EFSC as to the substantive local criteria that must be used in EFSC's review and issuance of a site certificate and included the setback adjustment criteria among the binding local criteria. LUBA sided with the petitioner, ruling that ORS 469.504 gives EFSC the authority to determine which local criteria are the "applicable substantive criteria" and whether the proposed facility complies with these criteria.

Given the ordinance's inconsistency with both the Oregon Constitution and state law, LUBA remanded the County's decision.

3. Transmission Towers (LUBA HN# 31.3.8)

Hill v. City of Portland, ___ Or LUBA ___ (LUBA No. 2012-036, September 20, 2012)

Petitioner appealed a city council decision granting a conditional use permit to construct a 45-foot tall monopole tower. LUBA affirmed.

The arguments were tightly focused on two provisions of Portland City Code (PCC) 33.815.225 that contain approval criteria for Radio Frequency Transmission Facilities. PCC 33.815.225(C) sets out the approval criteria for "facilities operating at 1,000 watts [Effective Radiated Power] ERP or less * * *." The approval criteria for "all other Radio Frequency Transmission Facilities" are set out at PCC 33.815.225(D). A key issue in this appeal was whether PCC 9 33.815.225(C) or (D) applied to the application. After the city hearings officer denied the application on the basis that intervenor had not demonstrated that its proposed monopole tower was a "facility operating at 1000 watts ERP or less" under PCC 4 33.815.225(c), intervenor appealed the decision to the city council.

The PCC does not define "facility," and the PCC 33.810 definition of ERP does not resolve the ambiguity regarding how to calculate power for the purpose of applying PCC 33.815.225(C). After consulting its own legislative history (over the objections of the petitioner), the city council concluded that the city enacted PCC 33.815.225(C) in order to treat wireless facilities consistently with FCC emission thresholds for wireless facilities that had recently been enacted, which calculate emissions on a per transmitter basis. Each tower supports a number of antennae, and each antenna supports several transmitters. Because FCC emission thresholds are calculated per "transmitter" or "channel" and not per antenna or tower, the City Council concluded that even though the aggregate of transmitters might exceed the code standard, none of the transmitters did. Applying *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), LUBA concluded the city's conclusion was "plausible" and should be upheld.

Petitioner made several substantial evidence-related assignments of error and findings challenges, which LUBA denied.

4. Home Occupations (LUBA HN# 31.3.10)

Green v. Douglas County, ___ Or LUBA ___ (LUBA No. 2012-092, April 9, 2013)

LUBA affirms County amendments to a previously issued home occupation permit to conduct weddings, receptions, bridal showers, etc., on EFU property. This case is the subject of numerous appeals in *Green v. Douglas County*, 63 Or LUBA No. 200 (2001) (Green I) and *Green v. Douglas* County, 245 Or App 430, 263 P3d 355 (2011) (Green II) and finally *Green v. Douglas County*, LUBA No. 2010-106, November 23, 2011. In the present matter, the County was addressing the issues of whether the permit was in compliance with state and local law by requiring the use to be conducted "substantially" within buildings on the property and requiring no more than 5 employees on site.

LUBA first established the standard of review, using the *Siporen* deferential standard for interpretations of local law because the County Board, in declining review of the Planning Commission's decision, had "adopted it as its own." Interpretations of state law and local law implementing state law were not entitled to *Siporen* deference. LUBA found the County's reliance on affidavit testimony from the applicant, a staff memo describing the use and a modified condition of approval limiting not more than 20% of any single event to occur outside a qualifying building to be sufficient to establish compliance with ORS 215.448 and local implementing law. LUBA likewise found the Planning Commission's interpretation of the 5 employee limit in ORS 215.448(1)(b) more consistent with the statutory language than the interpretation urged by petitioner (PC interpreted it to mean no more than 5 on site at any one time; petitioner urged it to mean no more than 5 employees each day). Finally LUBA deferred to the Planning Commission's interpretation of its local ordinance requiring rectification of past code violations.

5. Destination Resorts (LUBA HN# 31.3.12)

Central Oregon LandWatch v. Deschutes County, ___ Or LUBA ___ (LUBA Nos. 2011-115/116, September 6, 2012)

[*Also relates to LUBA HN# 16 and 45.1*]

Petitioner appealed comprehensive plan amendments to the county's map of lands eligible for siting a destination resort and corresponding zoning map amendments. In implementing new destination resort map amendment criteria and procedures, the county removed 91,701 acres from eligibility, continued eligibility for 20,747 acres, and added three new eligible sites totaling 1,255 acres. The appeal concerned the new eligible sites. LUBA affirmed.

ORS 197.455 addresses mapping land as eligible for destination resort siting. Only mapped land can be the subject of a destination resort application pursuant to ORS 197.445. As part of its comprehensive plan, a county must adopt a map of eligible land, which cannot include land in the six categories listed in ORS 197.455(1). Three of the exclusions are not absolute; they contain "unless" clauses, which indicate the land is ineligible *unless* a stated requirement is met.

Both of the two assignments of error focused on what issues must be resolved prior to mapping a site as eligible and what issues can be resolved later, if certain safeguards are in place to assure ultimate compliance with the applicable standards. Petitioner was apparently concerned that if

the sites were mapped as eligible and not all of the applicable criteria were fully met then, there might be an end-run at the time of the destination resort application.

The first assignment of error concerned the application of ORS 197.455(1)(f), which excludes from destination resort eligibility any site "in which the lands are predominantly classified as being in Fire Regime Condition Class 3, *unless* the county approves a wildfire protection plan that demonstrates the site can be developed without being at a high overall risk of fire." Each of the three sites is in an area classified as Fire Regime Condition Class 3, and each area is subject to a wildfire protection plan. The county found ORS 197.455(1)(f) to be met for that reason, but also required, as a first condition of approval, that each site to be developed to "FireWise" standards similar to those in other recent resorts. The county required, as a second condition of approval, that if, at the time of resort development, information were presented that the relevant Wildfire Plan and FireWise standards are insufficient to prevent a high overall risk of fire, the county would have to adopt an alternate wildfire protection plan demonstrating that each of the three properties can be developed without being at a high overall risk of fire.

Petitioner objected that because at least one of the wildfire protection plans was adopted prior to the 2010 statutory amendment that added ORS 197.455(1)(f), the plans do not satisfy the statutory requirement. Petitioner objected further that because the plans do not specifically address destination resorts and the three sites in question, and because they contain recommendations rather than "standards," they are insufficient to satisfy the statute. The real issue, however, was how to resolve the apparent tension between the statement in ORS 197.455(2) that the eligibility map "shall be the sole basis for determining whether tracts of land are eligible for destination resort siting" and the three criteria in ORS 197.455(1) containing "unless" clauses, which appear to open the door to a subsequent determination of eligibility. LUBA concluded that because the "unless" clauses can most practicably be fulfilled at the resort siting stage rather than at the mapping stage, the county's approach – mapping a site as eligible while imposing conditions that assure the "unless" clauses are met – was appropriate.

The second assignment of error concerned the Transportation Planning Rule (TPR), OAR 660-012-0060. After concluding that development of destination resorts on each of the three sites would "significantly affect" one or more nearby transportation facilities by causing them to fail during the planning period, the county imposed a condition that prohibited approval of a resort until the identified transportation improvements specific to the resort site were in place. The county also required the applicant for resort approval to submit a new traffic study and to construct any improvements identified by that study as necessary to satisfy the TPR. Finally, the county required any applicant to comply with ORS 197.460(4), which requires a traffic impact analysis. Petitioner objected that deferring actual compliance through a condition is inconsistent with OAR 660-012-0060(2)(a), and that measures that demonstrate land uses "are consistent with the planned function, capacity, and performance standards of the transportation facility" must be adopted at the time the sites are mapped as eligible. Petitioner also argued that the county cannot rely on ORS 197.460(4) to show compliance with the TPR. LUBA disagreed, finding that the conditions imposed by the county are sufficient to satisfy the rule and that the county supplemented, but did not displace, the TPR with the ORS 197.460(4) standards.

OAR 660-012-0060(2)(a) requires the county, when it is making comprehensive plan amendments, to "adopt measures that demonstrate allowed land uses are consistent with the

planned function, capacity, and performance standards of the transportation facility." Petitioner argued "adopt" means more than requiring an improvement be in place, it means requiring a finding that (1) the road authority for that facility (the state) has accepted the proposed improvement and (2) the funding is feasible. LUBA disagreed, because the development cannot in fact occur unless both are true.

XIX. VESTED RIGHTS (LUBA HN# 37)

Crosley v. Columbia County, ___ Or LUBA ___ (LUBA No. 2011-093, April 11, 2012)

[*Also relates to LUBA HN# 26.11 and 48.1*]

LUBA affirms the County's decision approving petitioner's dwelling subject to conditions requiring relocation and which essentially results in petitioner losing any vested rights he may have had to complete construction of a residence in a specific location because construction was interrupted for more than a year. Petitioner constructed a septic system in 1978 pursuant to a DEQ septic permit and began a foundation for his dwelling in 1979, pursuant to a County building permit. Beginning in 2009, petitioner framed and mostly completed construction of the dwelling. In the thirty year interim, the County adopted comprehensive plan and zoning regulations, including riparian corridor, big game and flood hazard overlays. The location of the dwelling approved in the 1979 building permit was in the setbacks for all of these overlay zones.

LUBA first discusses whether it has jurisdiction to hear this matter, under ORS 195.318(1) as a dwelling authorized under Ballot Measure 49 and therefore not a land use decision over which LUBA has jurisdiction. Based on briefing of the parties, LUBA distinguishes between a vested rights determination under Measure 49, over which it lacks jurisdiction, and a vested rights determination under the principles of *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973) to complete the dwelling in the location authorized by his 1979 building permit. At the urging of both petitioner and Respondent, LUBA concludes this is the latter over which it does have jurisdiction.

LUBA then framed the question in this case as whether the nonconforming use principles of the one/two year period for "abandonment, interruption" or similar limiting principles also apply to vested rights determinations. Citing *Fountain Village Development Co. v. Multnomah County*, 39 Or LUBA 207 (2000), *rev'd and remanded* 176 Or App 213, 31 P3d 458 (2001), LUBA concluded that they do apply with equal force because vested rights are properly viewed as "inchoate nonconforming uses." LUBA then went on to supply the "ordinary care" analysis that was missing from *Fountain Village* to explain why it is not reasonable to assume any maintenance activity, even those protected under ORS 215.130(5) and similar local code sections, will necessarily be sufficient to establish the use has not been abandoned, discontinued or interrupted.

LUBA ultimately upheld the County's decision that petitioner had discontinued construction for more than a year and therefore lost any vested right he may have had to complete the residence in the location of the 1979 building permit.

APPEAL:

Crosley v. Columbia County, 251 Or App 653, 286 P3d 911 (2012)

The Court of Appeals affirmed LUBA's decision, refusing to reconsider its earlier decision in *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 31 P3d 458 (2001), *rev. den.*, 334 Or 411, 52 P3d 436 (2002), in which it held that a vested right to construct a nonconforming use may be lost by abandonment, interruption, or discontinuance and characterized vested rights as "inchoate nonconforming uses."

XX. STATE AGENGIES (LUBA HN# 38)

A. Local Gov't Compatibility Destinations (LUBA HN# 38.3)

Campbell v. Columbia County, ___ Or LUBA ___ (LUBA No. 2012-060, January 28, 2013)

[*Also relates to LUBA HN# 36.5 and 26.4*]

Petitioners appealed a decision approving a land use compatibility statement (LUCS) that would allow repair and replacement of the septic system for a non-conforming mobile home park. LUBA affirmed.

The subject property includes tax lot 1900 (10.26 acres) and tax lot 2400 (5.83 acres), which were zoned rural residential 5-acre minimum (RR-5) in 1984. In 1965, prior to zoning or other land use restrictions, the owners of tax lot 1900 obtained a building permit and constructed a mobile home park on tax lot 1900, serviced by two septic drainfields (Drainfields 1 and 2). Portions of one or both drainfields were constructed near and perhaps beyond the property line with tax lot 2400, which at that time was owned by an adjoining farmer. In 1966, the county issued a second building permit authorizing a third septic drainfield (Drainfield 3) located on the northern portion of tax lot 1900. In 1967, the park owners acquired tax lot 2400. In the spring of 1975, the three septic drainfields failed, overloaded by an unauthorized increase in the number of mobile homes in the park. The county ordered the owner to remove all mobile homes in excess of 33 homes, and in June 1975 granted the owner a building permit to construct emergency repairs to the septic system to serve the authorized 33 homes. In 1984 the present RR-5 zoning was applied, making the mobile home park a nonconforming use. In 1996 the county approved an expansion of the nonconforming use to allow a maximum of 46 units.

The 1996 approval decision stated the septic system "will need to be upgraded to current standards for 46 units," and imposed a condition requiring the owner to repair any failing septic systems within 90 days, subject to certification by DEQ. The repairs were made, and DEQ issued a Water Pollution Control Facility (WPCF) permit for the septic system. Even with repairs, the system experienced periodic failures, particularly Drainfield 3. In 2011, the property owners applied to DEQ for a modified WPCF permit for extensive improvements on both tax lots, including a new drainfield on tax lot 2400 intended to replace Drainfield 3, which would then be held in reserve for emergencies. DEQ rules require a LUCS prior to issuing a modified WPCF permit.

The property owners applied for the LUCS, which was granted by a county planner. Petitioner appealed to the board of commissioners, which approved the LUCS on the basis that the 1996 decision verified the entire mobile home park, including the trenches previously constructed on

tax lot 2400, as a nonconforming use. Alternatively, the county concluded that if the 1996 decision did not verify the previously constructed septic trenches on tax lot 2400, those were lawfully established prior to 1984, when county zoning was applied, and prior to 1975, when the statewide planning goals applied. Finally, the county applied the criteria at ORS 215.130(5) and (9) to approve the proposed septic improvements as an "alteration" of the mobile home park nonconforming use.

ORS 197.015(10)(b)(H) excludes from the statutory definition of "land use decision" a determination that a proposed state agency action is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan if three conditions are met: (1) the local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action; (2) the use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or (3) the use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan. LUBA discussed the first two exclusions at great length and determined that when an approval decision makes multiple determinations, some of which fall within the exclusions and others which do not, the exclusions do not apply.

Petitioners contended that, as a matter of law, a nonconforming use is not allowed to expand onto a new lot or parcel of land. LUBA disagreed.

Petitioners maintained that parts of the septic system in existence in 1996 were not approved by the 1996 decision. LUBA disagreed and found, after discussing the staff report, which was adopted as findings by the county commissioners, that in verifying the mobile home park and its supporting septic systems, the county intended to verify the entire supporting septic system, including all septic trenches in those systems. LUBA characterized petitioner's arguments as a collateral attack on the 1996 decision.

The balance of the opinion focused on the meaning of ORS 215.130(5). The statute provides that "alteration" of a lawful nonconforming use may be permitted subject to ORS 215.130(9), which defines "alteration" to include changes in the use or structures "of no greater adverse impact on the neighborhood." It also limits the ability of local governments to deny or condition alterations of a lawful nonconforming use in three specific circumstances: when the alteration is (1) "necessary to comply with any lawful requirement for alteration in the use," (2) "necessary to comply with state or local health or safety requirements," or (3) necessary "to maintain in good repair the existing structures associated with the use." Petitioner argued that because the proposed septic improvements do not qualify as any of the three specific types of alterations, they can be approved only as a "general" alteration. Petitioner maintained that if a verified nonconforming use can be reduced in a way that permits the existing septic system to function, there is no "lawful requirement" to fix the septic system. LUBA disagreed, finding that the proposed improvements also fall within the "health or safety" exception.

XXI. BOUNDARY CHANGES (LUBA HN# 39)

A. Annexation (LUBA HN# 39.3)

Knaupp v. City of Forest Grove, ___ Or LUBA ___ (LUBA No. 2013-020, June 13, 2013)

LUBA affirms a City ordinance annexing 109 properties in 29 different noncontiguous areas into the City limits adopted under ORS 222.175, which allows island annexations without an election. All of the 29 areas were surrounded by property that was already inside the City limits. Petitioners contend the City was required by ORS 222.750(5) to delay the effective date at least three years and the annexation is inconsistent with the City's comprehensive plan and the metro code.

The effective date argument turned on the meaning of "zoned for residential use" in ORS 222.750(5). There is no dispute that many of the properties annexed were "in" residential use when annexed. The dispute was whether they were also "zoned" for residential use upon annexation when the applicable zoning allows some residential use. Petitioners argue any allowance of a residential use under the zoning meets the language of the statute and requires a three year delayed effective date. The City argues the zoning must primarily authorize a residential use for the delayed effective date to be required. LUBA found problems with both positions and agreed the statute was ambiguous. The legislative history gave no guidance so LUBA chose petitioners' interpretation as the one that seemed the most plausible and the least fraught with a highly subjective exercise for which the statute provides no guidance. Thus, LUBA concluded under ORS 222.750(5) a property is zoned for residential use if it is located in a zone that allows dwellings or residences as a permitted use. However, LUBA affirmed because it found the zoning at the time of annexation was merely a holding zone for future rezoning and the properties were therefore not "zoned for residential use" by the City. LUBA also disagreed with petitioners that the comprehensive plan or metro code required a contemporaneous acceptance of jurisdiction and assumption of maintenance responsibility for local access roads adjacent to or a part of the annexation. LUBA found no applicable comprehensive plan policies or metro code provisions requiring such contemporaneous actions.

Mintz v. City of Beaverton, ___ Or LUBA ___ (LUBA Nos. 2012-020, 2012-021, 2012-022 and 2012-023, August 22, 2012)

This case involves an appeal of four City ordinances applying comprehensive plan and zoning map designations to 13 recently annexed parcels. The parcels are a mixture of vacant and developed parcels containing uses including the Peterkort Town Square Mall, a shopping center, the Deveraux Glen development and parcels surrounding the Sunset Transit light rail station.

In their first six assignments of error, petitioners contend the City applied the wrong City zoning and comprehensive plan map designations to the parcels. Under the seventh assignment, petitioners challenge the City's conclusion that the decisions will not significantly affect a transportation facility and therefore comply with the Transportation Planning Rule (TPR). The challenges to the map designations are based on criteria in the City's code requiring the City to apply plan and zoning designations that "most closely approximate the density, use provisions and standards" that applied under the County's land use designations at the time of annexation. The arguments were slightly different for each of the 13 parcels but petitioners essentially argued

the chosen designations will allow too much nonresidential development and will likely not result in the types and densities of mixed residential and commercial/office development that was envisioned under the County land use designations. LUBA addressed each "closely approximate" consideration separately (i.e., density, use and standards) noting that neither the comprehensive plan nor the City development code gives any express guidance as to whether a close approximation of densities is more or less important than a close approximation of uses or a close approximation of standards or whether all three should be given equal weight. The decision contains a detailed and lengthy comparison of the densities, uses and standards under the County designations with the densities, uses and standards under the chosen City designations as well as the ones not chosen to determine which ones more closely approximate the County's existing designations in those three regards. LUBA found error in the City's decision with regard to densities and uses and remanded with specific instructions to the City on how to correct the decision. LUBA noted the City's interpretation of the "most closely approximate" criterion would have been subject to deferential review under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), but the City had not adopted an express or implicit interpretation of the criterion.

With regard to the TPR analysis, the bulk of petitioner's arguments were directed at the "worst case scenario" traffic assumptions for one of the 13 parcels under County zoning as compared to City zoning. The challenge was not evidentiary but essentially a question of law as to how the City interpreted and applied the County code criteria related to a square footage or percentage limitation on commercial development. Finding contextual support for the City's interpretation, LUBA denied this assignment of error concluding petitioners had failed to establish the City's decision was erroneous. LUBA also agreed with the City that it did not improperly defer consideration of the TPR.

Mintz v. City of Beaverton, ___Or LUBA ___ (LUBA No. 2013-010, May 23, 2013)

This is the appeal of the city's decision on remand from LUBA as discussed above.

XXII. CONDITIONS OF APPROVAL (LUBA HN# 45)

A. Generally (LUBA HN# 45.1)

Von Clemm v. City of Portland, ___ Or LUBA ___ (LUBA Nos. 2012-045, 2012-046, November 9, 2012)

Petitioner challenged the city's decision to approve a single-family dwelling on a 22,000 square-foot lot zoned R- 20 and located in the city's environmental conservation (C) overlay zone, together with a side-yard setback. LUBA affirmed.

The Portland Zoning Code (PZC) provides that if an application meets the "General Development Standards" in PZC 33.430.140 through 33.430.190, environmental review is not required. If an application does not comply with the General Development Standards, then an applicant is subject to environmental review with respect to the aspect of the proposal that does not comply with the General Development Standards.

LUBA agreed with the city that meeting the General Development Standards through conditions was adequate to avoid full environmental review. LUBA also agreed that partial environmental review can be chosen as a means to obtain setback approval, thereby avoiding the need for an adjustment review. Finally, LUBA agreed that the technical standards imposed by the Bureau of Environmental Services (BES) and alluded to in the PZC did not need to be satisfied as part of the land use application process, but could instead be deferred to a separate BES review.

Gould v. Deschutes County, ___ Or LUBA ___ (LUBA No. 2012-042, January 8, 2013)

[*Also relates to LUBA HN# 31.3.12*]

Petitioner appealed a county decision that the destination resort authorized by an April 15, 2008 conceptual master plan approval decision had been "initiated," as that term is used in Deschutes County Code (DCC) 22.36.020(A)(3). LUBA remanded.

The DCC establishes a three-step approval process for development of a resort: (1) conceptual master plan (CMP), (2) final master plan (FMP), and (3) individual subdivision applications. In this case, the CMP included 38 conditions, some of which were essentially impossible to implement until the FMP and subsequent approvals were obtained. Appeals following a county FMP approval, which was ultimately remanded to the county, slowed down the process until the recession forced the applicant to discontinue it. A considerable amount of time passed, which prompted petitioner's claim that the CMP approval had expired.

LUBA first addressed whether the county hearings officer was correct in deciding that an owner of seven out of eight lots comprising the proposed development could seek a declaratory ruling that would apply to all eight lots. The DCC does not address a situation where ownership is divided and only one owner seeks a declaratory ruling. LUBA decided that in making her decision, the hearings officer did not "[i]mproperly construe the applicable law," within the meaning of the ORS 197.835(9)(a)(D).

LUBA then addressed a tolling question. The DCC allows tolling while an approval is under appeal; OAR 660-15 033-0140, which is part of LCDC's administrative rule implementing Goal 3 (Agricultural Lands), does not. Petitioner argued that because the state rule addresses agricultural land specifically while the DCC provision is more general, the state rule pre-empts the DCC rule. The hearings officer found that because the county's comprehensive plan and land use regulations have been acknowledged, the DCC applied in this case. LUBA agreed with the hearings officer's reasoning and concluded that since the state rule is clearly a model for the DCC provision and the DCC makes it sufficiently clear that its provision applies in all zoning districts, the DCC rule applies in agricultural districts.

DCC 22.36.020(A) sets out what must be done to *initiate* a use, which is necessary to avoid the expiration of the CMP permit. One of three options is this: *"Where construction is not required by the approval, the conditions of a permit or approval have been substantially exercised and any failure to fully comply with the conditions is not the fault of the applicant."* The applicant relied on this option to contend the CMP approval had been initiated and had therefore not expired. LUBA determined that this option should not have been relied upon, but no one had appealed the decision to rely upon it. The failure to rely on an alternative section requiring only "substantial construction" made it far more difficult for the applicant to demonstrate the use had been initiated.

The hearings officer separated the 38 conditions of approval into nine categories: (1) "Conditions To Be Met Prior to FMP Approval" (nine conditions); (2) "Conditions To Be Met On or With Final Master Plan Submission" (six conditions); (3) "Condition of FMP Approval" (one condition); (4) "Conditions to Be Met Before or With First Phase of Development/First Tentative Plat and/or First Site Plan" (two conditions); (5) "Conditions to Be Met Before Final Plat Approval" (two conditions); (6) "Conditions to be Met With/On Final Plat" (three conditions of approval); (7) "Conditions To Be Met Prior To or With Construction" (two conditions); (8) "Conditions To Be Met With Each Development Phase" (one condition); and (9) "Conditions To Be Met At All Times" (19 conditions). In rejecting petitioner's contention that DCC 22.36.020(A)(3) requires that all 38 conditions of approval must be "substantially exercised," the hearings officer pointed out that the DCC refers to "the conditions" not "all conditions" and that petitioner's interpretation would effectively require that the destination resort be fully constructed within two years after the date of the CMP approval to prevent having the approval become invalid. To avoid that impossibility, the hearings officer concluded that only those conditions that were required to be completed before FMP approval were relevant in applying the two-year time limit applicable to the CMP approval. If the code were interpreted that way, the project could continue, notwithstanding the long delays in gaining FMP approval, which still had not been achieved. LUBA rejected her approach, which it concluded required effectively rewriting the DCC, and found that the "substantially exercised" requirement applied to all of the conditions, even if it was impossible to meet the standard because of the lengthy, three-step approval process. LUBA redirected the focus to whether a failure to "substantially exercise" a condition of approval was due to the fault of the applicant.

XXIII. OUTDOOR MASS GATHERINGS (LUBA HN# 46)

Wetherell v. Douglas County, ___ Or LUBA ___ (LUBA No. 2012-051, March 27, 2013)

[*Also relates to LUBA HN# 3.3.1 and 26.4*]

Petitioners appealed a decision approving a temporary use permit for a one-day music festival with no more than 3,000 attendees located on property zoned Exclusive Farm Use – Grazing (FG). Concluding it lacked jurisdiction, LUBA transferred the appeal to circuit court.

LUBA's opinion examined the distinctions and interactions between "outdoor mass gatherings," "other gatherings" (those with fewer than 3,000 persons), and "agri-tourism and other commercial events or activities" (agri-tourism). Outdoor mass gatherings are governed by ORS 433.745 to 433.770. They are defined as having more than 3,000 people, lasting more than 24 but less than 120 hours, not being held more frequently than every three months and being located in open spaces without permanent structures. ORS 433.735(1). "Other gatherings" are similar to outdoor mass gatherings, but they have fewer than 3,000 attendees. Under ORS 197.015(10)(a), a decision to approve an outdoor mass gathering or an "other gathering" is not a land use decision to which land use regulations apply and over which LUBA has jurisdiction. "Agri-tourism" is a new category of use in EFU zones authorized by ORS 215.283(4), which was added to the ORS in 2011. ORS 215.283(4) sets out four different sets of standards for "agri-tourism" and allows agri-tourism events if they comply with any applicable standards and also comply with special restrictions set out in the statute.

The central issue discussed by LUBA is whether the challenged decision falls within the

ORS 197.015(10)(a) definition of land use decision or whether it falls under ORS 197.015(10)(d), which excludes outdoor mass gatherings and "other gatherings." ORS 197.015(10)(d) and ORS 215.283(6)(c) contain new language that carves out an exception for agri-tourism events to the gatherings exception to the definition of land use decision. In other words, agri-tourism events *are* statutory land use decisions.

The county's development code authorizes Temporary Use Permits, including "outdoor events." As defined by LUDO 1.090, an "outdoor event" is "An assembly that is held outside of a public park primarily in open spaces and not in any permanent structure, where either: the anticipated attendance will be more than 1,000 but not more than 3,000 persons, or; the event is expected to continue for more than three days within any three month period." The county approved the disputed music festival as an outdoor event, which falls under the ORS 197.015(10(d) exception for "other gatherings" over which the circuit courts, not LUBA, have jurisdiction.

XXIV. BALLOT MEASURE 49 (LUBA HN# 48)

A. Generally (LUBA HN# 48.1)

Ericsson v. DLCD, 251 Or App 610, 285 P3d 722 (2012)

Landowners applied for homesite approvals under section 6 of Measure 49, which DLCD denied because the landowner failed to establish that the requested homes were lawfully permitted on the date the owner acquired the property. The Court of Appeals affirmed, holding that the landowners were required to prove that it was more likely than not that they would have been actually permitted to establish the homes under the acquisition land use restrictions, rather than only providing that the homes were potentially allowed. Landowners failed to carry this burden of proof. The court also determined that evidence of a prior order by DLCD in another proceeding was inadmissible.