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Highlights

Appellate Cases — Real Estate

Evidence Affecting Property Value That Is Discovered After A Condemnation Action Is Filed Is Admissible

In *ODOT v. Hughes*, 162 Or. App. 414 (1999), the Oregon Court of Appeals held that evidence which is discovered after a condemnation action has been filed that pertains to the market value of the land on the valuation date (the date the condemnation action is filed or the date the condemnor appropriates the property, whichever occurs first), is admissible at trial so long as the evidence is discovered before a value has been fixed by the court or agreed upon by the parties.

Kenneth Hughes, et al. ("Hughes"), owned land on the Columbia River Highway that was used to service motorcycles, boats, jet skiis, and other equipment. ODOT condemned part of Hughes' land to widen the highway. The condemnation action was filed on January 5, 1996.

After the condemnation action was filed, ODOT began working on the highway project on Hughes' land. As part of the project, soil was excavated, and ODOT discovered the land was contaminated with hazardous materials. Neither Hughes nor ODOT was aware of the contamination when the condemnation action was filed.

Before trial, Hughes filed a motion *in limine*, requesting the court exclude evidence of the contamination. The trial court granted the motion. In granting the motion, the trial court ruled evidence of the contamination was not relevant and was inadmissable because:

> The appropriate value for property taken in a condemnation is the value that a willing buyer and a willing seller would agree to as to the price *on the date that the complaint was filed* . . . . Only the information that was available to the parties at that time should be considered. (Emphasis added.)

ODOT appealed this ruling.

On appeal, ODOT argued the trial court erred in excluding the evidence of contamination, arguing the evidence was relevant to determine the fair market value of the land that was condemned. ODOT argued the fact that the contamination was discovered after the condemnation action was filed did not, as a matter of law, mean the evidence had to be excluded. The Court of Appeals agreed.

After explaining the condemnation process, the Court of Appeals held that the evidence of contamination that existed on the land on the date the condemnation action was filed was relevant to determine the fair market value of the land. It also held the relevant evidence should not be excluded as a matter of law simply because neither party was aware of it on the date the condemnation action was filed.

The Court explained that the final determination of just compensation occurs after the valuation date and that the just compensation is determined based on what a hypothetical but willing purchaser would pay for the property. Since the hypothetical but willing purchaser could have brought forward evidence of the contamination on the date the condemnation action was filed, it was, therefore, appropriate to consider it. The Court stated: ". . .to ignore such information does not promote the purpose of just compensation, which is to compensate the landowner fully and fairly for the loss of the land. . . To award less than the value of the land would be unjust to the owner; to award more would be unjust to the public."

In reaching what appears to be the fair and right result, the Court was careful to distinguish the contamination evidence in this case from evidence about the value of land which relates to circumstances that arise after the condemnation action is filed. Thus, evidence about the changes in the condition or value of the land that arise after a condemnation action is filed is inadmissible.

Marnie Allen

ODOT v. Hughes, 162 Or. App. 414 (1999)

This Fence Does Not Establish Hostility for Adverse Possession Purposes

In *Hoffman v. Freeman Land and Timber*, LLC, 329 Or 554 (1999) (en banc), the Supreme Court reversed the decision of the Court of Appeals and affirmed the Circuit Court judgment, which quieted title in favor of the record owner and held that the adverse possession claimants had not met their burden of proof. By agreement of the parties, the case was decided under pre-1990 common law, rather than ORS 105.620, an adverse possession statute enacted in 1989. The Supreme Court reviewed only questions of law.

The disputed property is a 4.7 acre lot known as "Lot 20." It is part of a subdivision and is the only lot in the subdivision lying generally east of a certain road. It is part of an area known as the Boy Scout Pasture and is not separated by any natural or constructed boundaries from the Boy Scout Pasture. Defendants owned and previously leased a cattle ranch adjacent to Lot 20, which included the remainder of the Boy Scout Pasture. Defendants and their predecessors had cleared brush on the disputed property from time to time, crossed the disputed property every few weeks to reach other parts of the Boy Scout Pasture and occasionally repaired the wire fence encircling the Boy Scout Pasture. The grass on Lot 20 itself was capable of sustaining only one cow for a couple of days per year.

Defendants asserted an adverse possession claim when the Lot 20 was listed for sale. To prevail in their adverse possession claim, defendants needed to establish, by clear and convincing evidence, that their use of the property was actual, open and notorious, exclusive, continuous, and hostile for a ten-year period.

The Supreme Court held that defendants satisfied the first four elements of their adverse possession claim but failed to prove the fifth element, hostility. The Supreme Court held that the Court of Appeals had erroneously used prescriptive easement case law to create a presumption of hostility in favor of adverse possession claimants and to place the burden of proof on the record title owner to show permissive use.

Evidence concerning the fence encircling the Boy Scout Pasture failed to persuade the Supreme Court that defendants' possession of Lot 20 was "hostile." The Supreme Court acknowledged that *construction* of a fence can establish hostility, but here the fence predated the ownership of the adjacent ranch by defendants' predecessors. The trial court had characterized the fence surrounding Lot 20 as a convenience, intended to prevent cattle from wandering onto the road rather than to establish a boundary, and the Court of Appeals did not dispute this finding. The trial court had also found that the "No Trespassing" signs along the fence were intended merely to keep out hunters and the like, rather than to keep out persons who might claim ownership of the property. The Court of Appeals did not dispute this finding either. Furthermore, the Supreme Court held that the occasional crossing of the disputed property and the occasional thinning of brush were consistent with use of the property merely as a convenience.

In conclusion, the Supreme Court held that, even if the use of Lot 20 by defendants and their predecessors was sufficiently "open and notorious" to put the record owner on notice of their adverse possession claim, the use was not significant enough to demonstrate, by clear and convincing evidence, that defendants and their predecessors had used the land "intending to be its true owner and not in subordination to the true owner."

Susan Glen

Hoffman v. Freeman Land and Timber, LLC, 329 Or 554 (1999)

Editor's Note: Edward J. Sullivan, one of the Digest's *long-standing associate editors and a valued contributor, prepared the following article to celebrate the* Digest's *twentieth anniversary last fall. Many thanks to Mr. Sullivan for his thoughtful observations on and summary of the* Digest's *history.*

The Digest Twenty Years On

By 1979, the Oregon State Bar had grown to such an extent that it was more feasible for lawyers to find common ground only with other lawyers in the same practice area. The Board of Governors encouraged formation of the bar sections to this end. One of the most popular bar sections was the Real Estate and Land Use Section. The new section sought to keep its members aware of both section activities and changes in the law through a new section publication, the *Real Estate and Land Use Digest*.

The first issue of the *Digest* came out in October 1979 under its first editor, Pat Randolph, a law professor at Willamette University. However, Professor Randolph left Oregon for greener academic pastures within the next year and the Section Executive Committee appointed Laurence Kressel to replace him. Mr. Kressel spent most of his professional life in the Multnomah County Counsel's Office and at the Land Use Board of Appeals. He passed away in 1996 after a long illness and after serving the *Digest* for over sixteen years. The Section Executive Committee then appointed Kathryn Beaumont, first as interim editor, then on a permanent basis to serve as the *Digest's* editor. In addition to the Section Treasurer, who serves as an ex officio member of the *Digest's* editors, there have been only three other persons serving in the two positions of Associate Editors during the twenty-year history of the *Digest*. The late Frank Josselson served in this position until approximately 1990 when Alan Brickley succeeded him, and myself. The *Digest* has had a tradition of continuity and excellence in its service to the Section.

Over the years, the *Digest* has provided much food for thought for its readers because it was fortunate to have writers who were conversant with real estate and land use law. After each session, the *Digest* has advised practitioners of the many changes in the law wrought by the legislature. More importantly, the *Digest* has monitored decisions of LUBA (which, coincidentally, celebrated its twentieth anniversary last fall) and the appellate courts in this state, as well as important cases from the federal courts and other jurisdictions. Finally, the *Digest* has also served as a forum for various views on the law in the real estate and land use fields.

In addition to its editors, the *Digest* has had a series of writers who have taken their time to share their expertise and views with Section members. It is these writers who have made the *Digest* such a helpful tool to practitioners, for they analyze the cases and point out their practical effects. The *Digest* has had very few dry academic articles, perhaps because its writers are part of the law as practiced.

Whether the practitioner in the real estate and land use fields is a new lawyer or one of greater experience, it is difficult to think of practice without this interactive Section newsletter. Please join editors and writers of the *Digest* in commemorating and celebrating the twentieth anniversary of our publication.

Edward J. Sullivan

Appellate Cases — Land Use

Uses Permitted Outright On EFU Land May Be Enjoined

In *Josephine County v. Garnier*, 163 Or. App. 333 (1999), the Oregon Court of Appeals held that Josephine County could enjoin a use that is permitted outright on land zoned exclusive farm use ("EFU"), if the use does not comply with state and local fire, building, and other public safety regulations.

Michael Garnier built four tree houses on property zoned for EFU. The tree houses were rented to overnight guests who were entitled to participate in the "Treehouse Institute." The "Treehouse Institute" offered "avocational instruction in basic engineering, design and construction methods for building treehouses." Michael Garnier built the tree houses without obtaining building permits and rented them without the required occupancy permit.

Josephine County filed an action in circuit court, seeking an injunction. The trial court granted the injunction and prohibited Michael Garnier from renting the tree houses and from building any more tree houses without obtaining all applicable permits from the County. Michael Garnier appealed.

On appeal, Michael Garnier argued the trial court erred in granting the injunction because the tree houses are "essential to the operation of an avocational school," which is a use that is permitted outright on land zoned EFU under ORS 215.213(1)(a) and 215.283(1)(a) and cannot be restricted under *Brentmar v. Jackson County*, 321 Or 481 (1995). The County responded by arguing this issue was subject to the Land Use Board of Appeals' exclusive jurisdiction, and that Michael Garnier did not offer evidence at trial that demonstrated his tree houses were sufficiently connected with the operation of a school.

After concluding it had jurisdiction to review the issue, the Court of Appeals opined that, regardless of whether or not the tree houses were schools within the meaning of ORS 215.213(1)(a) and 215.283(1)(a), Michael Garnier was obligated to comply with the building code. The Court went on to explain that *Brentmar* prohibits local governments from imposing additional approval criteria on the "class of uses described in ORS 215.213(1) and 215.283(1)," but it does not insulate those uses from all state and local government safety regulations.

This case offers local governments insight into the scope of *Brentmar* and clarifies that some restrictions are allowed on uses permitted outright on land zoned EFU.

Marnie Allen

Josephine County v. Garnier, 163 Or. App. 333 (1999)

Oregon Real Estate and Land Use Digest

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The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for

Appellate Cases — Landlord Tenant

Threats To Agent Of Corporate Landlord Are Sufficient Basis For Terminating Tenancy

In *Housing Authority of Portland v. Comstock*, 163 Or App 463 (1999), the Court of Appeals held that a threat of personal injury to the employee of a corporate landlord (as opposed to threats of injury to the landlord itself) are sufficient basis for terminating a residential tenancy on 24 hours' notice under ORS 90.400(3).

Defendant leased an apartment from the Housing Authority of Portland (HAP). When a construction company superintendent working on a contract for HAP at the building met with defendant, defendant used obscene and threatening language, told the superintendent to leave, and turned to a room where the superintendent knew the tenant kept a rifle. The same day, when a construction management specialist employed by HAP met with defendant, defendant became angry and threatened to hit the employee in the face. HAP terminated defendant's tenancy and initiated this action.

ORS 90.400(3) provides that a landlord may terminate on 24 hours' notice the tenancy of a residential tenant who "seriously threatens immediately to inflict personal injury, or inflicts any substantial personal injury, upon the landlord or other tenants."

The Court of Appeals reasoned that, because a corporation can act only through its officers and agents, the legislature's reference in the statute to threats of personal injury to a corporation must mean threats to the agents of the corporation. It held that to interpret the statute otherwise would require concluding that the legislature did not mean to include corporate landlords when it referred in the statute to threats against a landlord. This, the Court held, would allow a large loophole and would require concluding that the statute does not mean what it plainly says.

The Court of Appeals referred to definitions contained in the Residential Landlord Tenant Act. Those definitions read, in relevant part, as follows: "Landlord means the owner, lessor or sublessor of the dwelling unit or the building of which it is a part, and it also means a manager of the premises who fails to disclose as required by ORS 90.305." ORS 90.100(15). "Owner" means "one or more persons, jointly or severally, in whom is vested" title to the property. ORS 90.100(20). "Person includes an individual or organization." ORS 90.100(21). "Organization" includes, among other things, "a corporation, government, governmental subdivision or agency." ORS 90.100(19). The Court of Appeals held that, based on these definitions, the term "landlord" must include a "corporation, government, governmental subdivision or agency."

One dissenting justice argued that under a literal reading of the statute, the term "landlord" in ORS 400(3) can include only the landlord itself and one agent of the landlord, namely, a manager of the premises who fails to make the disclosures required by ORS 90.305. (ORS 90.305 requires anyone who enters into a rental agreement on behalf of a landlord to disclose certain information about who is authorized to manage the premises and to receive notices and service of process). The dissent observed that the definition of "landlord" in ORS 90.100(15) does not refer in general terms to the landlord's agents or employees, although general references to agents and employees are found elsewhere in the Residential Landlord and Tenant Act (e.g., ORS 90.322 (1)(d) referring to entry of dwelling by landlord or landlord's agent). The dissent argued that a distinction between corporate landlords and natural person landlords here is not "insensible," especially when one considers the severity of the remedy given to landlords under ORS 400(3)(a), a remedy reserved for conduct that is "outrageous in the extreme."

Susan Glen

Housing Authority of Portland v. Comstock, 163 Or App 463 (1999),

Cases From Other Jurisdictions

Eighth Circuit Affirms Invalidity Of Kansas County Radio Monopoly Regulations

In *Southwestern Bell Wireless, Inc. v. Johnson County Board of Commissioners*, ____ F.3d ____ (8th Cir. No. 98-3264, December 27, 1999), plaintiffs brought an action for declaratory and injunctive relief against the county board of commissioners, which had adopted both an ordinance and a condition on a conditional use permit regarding standards to prevent radio frequency interference ("RFI") with the county's public safety communications. The trial court granted summary judgment and held the ordinance and condition were pre-empted by federal law, notwithstanding defendant's contentions that the law violated the Tenth Amendment. Defendant contended the order was overbroad and that there were disputed facts that should have precluded summary judgment.

Plaintiffs applied for, and received, a conditional use permit for the monopoly. However, the approval was given subject, *inter alia*, to a condition that the transmission from the facility meet county non-interference standards with respect to local public safety transmissions. The standards required the permit holder to respond to county complaints on interference and to resolve those issues at its own expense. The standards replicated a county ordinance adopted just after the subject application was filed. In the hearings on the ordinance, both the FCC and plaintiffs raised the issue of pre-emption, which was the basis for the trial court's grant of summary judgment.

In analyzing pre-emption, the court found no express Congressional language to preclude state or local regulation on RFI. However, the Communications Act of 1934 pre-empted the field by providing a broad and comprehensive regulatory system over radio transmissions. That Act was amended in 1982 to give the FCC the authority to control RFI with an obvious intent to preclude state or local regulatory efforts. The Act was again amended in 1996, which, inter alia, recognized that local governments had zoning power over radio tower location. However, the amendment specifically said that local zoning authority did not otherwise affect the FCC's control over radio telecommunications. The court affirmed this construction and added that another basis for local regulation cited by defendant applied only to state or local removal of barriers to market entry with competition and not to local regulatory efforts. Moreover, the provision only applied to states, rather than local governments.

Additionally, the court found that both agency regulations and decisions of the FCC evinced a clear intent to prevent local RFI regulation and were consistent with the position taken by other federal courts.

As to defendant's Tenth Amendment and federalism claims based on traditional distribution of zoning and public safety matters and to the authority of local governments, the court noted a federal intent to pre-empt and a Congressional intent to occupy the field of RFI regulation. The court found RFI regulation was not a traditional local interest, but a national one pre-empted by federal legislation based on the commerce clause. Indeed, local public safety agencies

received their communication licenses from the FCC. The court said that a "patchwork of varied local regulations across the country would prevent a functional national telecommunications network" and concluded that there was not a Tenth Amendment violation. The trial court's determination that the local regulatory scheme was pre-empted was, therefore, affirmed. Finally, the court found no dispute over material facts relevant to the pre-emption issue, which would cause the matter to go to trial. The district court decision was thus affirmed.

This case involved a local attempt to regulate through zoning the radio transmission by the national communications facility so as to prevent conflicts with local public safety transmissions. However laudable is that goal, the national scheme of telecommunications regulations by the FCC precludes local efforts in this same field.

Edward J. Sullivan

Southwestern Bell Wireless, Inc. v. Johnson County Board of Commissioners, _____ F.3d _____ (8th Cir. No. 98-3264, December 27, 1999).

Klan Not Entitled To Participate In "Adopt-A-Highway" Program Says Missouri Federal Court

In *Cuffley and the Knights of the Ku Klux Klan v. Mickes, et al.*, 44 F.Supp.2d 1023 (E.D. Mo. 1999), plaintiffs sought on behalf of the Knights of the Ku Klux Klan to participate in the state's adopt-a-highway ("AAH") program, wherein monies are paid to the state for litter pickup along a stretch of state highway. In exchange for these funds, a sign acknowledging the donor's participation is erected. When defendants, on behalf of the state highway administration denied the request, plaintiffs filed a federal action. Both parties moved for summary judgment.

When plaintiffs applied to participate, defendants had no rules governing the AAH program and filed a declaratory judgment to determine whether it could lawfully deny the application. The Eighth Circuit found a state could not file a declaratory judgment on the constitutionality of its own actions and also that the matter was not yet ripe because the Klan were never denied the opportunity to participate. In the meantime, defendants adopted AAH regulations under which those applicants undertaking unlawful discrimination could not participate in the program, nor could those organizations with a history of violent or criminal behavior. The local highway engineer also adopted a moratorium on new AAH applications in the St. Louis area. Plaintiffs then filed the instant suit, alleging violation of the equal protection clause and their First Amendment rights.

Defendants asserted plaintiffs are collaterally estopped from participation by a Texas federal decision that disallowed Klan participation in the Texas AAH program and also contended that any speech in any AAH program was that of the state. Plaintiffs asserted their constitutional claims, as well as their claims that the regulations were vague and unclear and deprived them of due process and that defendants' actions constituted unconstitutional "viewpoint discrimination."

The court viewed this case as one of denial of access, rather than of entitlement or attempt to make the Klan change its viewpoint. The court found the AAH program to involve speech and rejected the state's contention that the speech was its own, rather than that of plaintiffs. Similarly, the court rejected the collateral estoppel argument based on the Texas decision because, even if there was privity between the Texas Klan and the Missouri Klan, the issues in the two cases were very different. In the Texas case, the Fifth Circuit found that that state's program involved a nonpublic forum, where the state had a right to exercise reasonable and viewpoint neutral grounds for regulation. In that case, the state refused to allow a sign to be placed in front of an integrated housing project that the Klan had been denied a license to picket. The result in that case did not mean that the Klan could not participate in AAH programs anywhere else.

The court found that, by the adoption of the AAH regulations, the state attempted to create a nonpublic forum and noted that the edges of public highways were not traditional fora, where the public discussed ideas. Nor did the state designate these roadside areas as a public forum. Rather, the state has devised a cheap litter-removal scheme by using free labor and thereby creating a narrow ancillary outlet limited to the participants' names and participation. The state maintains strict control over both the method of speech (placement of the sign and the act of participation) and the message (of such participation) itself. Those policies represent legitimate safety concerns, and the state's insistence on maintaining independence from the political, social or commercial interests of participants. In that way, the forum created was nonpublic. As such, access can be restricted if the regulations are reasonable and do not have the effect of suppressing views. The court then turned to the challenged regulations.

As to prohibiting participation to organizations that discriminate on the basis of race, religion, color, national origin or disability, the state asserted a reasonable basis for the restriction, which was a feared loss of federal funding. However, the reasonableness of the regulation does not make it viewpoint neutral. In its letter of rejection, the state asserted the Klan violated Title VI of the Civil Rights Act of 1964, which prohibited discrimination in programs or activities receiving federal funds. However, there was no program or activity over which the Klan controls access and thus no basis for finding the violation of Title VI. While the Klan discriminates in membership policies, so do other AAH participants, such as the Boy Scouts and Knights of Columbus. The only basis left is the Klan's belief in white supremacy. However, the state cannot base its denial on those beliefs, which constitute an effort to suppress plaintiffs' rights to espouse unpopular ideas. Summary judgment was granted for plaintiffs on this ground.

Regarding the second ground, plaintiffs' history of violent and criminal behavior, the court found this to be an unreasonable basis unreasonable as a basis for denial of access to a nonpublic forum. The court agreed with plaintiffs that the regulation is vague and unclear and gave the administrator great discretion to regulate free speech. While the state may prohibit certain criminals from participating in state programs, the law directs the forfeiture of specific rights on conviction. The lack of clarity of these regulations caused the court to grant summary judgment on this ground as well.

However, the court found the moratorium on new AAH participation in the St. Louis area to be reasonable and viewpoint neutral. The court granted summary judgment to defendants on that issue and denied the requested injunction.

The court concluded that, while the Klan's policies violated the underlying spirit of the original and amended version of the Civil Rights Act (originally enacted to combat the Klan in 1870), the legislation provides a basis for sheltering Klan expression. The state cannot use its regulations to target the Klan's "unfortunate" beliefs, but can regulate nonpublic fora in a reasonable and viewpoint neutral way and can impose a moratorium on the applications to meet legitimate safety concerns.

This case provides a good discussion of regulation of speech in a nonpublic forum and stresses the importance of framing regulations to meet First Amendment concerns.

Edward J. Sullivan

Cuffley and the Knights of the Ku Klux Klan v. Mickes, et al., 44 F.Supp.2d 1023 (E.D. Mo. 1999).

Maryland Federal Court Strikes Political Sign Regulations

In *Curry, et al. v. Prince George's County, 33 F. Supp.2d 447 (D. Md. 1999)*, plaintiffs challenged defendant's ordinance, which prohibited posting political campaign signs (including those relating to both candidates and causes) more than 45 days before an election, and required them to be removed within ten days following an election. The ordinance contained a provision that a successful primary candidate may have his or her signs remain up until ten days following the general election. The ordinance also required permits and imposed fees. Plaintiffs were a former unsuccessful candidate and two property owners who asked for declaratory and injunctive relief under the federal Civil Rights Act, contending that the ordinance violates their First and Fourteenth Amendment rights. On cross-motions for summary judgment, the court granted plaintiffs' and denied defendant's motions.

The court first dealt with plaintiffs' contentions that the definitions of "campaign signs" and "causes" were vague, noting that political speech is highly protected under the First Amendment. See, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Nevertheless, political signs, may be regulated because, unlike oral speech, they take up space and may obstruct views, distract motorists, displace alternative uses of land, and pose other problems that might call for regulation. Courts have upheld political sign regulations based on size, shape and location.

A frequent starting point for First Amendment analysis is whether the ordinance is content-neutral. Until *Ladue*, most political sign regulations were considered content-neutral. However, that city attempted to ban signs displayed at a residence, while exempting certain signs, such as "For Sale" signs. The court quoted extensively from *Ladue*, which assumed content-neutrality and the city's legitimate interests in preventing visual clutter and promoting traffic safety, but found ample alternatives for political messages did not exist in that case and thereby struck the ordinance. While *Ladue* involved a newer ban on residential signs, the court speculated that durational bans on cause or political signs would not fare better. There is no terminable date on a "cause" sign, and this alone underscored plaintiffs' vagueness challenge.

The court read *Ladue* to erase the distinctions between political campaign and "cause" signs and to say that a city may regulate such signs by other means than total ban. The *Ladue* court was satisfied that residents would impose their own limitations against visual clutter on their property and that the city could limit signs placed on property for a fee by others or placed offsite. The court acknowledged that size, shape and location regulations would pass muster. On the other hand, under that same analysis, durational regulations would not.

The court not only struck the durational ban, but also struck the permit and fee requirements with respect to political signs on private residential property. Those signs neither interfere with the use of the streets nor create the risk of disorder, as might other First Amendment activity. The court viewed the fee as a tax on free speech. Political signs on private property are an unusually cheap and convenient form of communication, particularly for those with modest means. The court found no convenient way to sever the invalid portion of the ordinance it found unconstitutional and, therefore, struck the entire ordinance.

This case works out some of the implications of *Ladue*, but it does raise issues as to just how far local governments may go to regulate the number of political signs on single-family residential property.

Edward J. Sullivan

Curry, et al. v. Prince George's County, 33 F.Supp.2d 447 (D. Md. 1999).

Florida Court Reverses State Agency Approval Of Local Plan Amendment

In *Sumter Citizens Against Irresponsible Development v. Department of Community Affairs,* 730 So.2d 370 (Fla. App. 1999), co-defendant Sumter County approved a comprehensive plan map amendment for a 510-acre tract from "agricultural" to "planned unit development," thereby permitting development of 499 units. When its initial notice finding compliance with the local plan was challenged, defendant State Department of Community Affairs (the "Department") conducted a hearing. The hearings officer found the amendment in compliance with the local plan over petitioners' objections, and petitioners appealed.

At issue was whether the amendment complied with plan policies discouraging urban sprawl and whether the hearings officer misapplied an urban sprawl point-scoring system under that plan. The system applied to development orders (as opposed to plan amendments). Petitioners raised two claims concerning the plan policy issues: First, petitioners agreed that there must be a 50-percent open space ratio outside urban expansion areas. Additionally, petitioners contended that agricultural lands must be protected.

The hearings officer acknowledged a 44-percent open space ratio, but found the amendment extended the urban growth expansion area so that it did not apply. The Department upheld the order, notwithstanding its determination that the proposal did not extend the urban expansion area, and found that petitioners did not raise the objection sufficiently. The court disagreed.

In applying the urban sprawl point system, the hearings officer also found compliance with the plan, again by construing the amendment to extend the urban expansion area so as to include the subject site. Both parties in the appeal conceded that the urban expansion area was not extended and should not be so construed. Petitioners contended that the policy would have applied, except for the finding that the urban expansion area was extended. The Department struck that finding, but did not deal with the other parts of the order proposed by the hearings officer, which depended upon that determination. Because the hearings officer's determination in those areas depended upon erroneous determination on the urban expansion area, the matter must be remanded.

The court noted the statutory standing on review in cases involving the Department's determinations of compliance was a "fairly debatable" test, which gives great deference to the local government's determination. However, the court also noted that the Department's determination must also be supported by competent, substantial evidence in the record and that correct and fair proceedings occurred. In this case, the inclusion of the subject site in the urban expansion area so affected the determination, notwithstanding partial correction, so that the final order was erroneous. The court further concluded that these misconceptions so affected the findings relating to urban sprawl, open space, and consistency of other plan policies as to require a remand. While the Department corrected one finding of the hearings officer on the urban expansion area extension, it did not consider or amend the other related findings dependent on such a conclusion. The order was, therefore, remanded.

This case illustrates the often-trivial but necessary requirement that administrative orders be internally consistent and that legal conclusions proceed from, and be dependent upon, findings of fact found by the agency.

Edward J. Sullivan

Sumter Citizens Against Irresponsible Development v. Department of Community Affairs, 730 So.2d 370 (Fla. App. 1999).

Denial Of Dredge-Fill Permit Not A Taking Says Federal Circuit

In *Forest Properties, Inc. v. United States*, 177 F.3d 1360 (Fed. Cir. 1999), plaintiff landowner appealed the dismissal of its takings claim in the Court of Federal Claims, a claim that arose over the denial of a dredge-fill permit with respect to underwater lake-bottom property. In 1969, plaintiff and its sister company bought two adjacent tracts of land along Big Bear Lake in Southern California. The uplands tract was ultimately developed, and plaintiff sought to exercise its option to develop the adjacent lake bottom. After a dispute over the validity of the option, plaintiff reduced the developable acreage, but chose to develop the most scenic area. Under the settlement of the option dispute, if the dredge-fill permit did not issue within three years, the land would revert to a public water district.

The 9.4 acres to be developed included wetlands, which required a permit from the United States Corps of Engineers ("USACE"), with review by the United States Environmental Protection Agency. Under applicable USACE rules, permits for nonwater-dependent uses would not issue unless there were no alternatives. After reducing the dredge-fill area even further, the USACE denied the permit. Plaintiff did not seek administrative or judicial remedies of denial, but continued to develop the uplands area and has sold some of the lots. Plaintiff now claims the lake-bottom land is worthless, and it would have made $2.36 million in profit if the permit had issued. Plaintiff lost its claim below on a takings claim for just compensation because the trial court found that the permit denial affected only a small portion of the entire development, which was still profitable.

On review, the court found three questions applicable: (1) whether the taking claim was for a physical or regulatory taking ; (2) if it is a regulatory taking claim, what is the relevant parcel for the takings analysis; and (3) whether a taking had, in fact, occurred. The federal circuit agreed with the Court of Federal Claims that the taking claim was regulatory. In doing so, the court rejected plaintiff's characterization of the case as a physical taking claim because of the reversionary clause, which would have been effective if the dredge-fill permit was not secured within three years. The court found the reversion occurred only because of the contractual obligation, rather than from some governmental action.

Moreover, the court agreed with the Court of Federal Claims that the relevant parcel was the entire parcel plaintiff purchased and optioned and not the smaller portion, which was subject to the USACE permit application. Any takings analysis in these circumstances must deal with the parcel as a whole so that the court could compare the value "taken" from that parcel with the value that remained. Where the developer treats several parcels as a single economic unit, the combined parcels comprise the relevant parcel for takings analysis purposes. The court found the record supported the Court of Federal Claims' conclusion that the aggregate of parcels comprised a single integrated project of two tracts developed together. Only the uplands owner could exercise the option to purchase the lake-bottom property, and the uplands property and option tract were part of the same transaction. The court rejected the different types of title acquired for the uplands and lake-bottom properties, the different times for acquiring title, the different regulatory schemes applicable and the different permit requirements as a basis for finding a different relevant parcel, finding the lower court "properly looked to the economic viability of the arrangement, which transcended these legalistic bright lines."

In approaching the third question, i.e., that of taking, the court used the three factors of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), i.e., the economic impact of the regulation on the claimants, the extent to which the regulation interferes with distinct investment-backed expectations and the character of the governmental action. The trial court found the issuance of the permit would cause no nuisance, but also said that any investment-backed expectations must be reasonable. When plaintiff purchased the subject site, it was aware of the USACE regulations for permits, which clearly disfavored dredging and filling for residential use. The USACE told plaintiff three years before its final action that it would likely deny the permit application. The court said the investment-backed expectations criterion limits recovery to landowners who can prove that they bought the property in reliance on the nonexistence of the challenged regulations. Moreover, plaintiff failed to present convincing evidence of a reduction of value of the entire parcel caused by the denial of the USACE permit. The lost profits to plaintiff do not equate to the reduction in market value caused by the denial of the permit. The court concluded at 1367:

> "There are no comparable findings regarding the amount of the reduction in the fair market value of the relevant parcel here that resulted from the denial of the permit, and insufficient evidence in the record upon which such finding could be made. Forest had the burden of proof to establish a regulatory taking, and it failed to carry that burden. Indeed, the record shows that, despite the denial of the permit, the value of the 62 acres increased from the $3.6 million Forest paid in 1988 in what it asserts was an arms length transaction with Big Bear, to more than $12 million today. That result itself undermines Forest's contention that its property was taken.
>
> "In sum, we have no reason to disagree with the Court of Federal Claims' conclusion, grounded on the record, that the denial of the permit "did not prevent all or substantially all of the economically viable use of the property, and, thus, the economic impact of the regulation is not sufficiently severe to constitute a taking."

This case again illustrates the importance of the threshold inquiry as to the "relevant parcel" and that not every loss of profits by regulatory activity constitutes a taking.

Edward J. Sullivan

Forest Properties, Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999).

LUBA

Annexation

In *Johnson v. City of LaGrande*, LUBA No. 99-053 (12/17/99), LUBA rejected jurisdictional and procedural challenges to an annexation ordinance. Petitioners in *Johnson* appealed the City's adoption of an ordinance annexing 155 parcels, including petitioners', into the City through the double majority process under ORS 222.170(1). As a result of groundwater pollution, water in the annexation territory became unpotable and residential development in the area became too concentrated for the safe installation of septic systems. During the years prior to the annexation, the City provided water and sewer services to property owners in the annexation

territory and approved residential development in exchange for signed consents to annexation.

LUBA first addressed and rejected the City's jurisdictional challenge. The City argued the ordinance approving the annexation is not a statutory land use decision and LUBA lacks jurisdiction to review it. Pointing to a section in the ordinance that finds the ordinance complies with the City's comprehensive plan, LUBA concluded the decision is a statutory land use decision because it applies plan provisions as part of the City's decision making

LUBA also rejected the petitioners' argument that the City erred by failing to provide individual notice of the annexation proposal to property owners. Petitioners contended the City's decision was quasi-judicial in nature and the City should have provided written notice to affected property owners before adopting the ordinance, consistent with ORS 197.763. As a result of the City's failure to provide notice, petitioners argued they are entitled to raise issues before LUBA that they did not raise at the local level. The City characterized the annexation proceedings as legislative in nature and argued the requirements of ORS 197.763 are inapplicable.

LUBA acknowledged that the first step in analyzing the parties' arguments is to apply the three-part test set out in *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-3, 601 P2d 769 (1979) for determining whether a decision is legislative. As to part one of the test, LUBA determined the annexation process was not bound to result in a decision because the City was not required to complete the annexation process and adopt a decision. As to part two, the City's ordinance applies preexisting criteria to concrete facts because it analyzes the proposed annexation under applicable statutory criteria and comprehensive plan provisions. LUBA gave this factor less weight because these kind of general criteria are present in almost all land use decisions. As to the final part of the test, LUBA concluded the number of parcels (155) and diversity of ownerships (127) involved indicate the City's decision was not directed at a closely circumscribed factual situation or a relatively small number of people. Therefore, since LUBA held the annexation ordinance is a legislative decision.

Since the appealed decision is legislative, LUBA ruled the "raise it or waive it" provisions of ORS 197.763 do not apply and petitioners may raise issues at LUBA that they did not raise during the local proceedings. Additionally, findings are not required to support the City's decision. However, LUBA ultimately remanded the annexation ordinance to the City because the City failed to identify which provisions of ORS 222.170 it was proceeding under. The City also failed to present an annexation plan to persons from whom consents to annex were sought, erred by using consents to annex obtained by contracts before the effective date of ORS 222.115 and erred in relying on consents that had not been recorded before a transfer of title occurred. LUBA also agreed with petitioners that as a result of these errors, there was not substantial evidence in the record to support the City's findings that it had a sufficient number of valid consents to support the annexation. One noteworthy feature of LUBA's opinion is LUBA's consideration and rejection of petitioners' argument that the City obtained some consents to annex through the same kind of coercive contracts for service invalidated in *Hussey v. City of Portland*, 65 F3rd 1260 (9th Cir 1995).

Comprehensive Plan Map Amendments

Petitioners' appeal of a quasi-judicial comprehensive plan map amendments in *Neighbors for Livability v. City of Beaverton*, LUBA No. 99-036 (12/23/99) gave LUBA an opportunity to revisit the question of when zoning designations must implement and conform to comprehensive plan designations. At issue in *Neighbors* was the City's approval of comprehensive plan map amendments for several parcels approximately half a mile from each other. The City changed the designation of the 10.3 acre Beard/155th site from Commercial to Urban Standard Density Residential (SDR), and changed the designation of the Beard /Murray site from SDR to Commercial (northern 10 acres) and from SDR to Urban Medium Density Residential (MDR) (southern 7.5 acres). The amendments will allow development of a supermarket on the Beard/Murray site.

The City characterized the map changes for the 10.3 acre Beard/155th site and the northern 10 acres of the Beard/Murray site as "relocating" the existing map designations. The City also imposed a condition that if substantial progress in developing the sites does not occur within two years, the amended comprehensive plan map designations revert to the former plan map designations. The City's decision defines "substantial progress" as filing a complete zone change application for the Beard/155th site, and filing applications for zone changes and either design review or a conditional use permits for the southern 7.5 acres and the northern 10 acres of the Beard/Murray site.

On appeal, petitioners argued that the City's decision violates Goal 2 because the City changed only the comprehensive plan map designations for the properties and failed to make corresponding zoning map changes to implement the plan designations. The City's decision explains that a range of commercial zones are potentially available to implement the commercial plan designation for the Murray/Beard site and that the applicant will not be able to develop this site until a specific zoning designation is applied to it. Petitioners contended the Oregon Supreme Court's decision in *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975) requires contemporaneous application of a zoning map designation anytime the comprehensive plan map designation for a parcel is changed.

LUBA concluded the language of Goal 2 does not support the petitioner's argument and upheld the City's decision to change the comprehensive plan map designations now and conform the zoning to these designations later. Goal 2 requires the City to ensure that its "land use regulations," including its zoning map, are consistent with the comprehensive plan map. LUBA noted, however, that "neither Goal 2 nor ORS 197.175 expressly dictate that plan map/zoning map consistency must be achieved at the same time that the comprehensive plan map is amended." And while the Court's decision in *Baker v. City of Milwaukie* established that the city must conform its zoning to its comprehensive plan, LUBA noted the Court specifically left open the question of when the conforming zoning should be adopted.

LUBA also rejected the petitioners' argument that the City has no zoning district that can implement the challenged comprehensive plan map amendments. The City's findings explained that either the Community Service (CS) or Neighborhood Service (NS) zoning districts could be applied to the property in the future. Petitioners contended neither of these zones are potentially available given the specific commercial development envisioned for the northern 10 acres of the Beard/Murray site. LUBA responded

> Nothing in the challenged decision purports to be a final decision that the NS zone or the CS zone may appropriately be applied to implement the development that is envisioned by the challenged decision for the northern 10 acres of the Beard/Murray site.***Moreover, even if petitioners are correct that neither the NS nor the CS zoning districts or other *existing*

> zoning districts can be applied to implement the challenged plan map amendment, that would not require the challenged decision be reversed or remanded. If petitioners' view of the NS and CS zoning districts proves to be correct in the future, the city simply would be required to (1) adopt a new implementing zoning district or amend anexisting zoning district so that it could be applied, or (2) adopt any further map amendments that may be required to allow an implementing zoningmap designation to be applied. We fail to see why a lack of an availableimplementing zone now, even if true, necessarily provides a basis for reversal or remand. (Slip Op at 10-11)

In a footnote, LUBA also observed that the City may need to interpret its comprehensive plan and zoning code to decide whether the NS and CS zones can be applied to the property.

LUBA also upheld the condition the City imposed, which provides for a reverter to the original comprehensive plan map designations if the applicant does not make "substantial progress" in implementing the development within two years. Petitioners argued this condition violates Goal 2 because it creates uncertainty and, if it is exercised, violates the statutory requirements for notice and the right to appeal for post-acknowledgment land use decisions. LUBA concluded that nothing in Goal 2 or the City's code prohibits the condition the City imposed, particularly if the City's decision is viewed as a single amendment with two possible outcomes, rather than two separate plan amendments. LUBA also found nothing in ORS Chapters 197 or 227 that prohibits such a condition.

LUBA noted that if the reversionary period was longer than two years, this type of condition might violate Goal 2's requirement that there be an "adequate factual base" for land use decisions, explaining:

> As the length of time in which a plan map designations reversion could occur gets longer, the chances increase that the relevant facts may changein unanticipated ways. At some point a *current* decision that plan map designations could automatically change several years in the future would cease to be supported by an adequate factual base, simply because the decision maker's ability to make valid assumptions about future facts is limited.

In this case, LUBA concluded the two-year reversionary period is not long enough to raise Goal 2 concerns.

Finally, LUBA rejected the petitioners's argument that the City's decision violated a criterion of approval for comprehensive plan map amendments. The criterion requires a finding that there is a "demonstrated public need to be satisfied by the amendment as compared to other available properties." The City found this criterion is satisfied because the approved comprehensive plan map amendments simply swap existing comprehensive plan map designations for two 10-acre parcels that are a half-mile apart. The amendments do not affect the existing acreage of Commercial and SDR-designated land. Since petitioners did not specifically change the City's interpretation of its criterion, LUBA concluded it passed muster under the deferential standard in ORS 197.829(1) under the unique factual circumstances of this case. Accordingly, LUBA affirmed the City's decision.

LUBA Jurisdiction

In two decisions offering good news to local governments, LUBA concluded it lacked jurisdiction to review local government actions challenged as land use decisions. In *Bigley v. City of Portland*, LUBA No. 99-089 (1/21/00), petitioners attempted to appeal a city council decision approving a conditional use master plan for the Metro Washington Park zoo almost two years after the Council made its decision. Petitioners contended their appeal was timely because the City's initial notice of hearing on the master plan failed to identify conversion of a temporary parking lot into a permanent parking lot as one of the elements of the master plan. As a result, petitioners argued the proposal approved (with the permanent parking lot) differed from the proposal described in the notice to such a degree that the notice did not reasonably describe the City's final actions and the appeal period was tolled. Since the notice of hearing did not identify the parking lot conversion, petitioners argued they could safely assume it was not part of the master plan proposal and elect not to attend hearing before the hearings officer. In fact, petitioners did not participate in the hearings before the hearings officer or the Council and, as a result, did not receive notice of the Council's final decision.

Citing its decision in *Kevedy v. City of Portland*, 28 Or LUBA 227 (1994), LUBA reiterated that ORS 197.830(3) requires that a reasonable person be able to tell from a notice of hearing that the local government might take the action it ultimately takes. A corollary of this is that a reasonable person recognizes that the level of detail in a notice is related to its length and that a land use proposal may change somewhat after the notice of hearing is given. And, if his or her interests may be affected, a reasonable person participates in the local proceedings to protect his or her interests.

Here, LUBA noted the City's notice of hearing describes a "multifaceted" conditional use master plan for the zoo involving a large number of potential projects. In LUBA's view, "[a] reasonable person reading that notice would realize that plans for a number of changes in zoo facilities and improvements were proposed and that the notice might not completely describe all the proposed projects and improvements." If petitioners had asked for a copy of the staff report, as the notice invited them to do, or attended the hearing, they would have learned of the proposed parking lot conversion. LUBA concluded that ORS 197.830(3) only requires that the notice adequately describe the master plan proposal. It does not require the notice to precisely describe every detail. The notice of hearing was adequate to inform petitioners that the proposed master plan included many new projects. In sum, LUBA held that petitioners failed to show that "a multifaceted Zoo Master Plan *with* the temporary parking lot converted to a permanent parking lot so differs from a Zoo Master Plan *without* the permanent parking lot that the notice of hearing 'did not reasonably describe the local government's final action'." As a result, petitioners' appeal was untimely and LUBA dismissed the appeal.

In *Baker v. City Woodburn*, LUBA Nos. 99-149/99-162 (1/25/00), LUBA held that an ordinance creating a process for forming a reimbursement district and a resolution approving the formation of a reimbursement district were not land use decisions. Petitioners argued both actions were statutory land use decisions because they modified conditions of development permits the intervenor obtained for the Woodburn Company Stores and the intervenor could not have obtained the permits without establishment of a reimbursement district. LUBA disagreed, characterizing the reimbursement district as the City's alternative cost-sharing choice. The conditions of approval obligated the intervenor not to contest formation of the reimbursement district, but nothing about the challenged decisions modified these conditions. Accordingly, LUBA concluded the ordinance and resolution were not statutory land use decisions.

LUBA also considered and rejected petitioners' argument that the challenged decisions were significant impact land use decisions. Petitioners contended they cannot develop some of their property

until they pay the reimbursement fees established by the ordinance and resolution, and that the resulting delay is a sufficient impact to constitute a taking and to make both actions significant impact land use decisions. LUBA disagreed. Since development delay is the only impact petitioners alleged, LUBA noted that even if it the delay constituted a taking, "a taking, by itself, does not necessarily cause a significant impact on land use." Petitioner has not shown that he is unable to develop his property and LUBA concluded he had not demonstrated the challenged actions were significant impact land use decisions.

In a rare application of the *State Housing Council v. City of Lake Oswego* decision, LUBA held the challenged actions were fiscal ordinances with only a tangential relationship to land use. Since fiscal ordinances are not reviewable as land use decisions, LUBA concluded it lacked jurisdiction to review them. LUBA granted the intervenor's motion to transfer this case to circuit court, even though the intervenor did not file a motion to transfer within 10 days of the date the City filed its motion to dismiss the appeals, as LUBA's rules require. LUBA concluded intervenor committed only a technical violation of its rules and petitioners failed to show their rights were substantially prejudiced as a result of the untimely filed motion.

Local Procedure

Remand

Is there a difference between the issues that can be raised after a voluntary remand from LUBA and after a LUBA opinion remanding a local decision on the merits? No, says LUBA in *Riggs v. Douglas County*, LUBA No. 98-157 (12/27/99). This case is the outgrowth of the County's original approval of a comprehensive plan map amendment and zone change for a 101-acre parcel, which petitioners appealed to LUBA. After petitioners filed their petition for review, the intervenor-applicant asked for a voluntary remand of the decision to address the issues raised in the petition. LUBA granted the voluntary remand. The county planning commission declined to hold a *de novo* hearing as petitioners requested and held a hearing that was limited to the issues raised in the petition. The commission approved the plan amendment and zone change, and the county board upheld the commission's decision. Petitioners again appealed to LUBA.

Among the errors petitioners alleged was the county's failure to make findings complying with specific approval criteria in the county code. The intervenor argued petitioners waived this issue because they did not raise it in their first petition for review and the county proceedings on remand were limited to the issues that were the basis for the remand, citing *O'Rourke v. Union County*, 31 Or LUBA 174 (1996). Petitioners argued *O'Rourke* is distinguishable because it involved a remand following a decision on the merits by LUBA, rather than a voluntary remand. In petitioners' view, they are entitled to raise issues before LUBA that were raised during the initial local government proceedings as well as during the proceedings on voluntary remand, even if the local government limited the scope of the evidentiary hearings after the remand.

LUBA phrased the issue before it as "whether an appeal of a local government decision after voluntary remand is limited to the issue(s) identified in the petition for review filed in the initial appeal, if any." LUBA characterized the petitioners' argument as putting a petitioner in a proceeding that is voluntarily remanded in a better position than a petitioner that obtained a final order by LUBA remanding a local government decision. The petitioner in a voluntary remand could raise issues from the initial local government proceeding that the other petitioner could not. LUBA declined to adopt the petitioners' argument, stating:

> 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. Allowing a petitioner on appeal of a voluntarily remanded decision to raise pre-existing issues that the petitioner did not raise on the remand would be inconsistent with the policy the legislature enacted at ORS 197.805.

Since petitioners could have raised compliance with the cited code criteria in their initial petition for review, but failed to do so, LUBA concluded they waived their right to raise this issue in their appeal. LUBA sustained other assignments of error the petitioners raised, however, and remanded the County's decision.

Failure to Identify Relevant Approval Criteria

The city's confusion over the nature of a conditional use request and resulting failure to identify the applicable approval criteria led to a remand in *Latta v. City of Joseph*, LUBA No. 99-072 (9/27/99). Petitioners in *Latta* appealed the city's approval of a conditional use for a florist shop as a home occupation in the city's General Residential zone. In its decision, the city described the application as an application for a conditional use to place two greenhouses on the property for the cultivation of nursery stock, display and retail sale and for a florist shop located in the dwelling on the property. The city council found that "crop cultivation" and "plant nursery" were uses allowed outright in the General Residential zone, but the zoning ordinance did not provide for a commercial plant nursery where plants will be displayed and sold on a retail basis. The Council denied the conditional use for a commercial plant nursery, but nevertheless approved a conditional use for a home occupation for a florist shop.

Petitioners alleged the city's processing of the conditional use application violated ORS 197.763 in a variety of ways, including the city's failure to identify the relevant approval criteria in the notice of hearing or in the oral statement the council made at the outset of the hearing. The record showed confusion on the city's part about the nature of the application, which was variously characterized as a home occupation to relocate a florist/nursery, a conditional use for a home occupation and a request for greenhouses for the cultivation of nursery stock, display and retail sale. Although the decision denied approval for a commercial greenhouse, it granted approval for a florist shop in an existing dwelling.

LUBA concluded petitioners' right to a fair opportunity to present their case was substantially prejudiced by the city's failure to identify the relevant approval criteria. The relevance of the greenhouses to the approval criteria varies depending on whether the conditional use request is viewed as seeking approval only for a florist shop. LUBA accordingly remanded the decision to the city.

Manufactured Dwellings

Petitioner in *Multi/Tech Engineering Services v. Josephine County*, LUBA No. 99-049 (12/15/99) successfully challenged the county's denial of an application to site a manufactured home park, based on the county's failure to apply clear and objective criteria to the review of the application. Petitioner, the applicant, sought permission to site a 55-unit manufactured home park (MHP) on 8.38 acres zoned R-2 (single and two-family residential). Under the county's code, a

MHP is a conditional use in the R-2 zone subject to review under adopted Mobile Home Park Development Guidelines, which contain objective standards. However, the county denied petitioner's application based on findings of noncompliance with discretionary criteria applicable to conditional use permits and site plan approval.

Petitioner argued ORS 197.480(5) precludes the county from applying the discretionary criteria. That statute authorizes cities and counties to establish clear and objective criteria for the placement and design of mobile home or manufactured dwelling parks. If a hearing is required for approval of a mobile home or manufactured dwelling park, application of the clear and objective criteria is the sole issue to be determined at the hearing. Finally, any criteria adopted must not preclude the development of mobile home or manufactured dwelling parks. Petitioner contended that the adopted Guidelines are clear and objective and that the only issue the county should have determined was whether the proposed MHP complied with the Guidelines.

LUBA agreed with the petitioner that the conditional use and site plan review criteria the county applied to deny the MHP are not clear and objective, as required by ORS 197.480(5). Moreover, ORS 197.480(1) requires the county to permit MHPs as an allowed use on residential lands sufficient to accommodate the need for such uses identified in the inventory and projection required by other subsections of the statute. MHPs are not identified as allowed uses in two of the county's residential zones and are listed as conditional uses in the other two residential zones, subject to the Guidelines. LUBA concluded that the county's approach to regulating MHPs does not satisfy the statute, observing:

> ***as the county has applied [its code] here, every proposed MHP within the [Urban Growth Area] is subject to conditional use and site plan review criteria. Those criteria are not clear and objective. Absent some explanation from the county as to why the MHP proposed in this case is not subject to the requirements of ORS 197.480, we conclude that the county erred in applying the [conditional use and site plan review] criteria***(Slip Op at 8)

The fact that the county's code has been acknowledged has no bearing on whether the code complies with ORS 197.480. Consistent with its decision, LUBA remanded the decision to the county.

Statewide Planning Goals

Goals 2 and 5

LUBA's decision in *Turner Community Association v. Marion County*, LUBA No. 99-024 (12/16/99) is noteworthy for its discussion and application of the revised Goal 5 rule LCDC adopted in 1996 and the Goal 2 coordination requirement. Petitioners appealed a county ordinance that added a 389-acre site to the county's inventory of significant aggregate sites and approved a plan to mine and process aggregate material on the site. Petitioners raised numerous claims of noncompliance with the Goal 5 rule, including the county's failure to address all potential conflicts with the mining use as required by the rule and the county's imposition of a condition that appeared to allow post-mining uses on the site that are not otherwise allowed.

Petitioners argued the county erred in identifying noise as the only potential conflict to be addressed through the Goal 5 rule, when the county's findings and evidence in the record indicated other conflicts existed, such as a conflict with dewatering of the extraction area and with a Santiam Water Control District (SWCD) lateral that runs through the property. LUBA agreed, noting that the county's findings discuss a variety of measures to avoid or mitigate impacts from dewatering and the SWCD lateral. In LUBA's view, "if measure must be taken to avoid potential conflicts, it is incorrect to conclude that there are no conflicts under OAR 660-023-0180(4)(b)." On remand, the county must clarify whether dewatering and the SWCD lateral are potential conflicts with the mining use and, if they are, show that the conflicts can be minimized consistent with the rule.

Petitioners also argued a condition the county imposed on post-mining uses is inconsistent with portions of the Goal 5 rule, which limit these uses to farm uses under ORS 215.203, uses listed under ORS 215.213(1) or 215.213(1), and fish and wildlife habitat uses, including wetland mitigation banking, for aggregate sites on Class I, II or unique farmland. To implement this requirement, the county adopted the following condition:

> *Future Use*. Except as otherwise approved herein, farming, wetland and wildlife habitat are the designated uses of the subject properties. These shall be the designated uses unless the county approves other uses allowed, permitted subject to standards or conditionally permitted in the underlying zone.

The county argued the condition simply authorizes the post-mining uses identified in the reclamation plan (water impoundment for use as plant and wildlife habitat). It recognizes the statutes and the county's implementing code provisions allow some uses besides farming, wetland or wildlife habitat, but does not authorize uses beyond those allowed by the statute. LUBA concluded it was not possible to tell from the condition's wording whether the county board actually intended the interpretation of the condition the county advanced on appeal. As a result, LUBA concluded the decision should be remanded to allow the county to rephrase the condition to ensure it does not violate the Goal 5 rule.

Finally, LUBA agreed with petitioners that the county failed to adequately perform its coordination function under Goal 2 by failing to coordinate its decision with the City of Turner and the Cascade School District #5. The city and the school district raised concerns about truck traffic, peak hour traffic, summer and fall traffic peaks and emergency services, among others. LUBA concluded these issues were raised with sufficient specificity to warrant a response in the findings and traffic impact analysis. Since neither document adequately addressed these issues, LUBA remanded the decision to give the county an opportunity to do so. Pages 26 and 27 of LUBA's opinion contain a good summary of the legal principles applicable to the Goal 2 coordination requirement.

Goal 9

LUBA upheld petitioners' allegations that portions of the city's legislative action adopting amendments to the Bend Area General Plan (BAP) violate Goal 9. The adopted changes included a new road classification scheme that designates the street on which petitioners own property, 27th Street, as a major arterial with a required minimum right-of-way of 100 feet and up to five vehicle lanes. The street was previously classified as a minor arterial with a minimum right-of-way width of 80 feet. Petitioners argued the change in classification for 27th Street will result in additional right-of-way acquisition and access limitations. This will make it more difficult for petitioners and others on 27th Street to develop their property and will affect the supply of buildable land or commercial sites. Petitioners argued the city erred by failing to address the effect of the reclassification on the city's compliance with Goal 9.

LUBA rejected the city's argument that the reclassification has no Goal 9 implications, because under the former classification system the city could have authorized widening the street beyond the minimum required 80 feet. Since the new classification imposed a required minimum 100 foot right-of-way, LUBA concluded "the increase in the minimum right-of-way could reduce the amount of buildable land and commercial sites in a manner that implicates Goals 9 and 10." The city failed to identify any findings or evidence in the record showing the reclassification will not affect the supply of buildable or commercial land, and LUBA remanded the decision.

In contrast, LUBA rejected the petitioners argument that the city failed to designate sufficient land to meet the identified need for commercial and industrial land in violation of Goal 9. LUBA noted that the Goal 9 rule makes clear that local governments need to review and amend their comprehensive plans to comply with the rule only during periodic review. Although the city updated the total number of acres of industrial and commercial lands in the BAP as part of the amendment process, it did not appear to LUBA that the city intended to address the Goal 9 rule in doing so. Moreover, petitioners did not argue the supply of industrial and commercial sites is currently inadequate, regardless of whether the supply of such sites may be inadequate under the 20-year planning horizon identified in the rule. No similar planning period is described in the rule. Accordingly, LUBA concluded petitioners failed to show the county violated Goal 9 by failing to designate additional industrial and commercial lands.

Kathryn S. Beaumont

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