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Contents

Appellate Cases – Land Use

■ *ANOTHER BOOST FOR WIND ENERGY IN UMATILLA COUNTY*

Blue Mountain Alliance v. Energy Facility Siting Council, 353 Or. 465, 300 P.3d 1203 (2013), addressed the approval of an amended site certificate by the Energy Facility Siting Council (" the Council"). The central question was whether a newly adopted county ordinance requiring a two-mile setback between wind turbines and rural residences applied to the amended site certificate pursuant to ORS 469.401(2). The Oregon Supreme Court concluded the statute did not apply and affirmed the Council's final order approving the amended site certificate.

In July 2009, the Council issued a site certificate for the Helix Wind Power Facility ("Helix") in Umatilla County. The site certificate permitted 60 wind turbines covering 7,586 acres and included conditions requiring construction to begin within three years and to then complete construction within three years of the start date. In June 2011, the Council issued a final order approving Amendment #1, expanding the size of the facility to include 134 turbines on 20,613 acres. On February 3, 2012, Helix applied for Amendment #2 to extend the construction start and completion dates by two years.

In May 2012, the Council held a listening session and received public comments. Public testimony and comments highlighted Umatilla County Ordinance 2012-04 ("the Ordinance"), adopted on February 28, 2012. The Ordinance requires a two-mile setback between wind turbines and rural residences. In opposing Amendment #2, the petitioners sought to have the Ordinance enforced, arguing that the Ordinance had been adopted as a public health and safety measure and that the two-mile setback must be enforced to protect the public from turbine noise.

In August 2012, the Council issued a final order approving Amendment #2 and incorporating certain staff recommendations from the Oregon Department of Energy ("ODOE"). Specifically, ODOE staff treated the Ordinance as a "land use regulation" to be evaluated under ORS 469.504(1), instead of a "public health and safety" measure to be evaluated under ORS 469.401(2). The Council found the Ordinance was a land use regulation and, as such, that it did not apply to Amendment #2 because of the goal-post rule in ORS 469.503(4).

To explain the court's decision, a short statutory overview is necessary. To determine whether to issue an amended site certificate, the Council must make a series of determinations as to whether the evidence supports several conclusions. ORS 469.503. One determination is whether the facility complies with statewide planning goals under ORS 469.503(4). Ways to make that determination are provided in ORS 469.503(1). At issue here is ORS 469.504(1)(b)(A), which provides (emphasis added):

> (1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503(4) if: . . .
>
> (b) The [council] determines that:
>
> (A) The facility complies with applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals ***and in effect on the date the application is submitted***, and with any [LCDC] administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646.

Thus, the statute sets out a goal-post rule for consideration of criteria derived from the local government's comprehensive plan and land use regulations. In the case of site certificates, including amended site certificates, the date a land use regulation must be adopted to be effective is the date the site certificate application is submitted.

The other statute in play according to the petitioners was ORS 469.401(2). It sets out the required contents of an amended site certificate. Specifically, that statue provides (emphasis added):

> The site certificate or amended site certificate shall require both parties to abide by local ordinances and state law and the rules of the council ***in effect on the date the site certificate or amended site certificate is executed***, except that upon a clear showing of a significant threat to public health, safety or the environment that requires application of later-adopted laws or rules, the council may require compliance with such later-adopted laws or rules.

Examining ORS 469.401(2) in the context of ORS Chapter 469 as a whole, the court determined that the phrase "abide by local ordinances" does not include local "land use regulations." Instead, land use regulations are governed by ORS 469.504(1)(b)(A). According to the court, the legislature intended the two concepts to remain separate, because of their different "trigger" dates. Under ORS 469.401(2), the trigger date for application of "local ordinances" is the date the site certificate is executed. However, the trigger date for applying criteria from a "land use regulation" is the date an application is submitted.

The court also examined whether Ordinance 2012-04 is a "land use regulation." Noting that the Ordinance may have a positive impact on public health and safety, the court nonetheless found it to be a land use regulation. Among other reasons, the court concluded the Ordinance was a land use regulation because the clear text of the Ordinance reveals it is a siting restriction and it was adopted as part of Umatilla County's Development Code, which serves the purpose of carrying out statewide planning goals and establishing use zones and regulations governing the development of land within the county.

Thus, as a land use regulation, to determine whether the Ordinance was effective the Council must examine the date the application was submitted, not the date the site certificate was executed. Here, the application for Amendment #2 was submitted 25 days prior to the Ordinance being adopted. Accordingly, it did not apply and the court affirmed the Council's approval of Amendment #2.

Will A. Van Vactor

Blue Mtn. Alliance v. Energy Facility Siting Council, 353 Or. 465, 300 P.3d 1203 (2013)

Appellate Cases – U.S. Supreme Court

■ *UNITED STATES SUPREME COURT EXTENDS LAND USE TAKINGS CLAIM TO INCLUDE MONEY*

Koontz v. St. Johns River Water Management District, 570 U.S. ___, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013), involved discussions between plaintiff Koontz and defendant St. Johns River Water Management District ("the District"), which had jurisdiction over permits to dredge or fill Florida wetlands. The District had specific authority under state law to offset environmental damages, including "creating, enhancing, or preserving wetlands elsewhere." 133 S. Ct. at 2592. In 1972 Koontz's father had purchased a 14.9-acre parcel that included wetlands. Koontz succeeded to that parcel and proposed to develop 3.7 acres in 1994, agreeing to dedicate approximately 11 acres to the District for wetland preservation. The District found this action to be inadequate and proposed alternatives including development of just one acre (which would require a dedication of 13.9 acres to the District) or development of 3.7 acres so long as Koontz would help restore wetlands on District-owned property within the same basin several miles away or pay an equivalent amount to do so.

Koontz refused to undertake or propose other alternatives; thus the permit was denied. Koontz sued for a taking. The trial court found actions above and beyond the 11-acre dedication proposal violated both the nexus and rough proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), respectively. The Florida Court of Appeals affirmed but the Florida Supreme Court reversed, finding no taking as there was no condition on which to predicate a *Nollan/Dolan* violation and because the claim involved a demand for money, which the Court found not subject to a takings claim under those cases. The United States Supreme Court granted certiorari.

The Court applied the doctrine of "unconstitutional conditions," under which "the government may not deny a benefit to a person because he exercises a constitutional right." *Id.* at 2594. That doctrine has a special application in

Nollan and *Dolan* that reflects, according to the majority, two "realities" of the land use permitting process: 1) that applicants are especially vulnerable to coercion, and 2) that some proposed uses of land impose costs on the public that property dedications can offset. Acknowledging that governments may regulate developers to internalize the negative externalities of their proposals, the Court said it had developed the nexus and rough proportionality rules to provide a balance between those parties in the development process. That balance does not depend on whether an application is approved or denied, *i.e.*, whether a condition is actually imposed or the applicant is told that the application will not be approved until certain concessions are made. In either case a public agency may not withhold the benefit (whether or not an applicant is entitled to it) for refusal to give up a constitutional right.

The Fifth Amendment may not apply where a permit is denied outright with no qualification of conditions that would result in approval. However, where there is an excessive demand by way of an unconstitutional condition that results in denial, the question of money damages may not result from the federal constitutional question, but rather result in a cause of action under either state or federal law. In this case, Koontz brought an action under a Florida statute that the Supreme Court declined to apply, instead remanding the matter to the Florida Supreme Court for disposition. That statute allows a property owner to sue for damages if a state agency action is found to be "an unreasonable exercise of the State's police power constituting a taking without just compensation." Fla. Stat. Ann. § 373.617. Whether and how the statute applies must be addressed on remand.

The District argued that no taking was involved because Koontz had a range of choices that included building on less of his land or paying to improve wetland facilities on other lands. However, the Court concluded that the substance of the alternatives was that either more land would be required to be dedicated to the public or Koontz would be required to pay more offsite mitigation costs. The Court found both alternatives to be subject to *Dolan's* proportionality standard. The fact that money was involved in one of the alternatives did not take the case outside *Nollan* and *Dolan*.

The Court noted the prevalence of "in lieu of" fees in planning practice and suggested that it would be easy to avoid *Nollan* and *Dolan* by simply imposing these fees instead of requiring a dedication. The Court concluded that money requirements substituted for land dedication are "functionally equivalent" to other types of land use exaction. *Id.* at 2599. Moreover, the Court found the exaction "operate[d] upon" a specific parcel (by requiring the alternative of a money payment), thus burdening the ownership of the parcel in a manner comparable to taking a lien (a right to income from property). *Id.* A lien acquisition by the government would result in a taking, according to the Court's view of its precedents. If there is

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such a direct link, *Nollan* and *Dolan* operate to prevent a diminution of property value if the exaction were unjustified.

The Court distinguished this unconstitutional conditions case from the most frequently raised takings claim, a regulatory takings claim under *Penn Central Transportation Company v. New York* City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), as that issue was not raised, adding:

> The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. at 2600. The Court denied such an approach served to second-guess the wisdom of governmental actions—the case involved a demand for a transfer of money or property interest to the government that the Court found could operate as a *per se* taking in the same way as if it were a governmental acquisition of a lien.

The Court also denied that its new test would fail to distinguish in a meaningful way land use exactions from property taxes or user fees (which would not constitute a taking). The Court concluded that it did not need to decide that line in this case, noting that if a tax were "so arbitrary" that it becomes the confiscation of property, it could be recognized as a taking. *Id.* at 2499 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998)). In any event, the Court said that state courts have dealt with challenges to monetary exactions using *Nollan* and *Dolan*, and that the political process would keep a check on excessive land-use processing fees. The case was thus remanded for further review by the Florida Supreme Court without regard to whether money, rather than property, may be exacted under *Nollan* and *Dolan*. Nonetheless, the demand for money or property in a land use context will now be subject to those two cases.

Justice Kagan wrote a dissent for herself and three other justices. She asserted that there was no taking in this case as the conditions at issue were never imposed—Koontz could have sought under state law to have improper conditions removed or monetary remedies applied.

More importantly, Justice Kagan noted that there was no demand for money or property to which Koontz acceded. She agreed that the *Penn Central* standards for regulatory takings were inapplicable here and the heightened scrutiny of *Nollan* and *Dolan* applies. In her view, the Court's 5-4 decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), was controlling and limited taking claims for money to the government's appropriation of a "specific, separately identified fund," such as dissolving a lien or seizing a bank account. However, a generalized obligation to perform an act that costs money, such as a requirement that a person spend money to repair a public wetland, is not a taking. She warned that:

> By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery. . . . Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. . . .

Koontz, 133 S. Ct. at 2607.

Justice Kagan decried the extension of *Nollan* and *Dolan* beyond real property and wondered whether the Court could describe a coherent taking theory distinguishing land use exactions from other monetary requirements such as taxes. She said it wasn't clear whether the new rules apply across the board or only to ad hoc fees that are quasi-judicial in nature. She said that the majority was seeking a prophylactic rule but concluded that the result is a "prophylaxis in search of a problem." *Id.* at 2608. This was because there was no evidence to show that local governments routinely short-circuit *Nollan* and *Dolan* to exact real property interests having no relationship with development costs. She suggested that other state or federal constitutional or statutory provisions are adequate to deal with these issues and that the new rule actually deprives state and local governments of the "necessary predictability" to operate the land use process.

Finally, Justice Kagan would have affirmed the Florida Supreme Court for two other reasons: The District never demanded Koontz give up anything in exchange for a permit, and there was no taking. As to the first issue, she expressed concern that negotiating requirements for approval between developers and public agencies could be transmuted into takings claims. This would also militate towards simple denials in lieu of further discussion, especially in view of the fact that the District said it would consider other mitigation alternatives in this case. Moreover, this case is, according to Justice Kagan, not about a taking but rather the application of a Florida statute that allows for damage claims if there were an unreasonable exercise of the police power so as to constitute a taking (which, Justice Kagan asserted, did not happen). Justice Kagan asked:

> In what legal universe could a law authorizing damages only for a "taking" also provide damages when (as all agree) no taking has occurred? I doubt that inside-out, upside-down universe is the State of Florida. Certainly, none of the Florida courts in this case suggested that the majority's hypothesized remedy actually exists; rather, the trial and appellate courts imposed a damages remedy on the mistaken theory that there had been a taking (although of exactly what neither was clear). . . .

Id. at 2612.

To summarize, the dissent found three independent reasons that the Takings Clause did not apply: (1) That Clause does not apply to a condition imposed to pay money; (2) There was no demand made of Koontz; and (3) the Florida statute operates only in the event of a consummated taking.

Koontz is a significant case. Justice Alito's majority opinion is strikingly similar in style and substance to that of Justice Scalia—full of property rights rhetoric, breathtakingly facile in ignoring (or reinterpreting) previous precedents dealing with the application of the Takings Clause to money and, while finding no taking, providing for the possibility of damages, as if there were a taking. Perhaps the case involved a prophylaxis in search of a problem. The decision certainly appears to be a search for a desired result.

Edward J. Sullivan

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. ___, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)

Appellate Cases – Washington

■ *NO DAMAGES FROM DELAY IN PLAT APPROVAL PROCESS PRIOR TO AGENCY'S FINAL DECISION*

In *Coy v. City of Duvall*, 174 Wash. App. 272, 298 P.3d 134 (2013), Division One of the Washington Court of Appeals upheld the dismissal of Neal Coy's claim that the City of Duvall acted in an arbitrary and capricious manner during the application process for a preliminary plat approval. Coy claimed damages under RCW 64.40.020(1) for the city's alleged arbitrary and capricious actions in processing his application from May 2006 until the city's final decision approving his subdivision proposal in December 2008.

Coy proposed the development of a 32-unit residential subdivision on a 4.58-acre property in the city of Duvall. Upon Coy's initial application, the city consulted with an outside ecologist who concluded that Coy's proposed mitigation plan to fill the entire on-site wetland was insufficient and that the city's code would not allow this project. Coy maintained that the city had previously approved other plats in a similar situation and that the denial of his proposal was arbitrary and capricious.

In October 2007, Coy's attorney requested the city's immediate action to confirm that his plat application, consisting of wetland alteration with off-site mitigation, was authorized by the city's code. The city agreed to review Coy's proposal if he could demonstrate his plan's compliance with the code. In July 2008, the city determined that Coy met the requirements for filling the wetland and allowed him to perform off-site mitigation by contributing to the Snohomish Basin Mitigation Bank. Coy's preliminary plat application was approved on December 23, 2008.

In January, 2009, Coy sued the city pursuant to RCW 64.40.020(1), claiming that the city had both (1) failed to comply with the processing time limit for the permit application and (2) acted in an arbitrary and capricious manner during the application process. Coy agreed to dismiss his first claim, and the trial court granted the city's motion for summary judgment on the second, awarding attorney's fees to the city. Coy appealed the trial court's dismissal of his claim, asserting he was entitled to delay damages resulting from the city's allegedly arbitrary and capricious conduct throughout the application process, notwithstanding the ultimate approval of his permit.

Chapter 64.40 RCW provides a cause of action to property owners applying for land use permits for damages resulting from an act of an agency that is "arbitrary, capricious, unlawful, or exceed[s] lawful authority." The statute further defines "act" as either (1) an agency's final decision that excessively restricts, limits, or conditions the use of real property, or (2) the agency's failure to act within established time limits in response to a property owner's application for a permit. Coy contended that the city's actions during the application process, not the final decision granting his proposal, were arbitrary and capricious because the city had previously approved similar proposals without such a rigorous application process.

The appeals court affirmed the trial court's decision, holding that Coy failed to state a cause of action because the statute only provides for relief resulting from damages arising from a final decision. The court relied on its recent

decision in ***Birnbaum***, holding that there was no cause of action for arbitrary and capricious conduct during a five-year approval process that ultimately resulted in the approval of the permit. ***Birnbaum v. Pierce Cnty.***, 167 Wash. App. 728, 274 P.3d 1070 (2012). The court held damages incurred during the application process before an agency's final decision were not recoverable. ***Id.*** Therefore, Coy's allegation of damages arising from the city's conduct before the final decision granting his permit was not a viable claim for relief pursuant to this statute.

Coy also contended that the award of attorney's fees was improper because the city prevailed on jurisdictional grounds rather than on the merits of the case. The court upheld the award of attorney's fees, holding that the statute provides the trial court discretion to award fees to the prevailing party, "regardless of the basis for its victory." The trial court did not abuse its discretion in awarding fees, nor in the amount of the award.

Judge Schindler concurred in the decision, stating the "exhaustion of all administrative remedies is a statutory condition precedent to asserting a cause of action" under RCW 64.40.030. Coy failed to appeal the city's interpretation of the code, he did not apply for a variance or reasonable use exception, nor did he provide an alternative development proposal to his plan. Rather, he insisted that his proposal should have been accepted as it was. Therefore, Schindler concluded Coy's claim should have been dismissed because he failed to exhaust all available administrative remedies before asserting his cause of action.

Max Lindsey

Coy v. City of Duvall, 174 Wash. App. 272, 298 P.3d 134 (2013)

LUBA Summaries

■ *EXCLUSIVE FARM ZONES*

In resolving a second appeal of a decision approving a home occupation use, LUBA addressed the county's interpretation of ORS 215.448(1)(c), which authorizes the county to approve a home occupation in an exclusive farm use ("EFU") zone if it will be operated "substantially in . . . the dwelling; or . . . other buildings normally associated with uses permitted in the zone in which the property is located." ***Green v. Douglas County***, LUBA No. 2012-092 (Apr. 9, 2013) (***Green II***). In an earlier decision, LUBA reversed the county's approval of the Hesters' request to use their EFU-zoned property for weddings, receptions, bridal showers, luncheons, teas, birthday parties, and memorial services, all subject to numerical limitations on the annual number of events. ***Green v. Douglas County***, LUBA No. 2010-106 (Nov. 23, 2011) (***Green*** I).

In ***Green I***, LUBA remanded the county's decision because it failed to explain whether the events would be conducted substantially within buildings on the property and would employ no more than five persons, consistent with ORS 215.448(1)(b) and (c). On remand, the county found the approved events complied with ORS 215.448(1)(c), relying on the Hesters' testimony that 80% to 90% of each event would be inside buildings and on the planning staff's explanation that the events would be mostly carried out in the pavilion and catering building. To address the likelihood that some events will take place outdoors, the county again approved the Hesters' request by imposing a condition that no more than 20% of any event could occur outside of the buildings.

On appeal in ***Green II***, LUBA concluded the county's findings adequately addressed the statutory limitation, were supported by substantial evidence, and included a condition that was sufficient to assure that the "substantially" standard in ORS 215.448(1)(c) was satisfied. LUBA acknowledged the condition of approval didn't describe precisely how to measure compliance with the 20% limitation, particularly since the Hesters included time spent inside cleaning up and preparing for events in meeting this requirement and petitioners emphasized the portion of events that occurred outside. However, LUBA concluded this was not fatal to the decision, reasoning "such precision in land use decision making and conditions of approval is the exception rather than the rule, and we do not agree with petitioners that such precision is legally required . . ." to approve the Hesters' request. ***Green II***, slip op. at 9.

Petitioners also challenged whether the county's decision complied with the statutory limitation that any approved home occupation on EFU-zoned land "shall employ on the site no more than five full-time or part-time persons." ORS 215.448(1)(b). The county interpreted the statutory language to mean no more than five persons could be employed on the site ***at any point in time*** and imposed a condition of approval that reflected this interpretation. Petitioners argued the limitation contained in ORS 215.448(1)(b) meant the Hesters were limited to employing five people total, regardless of whether or not each person worked at a particular event. Under the county's interpretation, petitioners asserted the Hesters could have many employees as long as only five were employed for each event. Recognizing it was unlikely the legislature considered the types of events the county approved and deeming it "a reasonably close call," LUBA concluded

the county's statutory interpretation was "at least as consistent with the language of ORS 215.448(1)(b) as petitioners'" and affirmed the county's decision. *Id.*, slip op. at 14.

■ GOAL 15

In *Gunderson v. City of Portland*, LUBA Nos. 2010-039/040/041 (Apr. 26, 2013), LUBA addressed the single question remaining in the long-running appeal of the city's update of a portion of its greenway regulations, known as the North Reach River Plan ("NRRP"). *See Gunderson v. City of Portland*, 62 Or. LUBA 403 (2011), *remanded*, 243 Or. App. 612, 259 P.3d 1007 (2011), *aff'd*, 352 Or. 648, 290 P.3d 803 (2012). The question focused on the inventory requirement in the Willamette River Greenway Goal, Statewide Planning Goal 15, and whether the city was required to revise or update its Goal 15 inventory before amending its greenway regulations and including additional land in its greenway boundary as part of the NRRP. Goal 15 states that one purpose of the inventory requirement is to "determin(e) which lands are suitable or necessary for inclusion within . . . the Greenway Boundaries . . . ." Relying on this language, LUBA agreed with petitioners that the city's addition of land to its greenway boundary as part of the NRRP must be based on an updated or revised inventory.

However, LUBA rejected the petitioners' argument that ***any*** amendment to the greenway boundary or regulations triggers a requirement that the city must update ***all*** of its inventory. An additional purpose of the inventory requirement under Goal 15 is to provide a factual basis for the greenway management plans and programs a local government develops. Since the NRRP amended the city's existing greenway regulations, LUBA concluded an updated inventory is also necessary to support amendments to existing greenway regulation—but only to the extent the inventories are relevant to the amendments. LUBA reasoned:

> In the present case, we cannot tell from the text of the Greenway program amendments whether the current inventory or portions of that inventory were used in developing the new [greenway regulations]. If so, any portion of the inventory that was used must be updated first. And without regard to whether the inventory or some part of the inventory was used in developing the amended regulations, it may be that the regulation is of such a nature that the inventory or some part of the inventory must be updated. Whatever the case, if the city determines that no part of the inventory was or should have been used to "develop" the amendments, and that the amended Greenway regulations are not worded or structured in a way that implicates the inventory, the city must adopt findings explaining why no update to its Goal 15 inventory is required.

Gunderson v. City of Portland, LUBA Nos. 2010-039/040/041, slip op. at 10 (Apr. 26, 2013).

Since the city's findings supporting adoption of the NRRP failed to explain whether and how the city complied with Goal 15's inventory requirement, LUBA remanded the decision to the city.

■ LUBA PROCEDURE

In *Wal-Mart Stores, Inc. v. City of Hood River*, LUBA No. 2013-009 (May 21, 2013), LUBA addressed questions of ex parte contacts, bias, and the rule of necessity arising from a city council member's participation in decision making on an application the member opposed prior to her appointment to the city council. At issue in this appeal was the propriety of city council member McBride's participation in deciding Wal-Mart's application for site plan approval to expand its existing store and for a determination that it had a vested right to do so under the city's nonconforming use standards. McBride had previously opposed Wal-Mart's efforts to build a store in Hood River County. After her appointment to the city's planning commission, she recused herself from participating in the commission's decision on Wal-Mart's expansion because she stated she had "extensive contact" with the unsuccessful county Wal-Mart proposal and wanted to avoid any appearance of bias.

Between the time the planning commission made its decision on Wal-Mart's application and the city council's consideration of the application, McBride was appointed to fill a vacancy on the city council. At the initial hearings on Wal-Mart's application, McBride stated she would not participate based on her prior opposition to the county Wal-Mart proposal and to avoid any bias claim. As a result she did not disclose any ex parte contacts, but submitted a memo to the council explaining her position that Wal-Mart did not have a vested right to expand its existing store. At the last hearing on Wal-Mart's proposal, the mayor announced the record was closed and no new evidence would be accepted. When the time came to vote on whether Wal-Mart had a vested right, the six city council members deadlocked 3-3 on two separate motions. At that point the statutory deadline for making a final decision would expire in approximately two weeks. Over the objection of Wal-Mart's attorney, the council agreed that the only solution was to allow McBride to participate under the rule of necessity. McBride stated she could decide the matter in an unbiased fashion and reviewed the substance of her prior memo interpreting the city's nonconforming use regulations, but did not make any ex parte

contact disclosure. The council subsequently voted 4-3 that Wal-Mart had lost any vested right to expand its store because construction was discontinued for more than a year.

On appeal, Wal-Mart challenged McBride's failure to make any ex parte contact disclosures, her failure to recuse herself as biased, and the city's reliance on the rule of necessity to allow her to vote. Wal-Mart argued that McBride's prior statements explaining her recusal from the planning commission and initial city council hearings indicated it was likely that she had ex parte contacts. They contended the city erred by failing to require her to make an ex parte contact disclosure and by not offering its attorneys an opportunity to question her about any contacts she revealed.

LUBA agreed with the city that had McBride chosen to adhere to her initial decision not to participate in the council proceedings, no ex parte contact disclosure would have been required. Once she participated, however, LUBA agreed with Wal-Mart that it was "quite likely" she had ex parte contacts and she was required to disclose them as soon as she elected to participate in the city council vote on Wal-Mart's proposal. LUBA also rejected the city's argument that Wal-Mart waived its right to raise the ex parte contact issue by failing to object to her lack of disclosure. Since the evidentiary record was closed at the time she participated and the record showed the parties were fixated on the issue of McBride's potential bias at the time, LUBA concluded Wal-Mart had not waived the right to raise her failure to make an ex parte contact disclosure on appeal to LUBA.

Wal-Mart also asserted McBride should not have participated in the city council's decision making because she was biased. LUBA agreed that the record lacked substantial evidence to support the city's position that McBride was capable of making an impartial decision on Wal-Mart's application. Specifically, LUBA pointed to the fact that, after she initially recused herself, she advocated against Wal-Mart's application in her memo and cited the reasoning in her memo when she cast the deciding city council vote. As LUBA observed, "[i]f the ***Fasano*** requirement for impartiality means anything, it does not permit a decision maker to claim to be a neutral or unbiased decision maker in that circumstance." ***Wal-Mart Stores, Inc. v. City of Hood River***, LUBA No. 2013-009, slip op. at 15 (May 21, 2013).

Finally, LUBA addressed Wal-Mart's claim that the city council erred by invoking the rule of necessity to allow McBride's participation as a decision maker. The rule of necessity has been applied in local land use proceedings when there is no alternative impartial decision maker available to step in and when there is no reason to believe that continued deliberations will break a tie and yield a majority vote. After reviewing the transcript of the city council's final hearing, LUBA agreed with Wal-Mart that the council was premature in allowing McBride to participate under the rule of necessity. The transcript indicated a "reasonable possibility" that the six city councilors could have deliberated further and framed a motion that would yield the necessary majority vote to make a decision without McBride's participation. LUBA disagreed with Wal-Mart's assertion the planning commission could have served as an alternative decision maker, noting that any commission decision could have been appealed back to the city council and could have yielded another deadlock. Similarly, the fact that McBride could have been disqualified for bias did not preclude the city council from invoking the rule of necessity as a last resort.

If, on remand, the city council again deadlocks after continued deliberations, LUBA agreed with Wal-Mart that McBride's participation should be limited ***only*** to voting and she should not be allowed to participate in the deliberations leading to the vote. LUBA cited to the government ethics statutes, which require a government official to refrain from participating in any discussion or debate on any issue in which the government official has an actual conflict of interest (ORS 244.120(2)(b)(A)), and concluded this same limitation should apply to McBride's participation under the rule of necessity. In LUBA's view, "[t]he biased decision maker's ***vote*** may be necessary, but the biased decision maker's participation in the deliberations is not needed." ***Id.***, slip op. at 20.

LUBA remanded the city's decision with directions that the city council should first explore whether additional deliberations will yield a decision without McBride's participation. If not, the city council may invoke the rule of necessity to allow McBride to participate as long as she first discloses any significant ex parte contacts she has had concerning Wal-Mart's application and limits her participation to only casting a vote.

Kathryn S. Beaumont