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# OREGON REAL ESTATE AND LAND USE DIGEST

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## Highlights



# Appellate Cases — Real Estate

## No Escrow Agent License Necessary to Engage in Certain Activities Related to Residential Refinancings

In *Coast Security Mortgage Corp. v. Real Estate Agency*, 331 Or. 348 (2000), the Oregon Supreme Court reversed the Oregon Court of Appeals and Real Estate Agency, holding that an escrow agent license is not necessary to explain escrow instructions and settlement statements, obtain and notarize signatures, and send documents to an escrow company.

This case arose out of an enforcement action brought by the Real Estate Agency against Coast Security Mortgage Corporation (Coast Security) for allegedly acting in the capacity of an escrow agent without a license in violation of ORS 696.511(1). Coast Security is a licensed mortgage broker in Oregon that offered customers the convenience of signing refinancing loan documents, settlement documents, and escrow instructions at their homes or Coast Security's offices instead of at a licensed escrow agent's office. Coast Security forwarded lender prepared loan documents, escrow instructions, and settlement statements prepared by a California escrow company to its employee in Oregon, who delivered them to Coast Security customers in Oregon. The employee explained the documents to the customers, notarized customer signatures where appropriate, and sent the documents back to Coast Security, which returned them to the California escrow company for closing. The Real Estate Agency brought the action against Coast Security after a customer complained that Coast Security defrauded him in arranging the refinancing of his home. The enforcement action included forty-six other refinancings and involved similar activities.

The Supreme Court began its analysis by determining the standard of review for the Real Estate Agency's interpretation of the language "act in the capacity of an escrow agent" in ORS 696.511(1). It cited *Springfield Education Ass'n v. School Dist.,* 290 Or. 217, 621 P.2d 547 (1980), as authority that the standard of review depends on whether the phrase at issue is an exact term, inexact term, or delegative term. Although both parties asserted that the phrase was a delegative term, the Supreme Court concluded it was an inexact term. 331 Or. at 354. The Supreme Court explained that while the terms "escrow" and "escrow agent" are defined in the statute, "act in the capacity" is not defined by statute and does not require a legislative policy determination to have meaning. *See* ORS 696.505(2) (defining escrow); ORS 696.505(3) (defining escrow agent). Therefore, the language was not an exact or delegative term, but an inexact term, and the Real Estate Agency's interpretation of it was reviewed for consistency with legislative intent under *Springfield Education Ass'n*.

The Supreme Court determined the legislature's intent by using the methods of interpretation established in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), to construe "act in the capacity of an escrow agent." It divided the phrase into its essential parts: "act in the capacity" and "escrow agent" and analyzed the text and context of those parts. 331 Or. at 354–356. The Supreme Court concluded that "capacity" means a position, character, or role as defined in *Webster's Third New Int'l Dictionary*, 330 (unabridged ed. 1993). *Id.* at 355. Thus, to "act in the capacity of an escrow agent" means to act in the role of an escrow agent. *Id.* ORS 696.505(3) defines escrow agent as:

> "any person who engages in the business of receiving escrows for deposit or delivery and who receives or is promised any fee, commission, salary or other valuable consideration, whether contingent or otherwise, for or in anticipation of performance."

Consequently, the Supreme Court said, a person must meet two requirements to be an escrow agent: (1) receive or be promised a "fee, commission, salary or other valuable consideration" for his or her services; and (2) the services must include "receiving escrows for deposit or delivery." *Id.*

By reading the definition of "escrow" in ORS 696.505(2) with the above definition of "escrow agent," the Supreme Court concluded that

> "a person 'acts in the capacity of an escrow agent' when, pursuant to written instructions of the principals, and for a fee, commission, salary, or other valuable consideration, that person: (1) *receives* any written instrument, money, evidence of title to real or personal property or other thing of value (collectively, 'matters in escrow'), to which they have no right, title, or interest therein; (2) *holds* the matters in escrow as a neutral third party until the happening of an event or the performance of a condition specified by the principals; and (3) upon the happening of the event or condition, *delivers* the matters in escrow to a person who has right, title, or interest therein." 331 Or. at 356.

The Court then analyzed the concepts of receipt, holding, and delivery by looking at permissible and impermissible activities of an escrow agent specified by ORS 696.581(1)–(3) and ORS 696.505(2). Taken together, the Supreme Court concluded that the receipt of matters in escrow involves accepting the matters in escrow together with either signed written instructions from the principals directing how the escrow agent is to hold and deliver them, or a written agreement from the principals. *Id.* at 358. The escrow agent "holds" the matters in escrow until a specified event occurs or a condition is performed as outlined in the escrow instructions, that triggers the agent's duty to deliver the matters, also according to the escrow instructions. *Id.*

Finally, the Supreme Court analyzed the Coast Security employee's activities. Neither the employee nor Coast Security was asked by principals to prepare escrow instructions or to hold the documents pursuant to escrow instructions. 331 Or. at 359. The employee presented the documents to customers and processed them without receiving any written escrow instructions from the principals or waiting for a specific event or condition to occur. In short, the Supreme Court stated that Coast Security's employee was merely a messenger for the California escrow companies and the principals. The Court also rejected the argument that the employee's explanations to customers about the documents constituted acting within the capacity of an escrow agent. The act of explaining the nature and terms of certain documents falls outside the scope of an escrow agent's duties when the explanation requires trained or informed discretion. *Id.* (citing *State Bar v. Security Escrows, Inc.,* 233 Or. 80, 89 (1962)). Moreover, the Court explained, even if such explanations do not require trained or informed discretion, they alone do not constitute activities of an escrow agent. Because it concluded that the employee's actions were not those of an escrow agent, the Supreme Court held that Coast Security was not acting in the capacity of an escrow agent, and therefore, was not required to obtain an escrow agent license to engage in the residential refinancing activities at issue.

**Susan N. Safford**

*Coast Security Mortgage Corp. v. Real Estate Agency, 331 Or. 348 (2000).*

# Appellate Cases — Landlord-Tenant

## Landlord May Pursue Separate Lawsuits for Possession and for Unpaid Rent

*Stilwell v. Seibel*, 169 Or. App. 613 (2000), involves a commercial landlord who filed two lawsuits against tenants and sub-tenants; the first suit was an FED action for restitution of the premises and for damages, and the second suit was for breach of the lease for failure to pay rent. Landlord settled the first suit by obtaining possession and receiving damages from the Sub-tenant. In the second suit, Landlord executed a "Covenant Not to Further Sue or To Enforce Judgment" with one set of Tenants (Tenants 1), but continued to pursue rent damages from a second set of Tenants (Tenants 2). The trial court denied Tenants 2's motion for summary judgment, which was based upon an assertion that the second suit was barred by the judgment of damages in the first suit, but granted a later similar motion on the grounds that a settlement agreement with Tenants 1 had the effect of releasing Tenants 2.

In reversing the trial court, the Court of Appeals followed the Oregon Supreme Court's decision in *Schiffer v. United Grocers, Inc.*, 329 Or. 86 (1999), which held that a release of one joint obligor does not necessarily release all joint obligors. Thus, the trial court erred in granting summary judgment to Tenants 2.

Tenants 2 also cross-appealed the denial of its first motion for summary judgment based upon settlement of the FED action. The court noted that generally it does not review a denial of summary judgment unless: (1) the denial rests on a purely "legal contention" that does not require the establishment of predicate facts, or (2) the case ended without a trial. Since the second exception applied, the court reviewed the denial of the first motion for summary judgment and reaffirmed that FED actions and rent action are distinct. The court held that in receiving damages in the FED action, Landlord is not precluded from pursuing the separate rent action, unless the judgment in the FED action suggests that the awarded damages were intended to satisfy rent obligations.

**C. Edward Gerdes**

*Stilwell v. Seibel, 169 Or. App. 613 (2000).*

# Appellate Cases — Land Use

## Prescriptive Easement Must be Adverse to Land Owner's Use

In *Petersen v. Crook County*, 172 Or. App. 44 (2001), the Court of Appeals reversed the trial court, holding that a public prescriptive easement had not arisen on a narrow graveled roadway named Peppermint Lane. The key issue in the case was adversity.

Peppermint Lane crossed the north part of plaintiffs' property. It was constructed by unknown parties at an unknown time in the distant past. To the east and west of the disputed stretch, Peppermint Lane was in good condition with an improved public right-of-way that connected to paved roads. Alternate routes existed for reaching public highways without using the disputed, "washboard" stretch of Peppermint Lane across plaintiffs' property. Residential development gradually increased usage of Peppermint Lane, including the disputed stretch. Plaintiffs' concern with traffic problems led to this suit. The trial court granted a public prescriptive easement based on more than twenty years of public use, and plaintiffs appealed.

The court of appeals reversed. To establish a public prescriptive easement, a claimant must show by clear and convincing evidence that there has been open and notorious use of the land by the general public that is adverse to the rights of the servient owner for a continuous period of ten years. Although the public had used Peppermint Lane for more than ten years, the court found that the public use was not adverse. Plaintiffs successfully rebutted the presumption of adversity because the public merely used an existing roadway, which did not interfere with plaintiffs' use.

Helpfully, the court stated the rule as follows: a prescriptive easement does not arise where (1) a road is used in common by the owners of the property and by others, (2) there is no evidence of who constructed the road, and (3) the common use does not interfere with the owner's use.

The court's holding emphasizes that the owner of property that is crossed by a rural roadway may not be suffering the creation of a prescriptive easement by allowing indefinite common use of the road. The corollary to the holding is that at any time such an owner may close the roadway to future use without notice.

**Stephen Mountainspring**

*Petersen v. Crook County, 172 Or. App. 44 (2001).*

## Once Again, Court of Appeals Visits Golf Course and Affirms County Application of Plan Policies

In the latest in a series of cases, the Court of Appeals affirmed LUBA, holding that a showing of compliance with, or an exception to, Goal 14 is unnecessary to allow authorized urban uses in EFU zones. *Jackson County Citizens League v. Jackson County* (*Jackson County V*), 171 Or. App. 149 (2000).

In *Jackson County II*, the Court of Appeals reversed LUBA's decision that the proposed expansion of a golf course—a conditionally permissible use in EFU zones under ORS 215.283(2)(e)—was precluded by LCDC rules pertaining to golf courses on agricultural lands (*Jackson County I*). The court remanded the case to LUBA to address petitioner's argument that the expansion was inconsistent with statewide planning Goal 14 (urbanization), and that the county's decision had to comply with the goal or approve an exception to the goal.

LUBA concluded that Goal 14 was not directly applicable to decisions applying acknowledged comprehensive plans and land use regulations (ORS 197.646, 197.835(5)), and the county was not obligated to make findings demonstrating that the proposed use was rural or take an exception to Goal 14, merely because the issue was raised below. Notwithstanding its prior holding that uses allowed by statute in EFU zones are not subject to the additional requirement that the use be rural or an exception to Goal 14 be taken (*Washington Co. Farm Bureau v. Washington Co.*, 17 Or. LUBA 861, 878 (1989)), LUBA remanded the decision to the county to determine whether the proposed golf course expansion was consistent with county comprehensive plan urbanization policies that implement the statewide goal (*Jackson County III*).

The county decided on remand that the use was consistent with plan policies and again approved the application. Petitioner appealed the decision to LUBA, contending that the county's interpretation of its plan policies as allowing the expansion was contrary to Goal 14 and therefore reversible under ORS 197.829(1)(d) (*Jackson County IV*). That statute requires LUBA to affirm a local government's interpretation of its comprehensive plan and land use regulations unless LUBA determines that the local government's interpretation "is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements." ORS 197.829(1)(d). Respondent's position was that petitioners had waived this argument because they did not seek review of LUBA's decision in *Jackson County III*, in particular the analysis that relied on *Washington Co. Farm Bureau v. Washington Co.* LUBA reaffirmed that Goal 14 does not require counties to determine on a case-by-case basis whether applications for uses authorized by ORS 215.213 or ORS 215.283 on EFU-zoned land must be denied if they are characterized as "urban." LUBA explained that it was clear from the county's decision on remand that it interpreted its Urbanization Policies to impose no greater obligation on the golf course expansion onto EFU-zoned land than the obligation imposed if Goal 14 applied directly, and "[t]hat interpretation may not be rejected under ORS 197.829(1)(d)." *Jackson County Citizens League v. Jackson County V*, 171 Or. App. at 153 (citing *Jackson County III*). LUBA affirmed the county's decision and petitioner appealed.

The court first addressed respondent's argument attacking petitioner's failure to seek review of the *Washington Co. Farm Bureau* analysis. Under that analysis, "uses allowed by statute in EFU zones are not subject to the additional requirement that the use be rural or that an exception to Goal 14 be taken." LUBA had rejected the argument on the ground its holding in *Jackson County*


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*III* was based on the principle that the statewide goals do not apply directly to land use decisions of local bodies with acknowledged land use legislation. LUBA explained that the language cited by respondents from *Jackson County III* was *dictum*; therefore, the court could not have reviewed it earlier. Respondents argued that petitioner's contention and LUBA's reasoning in *Jackson County IV* were "identical in substance to the issue addressed by the 'dictum' in *Jackson County III*, and that it should not be material to the reviewability question whether that reasoning flows from the direct applicability of Goal 14 or from its 'indirect' applicability via ORS 197.829(1)(d)." *Jackson County V*, 171 Or App at 154. In their attack on LUBA's rejection of the waiver argument, Respondents cited inconsistency with *Beck v. City of Tillamook*, 313 Or 148 (1992), and the statutory policy of resolving land use controversies expeditiously (ORS 197.805).

The court affirmed LUBA's decision in *Jackson County III* and discussed ORS 197.829(1)(d), explaining that the statute modified the deferential standard LUBA and the courts used to review local ordinance interpretations under *Clark v. Jackson County*, 313 Or. 508, 836 P.2d 710 (1992). The statute was intended to prevent local governments from abrogating the statewide goals through local ordinance interpretations that otherwise were entitled to deference under the *Clark* principle. However, ORS 197.829(1)(d) does not displace the principle that the statewide planning goals do not apply directly to post-acknowledgement decisions of local governments, subject to some exceptions.

The court held that in local land use review proceedings on a single application, an opponent "can assert both that the goals are directly applicable and preclude approval, *and* that local regulations instead of the goals are applicable but the former must be interpreted as precluding approval in order to avoid the inconsistency with the goals that ORS 197.829(1)(d) proscribes." *Jackson County V*, 171 Or. App. at 155. The court acknowledged that because the assertions are alternatives, they may not be dispositive until *seriatim* proceedings and appeals are conducted. While the court defined limits on such a process in *Friends of Neabeack Hill v. City of Philomath*, 139 Or. App. 39 (1996), this case is a "paradigm model" of an appeal that turns on a goal consistency argument, then a remand to apply local provisions instead of the goal, and finally a second appeal that raises the question whether the local interpretation is contrary to the goal that was the subject of the first appeal. *Jackson County V*, 171 Or. App. at 156. The court noted: "Obviously, a potential for duplication, redundancy, and delay is inherent in the present statutory scheme." *Id.* Waiver might apply if a party kept an issue in reserve for a second appeal to LUBA if the issue was "cognizable at the time of the first appeal." *Id.* However, if petitioners' tactic in the *seriatim* proceedings was to prolong the resolution of the matter and delay the project, the "tactic is one that ORS 197.829(1)(d) facilitates." *Id.*

After disposing of the waiver argument, the court addressed whether compliance with or an exception to Goal 14 is required to allow uses on EFU land that are urban in nature but are of the kinds specifically permitted in EFU zones by ORS 215.213 or 215.283. The court agreed with LUBA's conclusion in *Washington Co. Farm Bureau* that compliance with or an exception to Goal 14 is unnecessary to allow urban uses in EFU zones that are authorized by ORS 215.213 or ORS 215.283. First, the statute authorizes an urban use in EFU land. It also implicitly permits the use on rural land, of which EFU land is a sub-species. Second, *1000 Friends of Oregon v. LCDC*, 301 Or. 447, 724 P.2d 268 (1986) (*Curry County*), did not establish a rule that a separate Goal 14 exception for urban uses on rural land must be made even when an exception or demonstration of compliance with another resource goal has been made to justify precisely the same non-resource *and* urban use in a rural resource zone: "Simply stated, a totally redundant exception to or showing of compliance with Goal 14 is unnecessary." *Jackson County V*, 171 Or. App. at 159. Finally, the approval standards for golf courses and other conditional uses under ORS 215.213(2) and ORS 215.283(2) are excused if the resource area is included within an exception area or urban growth boundary.

**Joan Kelsey**

*Jackson County Citizens League v. Jackson County, 171 Or. App. 149 (2000).*

# Cases From Other Jurisdictions — Washington Court of Appeals

## Denial of Access to Property Surrounded by Public Lands is Not a Taking, Says Washington Appeals Court

In *Granite Beach Holdings, LLC v. Washington*, 103 Wash. App. 186, 11 P.3d 847 (Wash. App. 2000), the Washington Court of Appeals held that a state denial of access to land-locked property was not a taking. Plaintiffs purchased private land completely surrounded by state trust land that could be reached by logging roads over the state land. Plaintiffs requested an easement across state property to facilitate a residential subdivision, but the state declined, saying that its timber management plans precluded the grant. Plaintiffs then sued the state and adjacent private landowners, alleging an implied easement, prescriptive easement, condemnation of private easement, and inverse condemnation. The trial court granted summary judgment against plaintiffs who appealed.

Plaintiff, Granite Beach, was a property company that specialized in "in-holdings"—private property surrounded by public lands the company purchased such lands made paper improvements, and sold them to the government or conservation groups for an enhanced value. Granite was made aware of the lack of legal access before purchasing the subject site in 1996. The state declined improve a stretch of the logging road that provided physical access to plaintiffs' property because of the cost of complying water quality standards and declined to grant plaintiffs access over the portion of the road that it would no longer maintain. The state also rejected a resource management easement, finding that such an easement would facilitate a residential inholding on forest lands that would conflict with its timber management plans for trust lands.

The Court of Appeals first considered whether there was an implied easement created by the sale of the inholding by a common grantor of the surrounding parcels, with an expectation of access to the inholding at the time of the sale. The court cited *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), for the proposition that an implied easement is not created by merely conveying lands from public to private ownership, in the absence of congressional intent when it authorized that conveyance. The court was also unwilling to find a common law right to such an easement, given the eminent domain power held by the United States, the common grantor. The court said that implying an easement in such a case would harm the predictability of land titles. In this case the grants were made in 1919 and 1921, when the United States no longer owned the surrounding lands. The purpose of conveying certain lands to railroad companies was to encourage the companies to use those lands for rail access. This is a very different congressional purpose than

inferring a road easement from the sale of a land-locked parcel to a private party.

The court also rejected the claim of a prescriptive easement by a combination of an oral agreement and subsequent use without permission. Such an easement is not favored, and the statutory elements that the unpermitted use be open, notorious, continuous, and uninterrupted for ten years are strictly applied. Plaintiffs bear the burden of proof in such a case. Where the surrounding land is vacant, open, unenclosed, and unimproved, the access is deemed permissive and plaintiffs must show otherwise. On the facts before it, the court found plaintiffs had not borne their burden of proof for continuous adverse use for ten years or more and affirmed the trial court on that point. Plaintiffs' predecessors used these roads only three times in a nine year period of their ownership. This use was far too sporadic to show that the underlying landowner had notice of their claim.

As to the statutory way of necessity claim, the court said that the rights are strictly construed and limited to that which is expressly conferred or necessarily implied by statute. Moreover, the statute cannot be used for a private condemnation over state land. In this case, plaintiffs sought to condemn use of existing private easements across state lands. However, even if plaintiffs were successful in acquiring an easement over these existing easements, they still needed to cross over other state property to reach their land, which was not permitted under the statutory scheme. The use of the easement would not be used for resource extraction or logging, but for a residential subdivision, and would expand the easement beyond its original purpose. Thus, the court found no right to a statutory way of necessity.

Finally, the court affirmed the trial court and found no inverse condemnation claim based on the state is failure to grant access to plaintiffs' land. The state did not take or injure any property right because plaintiffs had no right of access to their property at the time of original acquisition. The state manages the trust lands for the common school fund and is not required to grant easements to private parties over these lands where a grant is inconsistent with the state's trust obligations.

This case is an interesting exercise in property law dealing with easements by implication and prescription. However, the most interesting discussion for land use practitioners is the state's lack of obligation to grant easements over its trust lands to facilitate inconsistent development, even in the face of a takings claim.

**Edward J. Sullivan**

*Granite Beach Holdings, LLC v. Washington, 103 Wash. App. 186, 11 P.3d 847 (Wash. App. 2000).*

## Washington Court of Appeals Says Plat Denial is Not Taking

*Largent v. Klickitat County*, 101 Wash. App. 1033 (2000), involved an appeal of the denial of a preliminary plat application for a 9.64 acre parcel divided into twenty lots, later reduced to eighteen. The application was initially denied; however, denial was reversed by the Superior Court. On remand, the application was again denied, which was affirmed by the Superior Court. The County denied a variance to the county road standards and the plat because the water and sewer certificates were only for residential uses, whereas plaintiffs also sought commercial development. The Washington Court of Appeals denied relief to the plaintiffs, holding that there were no taking or substantive due process problems.

Turning first to the water and sewer issues, the Court of Appeals said the County resolved the adequacy of these facilities against the plaintiffs and that its decision was subject to a substantial evidence review. The County Board of Commissioners found the sewer issue was resolved only for Phase I of the subdivision. The court determined that the decision was a proper exercise of the Board's powers and affirmed.

As to the private road, the court first turned to the denial of the variance. The County classified the road as an "urban access," which required a thirty-two foot width under the county code. The fact that, in a footnote, the code also states that alternative designs "may" be approved did not assist plaintiffs because the word "may" infers discretion, and the Board may exercise that discretion to deny the application. The reason plaintiffs gave for the variance request was that it would be too costly to construct a full road improvement; however, this reason was insufficient to constitute a hardship or difficulty under the code, which must be related to the land itself, rather than to the financial condition of the owner. Nor was it sufficient that the County Engineer recommended the lesser standard, or that such a variance was granted to others.

The court also rejected plaintiffs' contention that the higher standard required for private roads than that for a county road constituted a taking. The court applied a regulatory takings analysis under Washington case law. The first test is whether the regulation goes beyond protecting the public and instead confers a benefit or impinges upon a fundamental attribute of ownership. The court found plaintiffs could make economically viable use of the land because they could still subdivide it and, by redesigning the plat, allow for rural access at a lesser standard. Similarly, plaintiffs failed to show that the regulations went beyond protection of the public to confer a benefit. The court thus found that there was not a viable takings claim.

Washington constitutional law also required the regulation to meet a substantive due process test of reasonableness, for which plaintiffs had the burden of proof. The court found the road regulations served a legitimate public purpose of providing for safe and adequate access through a reasonable means and the regulations were not "unduly oppressive," as they did not place on the landowner a burden that the public should bear. Even though the cost of the road was raised by thirty-three percent, there was no basis for a substantive due process violation.

The court then considered plaintiffs' procedural contentions, beginning with the drafting of the findings by the local prosecuting attorney after the first remand. The court found this did not justify reversal or remand. Plaintiffs also objected to the addition of reasons in the denial not specifically discussed by the Board of Commissioners, but the court found no basis for remand on that ground either. The court also rejected an "appearance of fairness" claim—that the hearing not only is fair, but also appears fair to a disinterested observer. Plaintiffs argued that the prosecuting attorney "poisoned the atmosphere" by carefully discussing the findings with the Board before their adoption. The court found no error in this procedure. Finally, the court denied plaintiffs' claim that the County erred because the plat was not processed within the ninety days required by statute. The court ruled the proper remedy was mandamus, rather than appeal. Plaintiff also contended that the trial court refused to review the site (a contention made without supporting argument). The court rejected that contention as well and affirmed the trial court's decision.

This appears to be a "run of the mill" first-generation subdivision case in which rural county authority to regulate land divisions is upheld. The takings and substantive due process analyses appear to be from an earlier time, which should be re-examined by the Washington Supreme Court.

**Edward J. Sullivan**

*Largent v. Klickitat County, 101 Wash. App. 1033 (2000).*

## Washington Appellate Court Rejects Requirement of Improvements on Dolan Challenge

In *Benchmark Land Co. v. City of Battleground*, 103 Wash. App. 721, 14 P.3d 172 (2000), the Washington Court of Appeals upheld its previous determination that a development condition was invalid under the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Plaintiff challenged the defendant City's condition of development approval, which required a half-street improvement to an adjacent street. Previously, the Court of Appeals had determined that the condition was invalid under *Dolan*, but the Washington Supreme Court remanded that decision in light of *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). *See Benchmark Land Co. v. City of Battleground*, 94 Wash. App. 537, 972 P.2d 944, *remanded* 238 Wash. 2d 1008, 989 P.2d 1140 (1999). In *City of Monterey*, the United States Supreme Court noted that it had not extended *Dolan* beyond real property exactions and did not apply it to the denial of the development. In the present case, the City contended that the condition at issue involved money, rather than land, and that *Dolan* was thus inapplicable.

The court first held that *Dolan* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), were applicable. Both cases involved dedications of land and required a developer to make an affirmative contribution to resolve an existing public problem that was, at least in part, off the site under development. The court also used the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 598 (1998), in which the Supreme Court held the Takings Clause applicable to money. The Court of Appeals stated:

"Although the condition exacted here was money, not land, we conclude that the *Dolan* proportionality test applies. The City, as in *Nollan* and *Dolan*, did not restrict the development of the property by limiting the number of residences, requiring wider streets in the property, requiring dedicated open space, imposing height limits or other similar conditions. Instead the City required the developer to address a problem that existed outside the development property—an adjoining street in need of improvement. And the development did not cause this problem, at most it only aggravated it."

*Benchmark*, 14 P.3d at 175. The court determined that there was a similarity between exacting land and exacting money and applied the *Dolan* "rough proportionality test. Finally, the court said that if proportionality did not apply, some people would be forced to bear public burdens, which, in justice and fairness, should be borne by the public as a whole. The court thus declined to reconsider its 1999 holding.

The question of whether *Dolan* applies to monetary exactions under the Fifth Amendment has not been directly resolved by the federal Supreme Court. Washington now joins the ranks of those who say that it does.

**Edward J. Sullivan**

*Benchmark Land Co. v. City of Battleground, 103 Wash. App. 721, 14 P.3d 172 (2000).*

# Cases From Other Jurisdictions — Federal Courts

## Oregon Federal Court Deals with Constitutional Claims Against Multnomah County

In *Frevach Land Co. v. Multnomah County*, No. CV-99-1295-HU, 2000 U.S. Dist. LEXIS 18656 (D. Or. 2000), plaintiff brought a section 1983 civil rights claim against defendant county and several of its officers on federal constitutional grounds, as well as state law theories. The Federal Magistrate, Dennis Hubel, had previously determined that even though the chances of prevailing on these claims were strong, the damages were solely economic and denied the preliminary injunction. The court had also previously decided that a stop-work order, the third in a series, was void for failure to conform to county code provisions, but denied relief challenging a condition of the previous land use order because the challenge was untimely.

Defendants moved to dismiss the writ of review, which had previously been decided against them. The court treated the matter as a motion for reconsideration and rejected it, finding that a petition for the writ must be filed within sixty days of the subject action, rather than within sixty days of any action of the court or its clerk. The court also rejected defendants' contention that its order granting the writ must recite compliance with each statutory requirement for the issuance of the writ, noting that it had dealt with the issue in its previous opinion.

The court then turned to the merits of the writ against the issuance of the third stop-work order, noting that there are five grounds for issuance of the writ under ORS 34.040. The order addressed an alleged failure to meet the conditions of a previously issued grading and erosion control permit. The court determined that the county code required the existence of three emergency circumstances before a stop-work order could be issued—irreparable harm, difficulty to correct, and immediate danger to public health or safety. Since there were no findings to support the conclusion that these circumstances existed, nor was there substantial evidence of the existence of those three conditions, the court found defendants erred in applying the county code.

As to the constitutional issues, plaintiff claimed denial of due process in the appeal proceedings on the stop-work order, which permitted only submission of written evidence and arguments and did not provide for cross-examination. The court applied the three-factor balancing test of *Mathews v. Eldridge*, 414 U.S. 319, 335 (1976). Although defendants argued there were compelling public interests to support not providing a hearing, the county made no such findings for issuance of a stop-work order, and plaintiff contested the existence of those facts. The court held the pre-deprivation proceedings were inadequate under the due process clause, but determined the post-deprivation proceedings, which were conducted in writing, were adequate because the risk of erroneous deprivation of rights was minimal.

The court then turned to plaintiffs' claims for declaratory and injunctive relief challenging conditions to the underlying 1997 permit on which the violation and stop work proceedings were based. The court previously held that it had no jurisdiction over these claims because they were untimely (more than two years had passed since the issuance of the original permit), and it adhered to this position on reconsideration, giving notice to the parties that it would consider summary judgment *sua sponte* on

those issues so as to dispose of them. Ultimately, the court dismissed the declaratory and injunctive relief claims.

Next, the court granted defendants' motions for summary judgment on plaintiffs' claims of intentional interference with economic relations. Plaintiff alleged that the county's correspondence with the Oregon Division of State Lands (DSL), which refused to issue plaintiffs a permit for submerged and submersible lands, constituted improper interference. Initially, defendant county notified DSL that compliance with its land use regulations had not been achieved because the plaintiff's application was still pending. Later, when defendants found DSL was considering a one-year lease, defendants asked DSL to suspend proceedings in the light of a stop-work order. Defendants wrote DSL once again the following month asking that the lease be denied. DSL finally denied the lease. The court, in granting summary judgment to defendants, declared that defendants' actions in reporting compliance with county regulations to DSL were not improper and did not constitute interference with plaintiffs' relations with DSL.

The court then considered plaintiffs' civil rights claims on all three stop-work orders. First, the court rejected the contention that defendants concealed the existence of a county appeals process, finding that, while there is now such a process, none existed at the time of the first stop-work order. Defendants did not tell plaintiffs that they could not file a writ of review or a civil rights claim against the stop-work order; defendants merely said that there was no internal appeal process. Since there was no concealment of the facts supporting a claim, the court determined that there was no justification to extend the two-year statue of limitations. More than two years had passed from the issuance of the first stop-work order and the original permit, thereby obviating plaintiffs' claims.

The second stop-work order, which was issued on March 12, 1998, was the subject of a claim not raised in plaintiffs' August 12, 1999 complaint, but was included in an amended version dated May 23, 2000. Plaintiffs claimed the civil rights claim based on the second stop-work order relates back to the original complaint and is timely; however, the court determined that Oregon relation-back case law requires notice of the claim within the statute of limitations period. The court also rejected plaintiffs' theory of hostility to plaintiffs as the basis for relation back and held the second stop-work order was beyond the two-year statute of limitations.

The court then turned to the third stop-work order, which was challenged in a timely way on the grounds that it was unauthorized, without findings, hearing or opportunity to challenge, and involved bias against plaintiffs. The court said the substantive due process challenge was possible; however, it treated the claim as an exclusively equal protection claim, stating that, where a specific constitutional provision was involved, a separate substantive due process challenge would not lie. *See Armendieriz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996). The court also considered the plaintiff's takings claim on the third stop-work order.

As to the plaintiffs' takings claim, the court found that this stop-work order lasted a year and four days and did not result in a categorical taking, as would be the case with a physical invasion or denial of all economic use. The court used the three-factor balancing test for regulatory taking from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), and determined that, in this case, would require a trial. Defendants' summary judgment motion was thus denied and the issues of causation and damages were sent to the jury.

The court then dealt with plaintiffs' equal protection claims based on unequal treatment and unconstitutional bias against plaintiffs. As only the third stop-work order was at issue, the court considered plaintiffs' evidence that the county had supported a Tri-Met bus turn-around, even though it found later that a permit similar to the one given to plaintiffs was required. The county had issued the Tri-Met permit in short order and it was not contested. However, the Tri-Met work was already completed, obviating the need for a stop-work order, and since it was too late in plaintiffs' case to challenge the underlying permit, the only comparison for the court's analysis was a stop-work order. The court found no issue of fact under these circumstances for such a comparison and granted summary judgment to the county. However, the court denied defendants' motion for summary judgment on the unconstitutional bias claim, finding that the allegations that the county acted "arbitrarily"—without a relationship to the county's legitimate interests—required a determination of fact by the jury.

The court next considered what it characterized as plaintiffs' first amendment claim. Plaintiffs claimed that the county's actions were a retaliation for plaintiffs' outspoken opposition to county policies and practices that, plaintiffs claimed, had resulted in the dismissal of a county senior planner. Again, the court found an issue of fact and denied summary judgment.

Plaintiffs also moved to amend their complaint to add another ground for declaratory and injunctive relief, alleging defendants have a policy to deny permits to an applicant it believes is violating its regulations, even if the permit is unrelated to the alleged violation. The court noted the claim arose after the close of discovery and said that this weighed against the amendment. The county objected to the amendment based on futility, delay and prejudice. The court found that the new claim would require new facts and the reopening of discovery, thus prejudicing defendants. Finally, as plaintiffs did not have a property interest in the permits, it had no constitutionally protected interest to vindicate. The court thus continued the matter for trial, after the grant and denial of the various motions for summary judgment and the denial of the motion to amend.

This case is a local exercise in constitutional law using the authorities and cases from around the country. The case settled the week before trial with the County paying plaintiffs $75,000, in addition to attorney's fees (which are contested), as well as agreeing to a process for plaintiff to pursue permits to make the use lawful.

**Edward J. Sullivan**

*Frevach Land Co. v. Multnomah County, No. CV-99-1295-HU, 2000 U.S. Dist. LEXIS 18656 (D. Or. 2000).*

## Washington Federal Court Deals with Federal Limitations on Local Land Use in Railroad Area

In *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000), plaintiffs, users of an aquifer in Idaho, filed a declaratory judgment action in federal district court to require defendant railroad to secure permission from the Surface Transportation Board (STB) to construct a refueling facility (the "Hauser facility"). Defendant filed a motion to dismiss, claiming that plaintiffs lacked standing and that there was no federal question jurisdiction. The district court ruled for the defendants on both the dismissal claims.

The Kootenai County Commissioners had granted defendants a conditional use permit for the construction and opera-

tion of the facility. Plaintiffs feared that the facility would cause environmental contamination to their ground water and asserted that the STB had exclusive jurisdiction over granting such permits. In response to defendant's jurisdictional claim, plaintiffs contended there was a federal question because the aquifer crossed the state lines and thus the federal court had inherent jurisdiction to resolve the matter.

Before 1996, the Interstate Commerce Commission (ICC) had jurisdiction over railroads, although arguably not over spurs or side tracks. With the ICC Termination Act of 1996 (ICCTA), Congress attempted to reduce railroad regulation and to streamline such regulation through the STB, which was given "exclusive jurisdiction," *inter alia*, over "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities" even if these facilities were located in one state. *Flynn*, 98 F. Supp. 2d at 1188. The Ninth Circuit recognized the exclusive jurisdiction of the STB in *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998). However, manufacturing activities or other facilities owned by railroads that are not integral to the provision of interstate rail service (non-transportation facilities) are subject to state and local jurisdiction.

In this case, the STB had exclusive jurisdiction over the Hauser Facility, pre-empting Kootenai County's regulation; however, the court found no reason why the railroad might not comply voluntarily with the county's requests because defendant is already subject to local regulation in other ways. Defendant must comply with building, plumbing, electric, fire, and other local codes, unless those codes restrict defendant from carrying out its operations or unnecessarily burden interstate commerce. State and local governments may also assert their authority to protect public health and safety and to carry out federally mandated programs, such as the Clean Air Act and Clean Water Act. Further, the STB has no regulatory authority over spurs and side tracks, as they are not part of a railroad's ability to provide transportation service.

Standing is a consideration independent of whether or not the complaint states a claim and focuses on whether there is a "case or controversy" before the court. One part of the case or controversy is whether plaintiffs have standing to sue, for which a plaintiff must show an injury in fact, causal connection between the injury and the conduct complained of, and the likelihood that the injury will be redressed by a favorable decision. In this case, plaintiffs alleged that they were injured by the Kootenai County Commissioners, who are not parties, in a decision that was pre-empted (regardless of whether defendant participated therein). The court was impressed with the process for filing a complaint with the STB, which has exclusive jurisdiction over most surface transportation matters. The court also found that the environmental injury complained of—possible contamination of plaintiffs' drinking water—was conjectural and hypothetical.

Even if the contamination constituted an injury in fact, the court determined that the causality and redressibility factors were not met. It was not clear that the STB had jurisdiction over this facility for regulatory purposes, that an STB permit would prevent contamination, that a leak or malfunction would occur with only local permits, that a leak would contaminate the aquifer, that the leak would reach Spokane County, or that the leak would contaminate the plaintiffs' drinking water. Even if the court enjoined defendant railroad from constructing the facility until it received an STB permit, there is no assurance that the non-party STB would find it necessary to issue permits or could do so.

The court concluded that plaintiffs lacked standing and, accordingly, that it lacked subject-matter jurisdiction. The court also noted that it had limited jurisdiction over railroad matters in any event under the ICCTA; however, here there was no jurisdiction (unlike the case in which a railroad might raise pre-emption of state or local regulations, which would raise a supremacy clause issue). The court thus dismissed the action for lack of jurisdiction and did not reach the issue of whether plaintiffs had stated a claim for relief. However, the court recognized plaintiffs' concern of a regulatory void:

> "In the absence of jurisdiction, this Court cannot grant Plaintiffs the requested declaratory and injunction relief. Plaintiffs appear to have a viable opportunity to raise their environmental concern regarding the Hauser Facility before the STB. This Court cannot assure Plaintiffs that the STB will exert its regulatory authority over the Hauser Facility. If the STB does not do so, it will confirm Plaintiffs' fear that a regulatory void exists that would require a legislative solution."

*Flynn*, 98 F. Supp. 2d at 1193.

This case raises the issue of the nature and extent of federal pre-emption of state and local regulation of railroads. The indirect way in which the subject was approached in this case is curious. Moreover, as the court noted, there appears to be a regulatory gap as to railroad facilities not specifically related to transportation and over which neither federal nor state government has any authority.

**Edward J. Sullivan**

*Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2d 1186 (9th Cir. 2000).*

## Ninth Circuit Upholds Right to Protest Housing for the Homeless

In *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), Housing Rights, Inc., a housing advocacy group, filed a complaint with the local office of the United States Department of Housing and Urban Development (HUD) in San Francisco, alleging that plaintiffs opposed the conversion of a motel to multifamily housing in the City of Berkeley because they believed the project would bring disabled persons (either mentally disabled or recovering substance abusers) into their neighborhood. Plaintiffs engaged in various opposition activities against the housing conversion, including local appeals and a lawsuit. HUD opened an investigation and, under threat of subpoena, questioned plaintiffs' activities and beliefs, reviewed their correspondence, informed the San Francisco media that they had violated the Fair Housing Act (FHA) and advised them to accept a "conciliation agreement," whereby they would cease all litigation and issuance of "discriminatory" literature. HUD dismissed plaintiffs' assertions that HUD's investigation chilled its First Amendment rights by asserting its jurisdiction over housing discrimination and the alleged discriminatory activities of plaintiffs. The national headquarters of HUD ultimately found no such violation, notwithstanding the determination of its San Francisco office, whereupon plaintiffs filed this civil rights action, alleging a First Amendment violation. Defendant HUD officials countered that they were obliged to open the investigation and thus had qualified immunity. The trial court denied defendants' motion for summary judgment on the qualified immunity defense and gave plaintiffs partial sum-

mary judgment on their claims, leaving open the issue of damages. The trial court also dismissed as moot the claims for declaratory and injunctive relief.

The Ninth Circuit first turned to the qualified immunity defense, which implicated the question of whether the plaintiff stated a proper claim for a "clearly established" violation of a constitutional right. The court determined the rights to expression, free association, and petitioning the government for redress of grievances, exercised by speaking out at the hearings and challenging an adverse decision in the courts, were clearly established. Advocacy is protected unless it involves an incitement to imminent lawless action, which was not the case here. The court concluded that plaintiffs' free expression was chilled by defendants' threat of legal sanctions, investigation and threatened use of subpoenas, and assertions that plaintiffs had "broken the law."

In response, defendants asserted that the FHA prohibits discrimination or threats, intimidation, or interference with providing housing to those with disabilities and provides for an administrative investigatory process. However, other courts have carved out a "free expression" exception to HUD's jurisdiction, protecting advocacy unless there is an incitement to imminent violence. HUD had no evidence that plaintiffs' advocacy amounted to incitement, nor did plaintiffs' unsuccessful lawsuit to overturn the city's decision to grant the permits, provide sufficient cause for defendants' action.

The *Noerr-Pennington* doctrine protects petitioning the government for redress of grievances under the First Amendment. This doctrine trumps statutory law in both the antitrust and housing areas, unless the petition a "sham"—it constitutes a pattern of repetitive baseless claims. However, an unsuccessful action is not necessarily objectively baseless. Only if the claim is baseless would a court reach the second prong of *Noerr-Pennington*—whether the action was brought for the purposes of harassment, intimidation or interference with a statutory right. In this case, there was a conflict of interest by a city board member, which the state court negated as a ground for appeal by applying a "good faith" exception. The Ninth Circuit concluded that plaintiffs' rights were not violated by defendants' acceptance of the complaint and their undertaking an investigation, or in sending plaintiffs a copy of a complaint. The nature and length of the investigation, however, which focused on plaintiffs' alleged discriminatory speech—referring to people with disabilities and questioning whether such housing should be permitted—were an indication of a First Amendment violation. The court concluded:

> "These undisputed facts show that the San Francisco HUD officials conducted their eight-month investigation, primarily if not exclusively, into and in response to the plaintiffs' purportedly unlawful speech and not in connection with their state-court lawsuit. Having ignored the factual and legal basis for that litigation throughout, and instead having taken a course certain to chill the exercise of the plaintiffs' First Amendment rights, the officials may not now argue that their investigation was justified as a means of determining whether the plaintiffs had violated FHA by filing a sham lawsuit."

*White*, 227 F.3d at 1234. Defendants contended they face personal, financial ruin from these proceedings; however, the court said that this is the only means available to vindicate constitutional rights and that HUD could certainly indemnify defendants.

The court upheld the grant of partial summary judgment for plaintiffs, which was necessarily resolved by its denial of defendants' assertion of a qualified immunity-defense. Similarly, plaintiffs' request for prospective relief was denied in the light of a HUD memorandum that indicated HUD would adhere to the tenets of this decision in future cases, which reflected a permanent change in HUD policy. Thus, the Ninth Circuit upheld the entire trial court judgment.

This is an important case in which the federal policy to end housing discrimination and the First Amendment collided. As a constitutional matter, the First Amendment prevailed. Nevertheless, there are cases in which the conduct of an opponent may overcome the First Amendment. This will be an exciting area to watch.

**Edward J. Sullivan**

*White v. Lee, 227 F.3d 1214 (9th Cir. 2000).*

# LUBA

## LOCAL PROCEDURE: Impartial Tribunal

LUBA's decision in *Halvorson-Mason Corp. v. City of Depoe Bay*, LUBA No. 2000-118 (4/19/01), is noteworthy because it is among the few instances in which LUBA remanded a local government decision because one of the decision makers was biased. This case involves the Little Whale Cove planned unit development at the north end of Depoe Bay, which was approved in 1976. At the time Lincoln County originally reviewed and approved the development, the City lacked a development code and both jurisdictions applied the county's code. A temporary real estate sales office was allowed in an approved PUD under the county's code and continued to be allowed as part of the originally approved development plan when the city later adopted and applied its zoning ordinance to the PUD.

In 2000, the petitioner applied to modify its business license so it could employ a licensed realtor in the PUD's real estate sales office. The city recorder denied the application because there was no approved building permit for the sales office in the city files, although the files contained a building permit application. While petitioner's appeal was pending, petitioner found the building permit approval and 1977 planning commission minutes acknowledging the permit approval. The city council held a public hearing and a week later voted 5-1 to uphold the city recorder's decision and denied petitioner's business license modification.

On appeal to LUBA, petitioner argued that one of the city councilors should have recused himself from the hearing because he was biased against the petitioner and one of its principals, Carl Halvorson. In support of its argument, petitioner asked LUBA to consider two pieces of extra-record evidence: (1) A letter from the city councilor to the mayor and other council members analyzing the city code and concluding petitioner has no right to use a portion of the development's recreational building for a sales office; and (2) A letter from the councilor to the mayor asking the mayor to consider recusing himself because of statements he made during other council meetings that the councilor interpreted as meaning "you would condone a potentially illegal agreement to subvert the zoning ordinance." The first letter predated the city recorder's decision, and the second letter was written shortly before the council hearing on petitioner's appeal. Petitioner also pointed to letters in the record from the councilor that contained various accusations directed at petitioner's sales activities.

LUBA agreed to consider the extra-record evidence because it "squarely presents the question of prejudgment and bias" and concluded this evidence, coupled with the letters in the record, clearly established the city councilor was incapable of making a decision based on the evidence presented at the council hearing. In LUBA's view, the evidence showed the councilor formed an opinion before he attended the hearing and advocated his position to other council members. The evidence also revealed the council member had a history of actively opposing the sales office within the Little Whale Cove PUD.

LUBA rejected the city's argument that its decision should be upheld because there was no evidence the councilor's bias tainted the votes cast by other council members. Petitioner was entitled to a full and fair hearing and the councilor's bias prevented petitioner from receiving such a hearing. Accordingly, LUBA concluded the city's decision must be remanded.

In a separate concurring opinion, Board Member Holstun agreed with the majority's conclusion, but indicated he believed the record was adequate to support petitioner's bias claim. He stated accepting the extra-record evidence was unnecessary because it "simply makes all the clearer what the evidence in the record already shows." Board Member Holstun acknowledged the city councilor had every right as a citizen to oppose petitioner's sales office. But having done so, the councilor should have recused himself from the proceedings. His assertions that he could make an impartial decision were simply implausible when weighed against his long history of actively opposing the sales office.

**Kathryn S. Beaumont**

*Halvorson-Mason Corp. v. City of Depoe Bay, LUBA No. 2000-118 (4/19/01).*

## Character of Local Government Action

Whether a challenged local government action is characterized as quasi-judicial or legislative determined the timeliness of an appeal in *DeBell v. Douglas County*, LUBA No. 2001-033 (4/18/01). In 1999, the county amended its comprehensive plan to correct references to the section number of the intervenors' property, which contained significant aggregate resources and was listed on the county's mineral sites inventory. The comprehensive plan amendment was included in an ordinance that contained unrelated housekeeping and policy amendments to the comprehensive plan. The next year, the intervenors applied for a conditional use permit to mine basalt on their property. During the November 30, 2000 public hearing on the application, county staff and other participants discussed whether the comprehensive plan correctly identified the parcel. The county attorney explained that the 1999 ordinance corrected the comprehensive plan and eliminated a discrepancy in references to the intervenors' property. The county subsequently approved the conditional use permit. In February 2001, petitioner filed a notice of intent to appeal the county's 1999 ordinance.

The county moved to dismiss petitioner's appeal, arguing that it was untimely because it was filed more than twenty-one days after petitioner learned of the 1999 ordinance during the public hearing on the conditional use permit. A supporting affidavit from a county planner stated that petitioner and his lawyer were present at the November 30th hearing in which the 1999 ordinance was discussed and that petitioner signed up to testify at the hearing. Petitioner did not dispute the facts stated in the affidavit, but argued he did not obtain actual notice of the 1999 ordinance during the hearing.

LUBA granted the county's motion to dismiss, but pointed out that both the county and petitioner incorrectly assumed the 1999 ordinance was a quasi-judicial land use action for which petitioner was entitled to notice under ORS 197.763(2). While the ordinance is "a collection of discrete decisions, some of which, viewed individually, could be described as quasi-judicial," its characterization as quasi-judicial or legislative "depends on its character as a whole, not the character of the constituent parts." Applying the three factors in the *Strawberry Hill 4-Wheelers v. Benton County Board of Commissioners*, LUBA concluded the 1999 ordinance was a legislative post-acknowledgement decision. The ordinance was not bound to result in a decision within any particular time frame, parts of the ordinance did not apply preexisting criteria to concrete facts, and the ordinance was generally not directed at a closely circumscribed factual situation or a relatively small number of persons. As a result, the appeal deadline was the deadline specified in ORS 197.830(3), which requires an appeal to be filed within twenty-one days of the date the 1999 ordinance was mailed to the parties entitled to notice under the post-acknowledgment statutes. LUBA concluded petitioner failed to file his appeal within the correct appeal period and dismissed the appeal as untimely.

**Kathryn S. Beaumont**

*DeBell v. Douglas County, LUBA No. 2001-033 (4/18/01).*

## Endangered Species Act

LUBA's decision in *McNern v. City of Corvallis*, LUBA No. 2000-197 (3/29/2001), is one of the first decisions to consider claims of noncompliance with the Endangered Species Act (ESA). Petitioners appealed a city decision approving development of park facilities and riverbank stabilization and ecological restoration work throughout the city's Riverfront Commemorative Park along the Willamette River. On appeal, petitioners argued the city failed to comply with the ESA in making its decision. Specifically, petitioners contended the city failed to obtain the approval of the National Marine Fisheries Service (NMFS) under the section 4(d) rules NMFS adopted to conserve threatened and endangered species and to prevent a "take" of these species. The section 4(d) rules provide a safe harbor from penalties imposed under the ESA if the city exercises its option under the rules to obtain NMFS's approval of a project that might result in an unintended take of a threatened or endangered species.

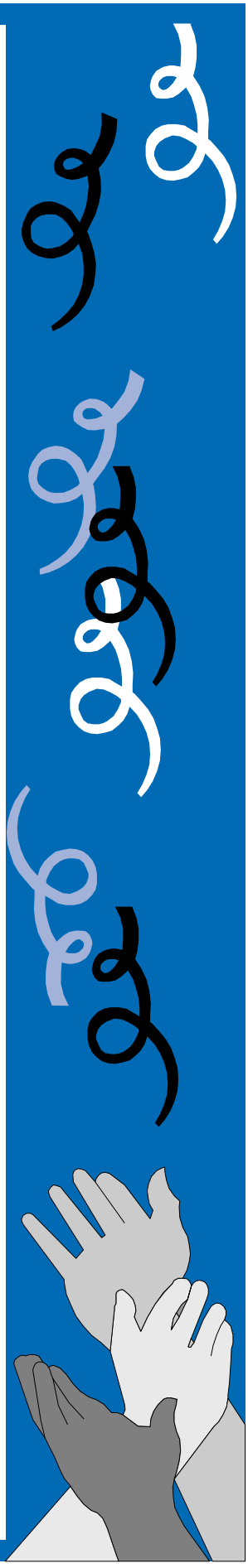
LUBA framed the threshold question as "whether the ESA applies to the city's decision in the way petitioners assume it does." LUBA noted that the relevant conditional development permit approval criteria in the city's code do not require an applicant to demonstrate compliance with the ESA. While the criteria require a showing that significant fish and wildlife habitat will be protected, the city adopted responsive findings on this issue. LUBA agreed that obtaining NMFS's approval of a project as compliant with the section 4(d) rules might be persuasive evidence that the city criteria are satisfied. This is not a step that the city code requires, however, although the city has an independent obligation to comply with federal law. LUBA concluded petitioners' ESA claim did not provide a basis for reversing or remanding the city's decision.

**Kathryn S. Beaumont**

*McNern v. City of Corvallis, LUBA No. 2000-197 (3/29/2001).*

# Goodbye and Hello to Student Editors

Publishing the *Real Estate and Land Use Digest* would not be possible without the invaluable assistance of the student editor. Brian Pasko, now a third year student, has served as student editor for the past year. Unfortunately for us, Brian will spend his third year as a visiting student at the University of Cincinnati Law School and will no longer be working for the *Digest*. Fortunately for us, Brian helped find his outstanding replacement, Stacy Harrop, a third year student at Northwestern School of Law. Brian and Stacy have worked hard to make the transition in student editors as seamless as possible. On behalf of the RELU Section, we thank Brian for his excellent work for the *Digest* and welcome Stacy, who has assumed the student editor position in equally capable fashion. If you have questions about the *Digest*'s publication schedule or wish to submit an article for publication in the *Digest*, please contact Stacy at harrop@lclark.edu.



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