



# OREGON REAL ESTATE AND LAND USE DIGEST

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## Announcement

### ■ *RELU Annual Meeting Materials Available*

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## Appellate Cases—Real Estate

### ■ *Declining the Right to Compensation in a Condemnation Proceeding Results in Extinguished Contract Rights in the Condemned Property*

In *Hunter v. West Linn-Wilsonville School Dist.* 3JT, 173 Or. App. 514 (2001), the Oregon Court of Appeals rejected a number of taking claims related to a less than fee interest in land.

The facts of the case are relatively simple. Plaintiff Hunter entered into a contract with a landowner to purchase all decorative landscape boulders and construction rock to be excavated from a piece of property that the landowner planned to develop into a golf course. Shortly after the landowner began construction of the golf course, the local school district initiated a condemnation action to build a middle school on the same property. Plaintiff moved to intervene in the condemnation action, but that motion was denied. Plaintiff appealed the denial of intervention, but did not file a motion to stay in the trial court during the pendency of the appeal, instead, asking the appellate court to issue a stay. The landowner and the school district then settled the condemnation proceedings for approximately \$1.2 million. Before allowing the settlement, the trial court conducted a hearing on the form of judgment, and Hunter participated at that hearing. The trial court specifically asked plaintiff whether he intended to claim any portion of the \$1.2 million and plaintiff declined, explaining that he was not a party to the condemnation proceeding and the settlement would not affect his interests. The trial court entered judgment on the condemnation proceeding, awarding the school district the property and requiring it to pay the landowner \$1.2 million.

Shortly after judgment was entered, the Court of Appeals granted plaintiff's motion to stay the trial court proceedings. However, the school district appealed that decision to the Oregon Supreme Court, which vacated the Court of Appeal's decision, holding that full payment of the settlement had rendered the proceeding for the stay moot. *West Linn-Wilsonville School Dist. 3JT v. Seida*, 328 Or. 10, 14, 968 P.2d 1268 (1998).

Plaintiff then initiated this action against the district alleging two claims. The first claim was for specific performance, arguing that the district, by taking title to the land, also took on the responsibility for performing the contract for the sale of boulders and construction rock. The second claim was for inverse condemnation, asserting that, by building a school on the property, the district has taken his boulders and rocks without paying for them. The school district moved for summary judgment on both claims, and the circuit court granted the district's motion.

The Court of Appeals affirmed the circuit court's ruling on the summary judgment motion. The court first examined the specific performance claim and noted that a condemnation proceeding is an action *in rem* and that a condemnation proceeding "determines all claims against property, not just those claims asserted by parties to the proceedings." *State Highway Comm'n v. Burk*, 200 Or. 211, 245, 265 P.2d 783 (1954). Accordingly, once compensation is paid in a condemnation proceeding, the government is entitled to take the property free of all other claims. Contracts with the landowner are, in effect, extinguished by the judgment.

The court stated that the proper recourse for parties to such contracts is to seek compensation from the condemnation award itself. The court noted that plaintiff could have sought compensation from the condemnation award, as the trial court suggested, but plaintiff declined. Plaintiff suggested that this case should be treated differently because the case settled, as opposed to reaching a jury verdict. The Court of Appeals concluded that there is no authority for the proposition that the effect of a judgment *in rem* depends on the nature of the events that proceeded it.

The court then turned to the inverse condemnation claim and noted that, "It is

axiomatic that, in order to claim inverse condemnation, plaintiff must have an interest in the property in the first place.” Thus, whatever rights Hunter may have acquired under the contract, they were extinguished by the judgment in the condemnation case and any subsequent action by the district could not have taken anything from Hunter.

This case demonstrates it is important to assert the right to compensation at every opportunity in a takings case. No case ever goes perfectly and, therefore, no opportunity should be ignored.

#### William Kabeiseman

*Hunter v. West Linn–Wilsonville School Dist.* 3JT, 173 Or. App. 514 (2001).

### ■ *Incorporating Terms of a Previous Agreement by Reference Can Create Confusion and Disputes*

In *Pioneer Resources, LLC v. Lemargie*, 175 Or. App. 202 (2001), the Oregon Court of Appeals interpreted a deed in which the grantor reserved certain timber rights and incorporated the terms of another agreement by reference.

The deed at issue was given in connection with a series of contractual transactions between the plaintiff’s and defendants’ predecessors in interest, Harris Pine Mills and the Gibsons. In 1971, the Gibsons exercised an option to purchase certain property from Harris Pine Mills. The deed conveying that property contained a metes and bounds description, which continued as follows:

“Excepting therefrom any and all merchantable timber now standing, including future growth, according to the terms and conditions of that certain agreement dated November 27, 1968, and recorded on Page 333, Book 159, Deed Records of Union County.”

The dispute arose when, in August 1997, plaintiff Pioneer Resources, LLC, attempted to harvest the timber on the property that had been conveyed to the Gibsons by the 1971 deed. Plaintiff sought declaratory and other relief. Defendants moved for summary judgment, arguing that plaintiff’s rights in the timber had expired when plaintiff failed to cut it within a reasonable time after the 1971 conveyance. Plaintiff argued that the deed incorporated by reference all of the terms of the 1968 agreement referred to in the deed clause quoted above, including a provision extending the deadline for cutting timber until October 10, 1997. Plaintiff argued in the alternative that the agreement was ambiguous and the parties should be allowed to present evidence as to the deed’s meaning. The trial court concluded that plaintiff was obligated to exercise its timber rights within a reasonable time and, after a trial on the facts as to what constituted a reasonable time, ruled for defendants.

The Court of Appeals held that the reference to the 1968 agreement in the disputed deed clause incorporated the terms and conditions of the 1968 agreement by reference. The court stated that it would treat the 1968 agreement as if it were a part of the 1971 deed.

The court reviewed the stated purposes of the 1968 agreement and the provisions of the agreement, most of which had to do with matters other than the property conveyed by the 1971 deed. One provision of the agreement extended until October 10, 1997, the period of time in which timber could be cut on certain property described by metes and bounds (not including the property described in the 1971 deed). Another provision described by metes and bounds the property (also not including the property described by the 1971 deed) intended to be “unaf-

ected” by the agreement. The agreement contained various other terms and conditions describing the timber that could be harvested and the methods to be employed by the timber harvester. The only reference in the agreement to the property conveyed by the 1971 deed was a paragraph granting the Gibsons a three-year option to purchase the property from Harris Pine Mills “subject to any timber rights in [Harris Pine Mills].”

The Court of Appeals held that the disputed deed clause unambiguously meant that the timber rights reserved in the deed were subject to the extended timber-cutting deadline described in the 1968 agreement. Although the 1968 agreement did not include the 1971 deed property in its description of the property for which the timber-cutting deadline was extended, the deed clause would have no purpose under any other interpretation. The court concluded that the only way to give effect to the incorporation language in the deed clause at issue would be to incorporate terms and conditions that otherwise would not have applied to this particular property; that is, the various terms and conditions having to do with harvesting timber, including the provision that extended the timber-cutting deadline. The court noted, as additional support for its conclusion, that the deed did not provide that *the property was to be conveyed* subject to the terms and conditions of the 1968 agreement, but rather that *the reserved timber rights* were subject to the terms and conditions of the 1968 agreement.

This case shows that simply incorporating the terms of one agreement in another agreement by reference can create confusion and disputes. If only certain provisions of an agreement are meant to be incorporated by reference, a drafter needs to be specific. Also, drafters should not include unnecessary references to other documents that might be interpreted as incorporations by reference if no incorporation is intended.

#### Susan Glen

*Pioneer Resources, LLC v. Lemargie*, 175 Or. App. 202 (2001).

### ■ *Residential Agency Relationship Disclosure Form Is Not Actionable Representation Under the UTPA and Emotional Distress Damages Are Not Recoverable*

In *Rathgeber v. James Hemenway, Inc.*, 176 Or. App. 135 (2001), the Oregon Court of Appeals reversed a jury verdict on a claim for violation of the Unfair Trade Practices Act (UTPA), ORS 646.605 to ORS 646.652, and judgment for noneconomic damages arising out of a real estate transaction.

The case arose out of a sale of rural residential property in Lane County. Plaintiffs, Rathgebers, hired defendant Zobel, an associate of Hemenway Realtors, as their buyers’ agent. (Defendant James Hemenway, Inc. was doing business as Hemenway Realtors/Better Homes & Gardens.) As required by ORS 696.820, Zobel provided them with an agency relationship disclosure form, which described certain affirmative duties he owed them under ORS 696.810 as a buyers’ agent. The affirmative duties included the fiduciary duties of loyalty, obedience, disclosure, confidentiality, reasonable care, and diligence. Plaintiffs signed the form, and Zobel signed on behalf of defendants. With Zobel’s assistance, plaintiffs located and purchased a property. Plaintiffs discovered substantial defects with the property just before closing and froze the funds they had placed in escrow. The seller brought an action for specific performance and settled with plaintiffs.

Plaintiffs then filed this action, alleging that defendants breached their fiduciary duties under ORS 696.810, causing

noneconomic emotional distress damage to plaintiffs. Plaintiffs also alleged that defendants violated the UTPA by representing that "their services as buyers' agents had qualities of competence and diligence that they did not have." 176 Or. App. at 138. After the trial court denied defendants' motion for a directed verdict, the jury returned a verdict for plaintiffs, finding that defendants breached their fiduciary duties and violated the UTPA; the jury awarded plaintiffs economic and noneconomic damages.

The Court of Appeals addressed three of defendants' assignments of error: denial of their motion for a directed verdict on plaintiffs' UTPA claim, denial of their motion to strike plaintiffs' claim for emotional distress damages in connection with plaintiffs' breach of fiduciary duty claim, and award of attorney fees to plaintiffs under a provision of the UTPA.

To prevail on their UTPA claim, plaintiffs had to prove (1) a representation by defendants, (2) in the course of defendants' business, (3) that Zobel had qualifications (4) that, in fact, he did not have when (5) defendants knew or should have known that the misrepresentation would constitute a violation of the UTPA. 176 Or. App. at 140-41. The Court of Appeals opinion addressed only the representation element. The court agreed with defendants' argument that the agency relationship disclosure form was a not an actionable representation because ORS 696.820 required Zobel to provide it to plaintiffs. As the court noted, ORS 646.612(1), a section of the UTPA, provides that the UTPA section that plaintiffs alleged defendants violated does not apply to conduct in compliance with a statute administered by a federal, state, or local government agency. 176 Or. App. at 141. The court also found unpersuasive plaintiffs' other arguments why there was a representation. It summarily dismissed the argument that Zobel expressly represented that he was experienced with rural properties because there was no evidence to the contrary. It rejected for lack of proof plaintiffs' argument that Zobel represented impliedly that he would act competently. The court also disagreed with the representation argument because the evidence proved that Zobel was negligent, not incompetent. The court explained that incompetent and negligent are not synonyms. Incompetent describes an actor lacking sufficient aptitude, skill, strength, or knowledge, while negligent describes conduct that creates an unreasonable risk of a foreseeable harm. 176 Or. App. at 142.

Next the court addressed the denial of defendants' motion to strike plaintiffs' claim for emotional distress damages. The court first noted that, generally speaking, a plaintiff may not recover damages for negligent infliction of emotional distress in the absence of physical injury. *Rustvold v. Taylor*, 171 Or. App. 128, 14 P.3d 675 (2000), *review allowed* 332 Or. 56 (2001). Plaintiffs argued that one of the exceptions to the physical injury requirement, permitting recovery for infringement of a legally protected interest independent of a tort claim for negligence, applied.

The Court of Appeals rejected plaintiffs' argument under *Curtis v. MRI Imaging Services II*, 148 Or. App. 607, 941 P.2d 602 (1997), *aff'd on other grounds*, 327 Or. 9, 956 P.2d 960 (1998), as well as prior Court of Appeals decisions. Although the court expressed uncertainty whether the reasoning of *Curtis* applied beyond medical malpractice cases, it concluded that plaintiffs failed to prove defendants owed them a duty to recognize and avoid the negligent infliction of emotional distress. In addition, the court described its prior holdings as consistently denying claims for emotional distress damages stemming from fundamentally economic relationships. The court described plaintiffs' evidence as showing only that defendants were to aid plaintiffs

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in the purchase of a residence, a fundamentally economic undertaking insufficient to support an award of emotional distress damages. The court also dismissed, without much discussion, plaintiffs' arguments concerning legally protected interests arising from the UTPA. Additionally, the court disagreed with plaintiffs' argument that defendants' interference with their legally protected interest in using and enjoying their property would support an award of damages for emotional distress under *Macca v. Gen. Telephone Co. of N.W.*, 262 Or. 414, 495 P.2d 1193 (1972). The court described plaintiffs' interest as a mere expectancy in procuring property, not a right to enjoy and use property, to which it refused to extend *Macca's* reasoning.

Finally, because the court concluded there was no evidence to support the jury's finding that defendants violated the UTPA, it concluded that plaintiffs were not the prevailing party and not entitled to an award of attorney fees under a provision of the UTPA, ORS 646.638(3).

**Susan N. Safford**

*Rathgeber v. James Hemenway, Inc.*, 176 Or. App. 135 (2001).

### ■ Court Clarifies Meaning of "Delivery" of Deed and Laches

In *Hilderbrand v. Carter*, 175 Or. App. 335, 27 P.3d 1086 (2001), the Court of Appeals determined that a later recorded "Correction Deed" did not affect the remainderman interest established in the original deed, nor was the action barred by laches. Thus, the court held that the plaintiffs-grantees owned the entire property upon the mother's death because the interest created in the original deed (joint tenancy with a right of survivorship) was not affected by the later deed.

In 1978, the mother recorded a deed transferring interest in a mobile home park from herself to herself and two siblings and their spouses. The deed stated the parties would hold their interests in "joint tenancy" and that "the grantees . . . do not take title in common but with a right of survivorship, that is, that the fee shall vest absolutely in the survivor of the grantees."

In 1983, the mother, unilaterally, but with the siblings knowledge, recorded a "Correction Deed" that specifically purported to correct the 1978 deed, stating that the mother would retain a half interest in the property and granting the two siblings and spouses an undivided quarter interest "as tenants by the entirety."

The mother died in 1995, and the siblings disagreed about who owned the property. Plaintiffs, the grantees, filed suit in 1996 claiming entitlement to the entire property. Defendants, beneficiaries of the mother's estate and trust, claimed that they owned a half interest in the property.

The Court of Appeals explained that the deed is effective upon execution and delivery. Delivery is not physical, but refers to the mental state of the grantor. Delivery in this sense means the grantor's manifestation of the intent to pass the property interest immediately. By recording a deed, a presumption arises that the grantor intended the deed to take effect and title therefore immediately passes.

The presumption of delivery sometimes can be overcome as was the case in *Myers v. Weems*, 128 Or. App. 444, 876 P.2d 861 (1994). In that case, the mother sought to cancel a deed because both parties admitted that the deed was meant to be an attempt to allow the daughter to inherit property upon the mother's death. Grantees made no such admission here, so the presumption was not disproven.

Furthermore, the court noted that the terms of the 1978 deed

were unequivocal, the 1983 deed sought only to "clarify" the 1978 deed (and the court ruled that the clarification was to determine the ownership interest in the property, but not the remainderman interest, joint tenancy with a right of survivorship). Also, the mother had filed a gift tax return after recording the 1983 deed wherein she acknowledged ownership transferred in 1978.

The court rejected the defendants' ownership claim for another reason: a grantor cannot unilaterally revoke a property interest created by an earlier deed. Thus, the 1983 deed could not change the remainderman interest established in the 1978 deed. There being no mutual mistake between grantor and grantees that might justify reformation of a deed, the 1978 deed was enforceable.

Alternatively, defendants argued that laches barred the plaintiffs from bringing the action in 1996 to interpret the 1983 deed. Laches consists of three elements: (1) full knowledge (actual or chargeable knowledge through a duty to inquire) of all facts, (2) delay for an unreasonable time, and (3) substantial prejudice. Laches is a fact determination and the burden of proof is on the defendant, except if the action is filed beyond the applicable statute of limitations, whereupon the burden shifts to the plaintiff.

Laches in this case did not begin to run in 1983 when the deed was recorded, but much later when the interest transferred by the deed was "actually repudiated or challenged." Thus, the statute of limitations had not run at the time of filing in 1996, and the burden of proof remained with the defendants.

The court then ruled defendants failed to meet their burden of proof. Since the mother could not have unilaterally altered the 1978 deed through a later recorded deed, her intent in filing the 1983 deed was irrelevant. Thus the resolution of this matter was not factually based, but legally based. The mother's death before the filing of the lawsuit, therefore, was not prejudicial to the defendants, and laches did not apply.

**Edward C. Gerdes**

*Hilderbrand v. Carter*, 175 Or. App. 335, 27 P.3d 1086 (2001).

## Appellate Cases—Land Use

### ■ ORS 215.283(1)(w) Permits Establishment of Fire Services Facilities on EFU Land

In *Keicher v. Clackamas County*, 175 Or. App. 633 (2001), the Oregon Court of Appeals addressed the question of whether a proposed fire station was a permitted use under ORS 215.283(1) on land zoned Exclusive Farm Use (EFU). The Clackamas County Fire District proposed to construct a fire station on EFU land in replacement for a station on non-EFU land. The fire station would include fire fighting services, as well as emergency medical services (EMS) and training. The fire station would primarily serve rural areas, but would also serve certain urban areas. LUBA affirmed Clackamas County's approval of the fire station and petitioner Keicher appealed.

The first issue the Court of Appeals dealt with was whether ORS 215.283(1)(w), which specifically lists "[f]ire services facilities providing rural fire protection services" as a permitted use in EFU zones, required that the proposed fire station only provide rural fire protection services to the exclusion of urban fire protection services. Petitioner argued that because five percent of the fire station's service area would be within the Metropolitan Service District Urban Growth Boundary (UGB) it did not qual-



ify as a permitted use under ORS 215.283(1)(w). Petitioner relied on the court's earlier holding in *Warburton v. Harney County*, 174 Or. App. 322, 25 P3d 978 (2001), in which the court ruled that local and state provisions permitting non-farm uses in EFU zones should be construed consistently with the policy of preventing loss of agricultural lands.

The court ruled that the policy of preventing loss of agricultural lands does not replace the specific authority set forth in ORS 215.283(1)(w) to permit fire service facilities in EFU zones. Specifically, the court found that ORS 215.283(1)(w) makes no mention of the location or scope of service of a permitted rural fire service facility and, pursuant to principles of statutory construction as set forth in *PGE v. BOLI*, 317 Or. 606, 611–12, 859 P.2d 1143 (1993), the court was not to insert such requirements in the statutory language where the legislature had not done so. The court noted that, contrary to the lack of such a limitation in ORS 215.283(1)(w), the legislature had limited other permitted uses under ORS 215.283(1) to rural uses. Specifically, ORS 215.283(1)(v) permits the siting of a facility on an EFU-zoned farm for processing of farm crops, provided the facility receives at least one-quarter of its crops from the host farm. The only requirement under ORS 215.283(1)(w) is that the fire services facility be rural. The court therefore affirmed LUBA's finding that a fire station serving predominantly rural areas is permitted under ORS 215.283(1)(w).

The second issue the court addressed was whether ORS 215.283(1)(w) also permitted EMS and training services. The record contained testimony that EMS and training services are integral parts of fire services. The parties did not dispute this evidence, and the court therefore affirmed LUBA's finding that such services are permitted under ORS 215.283(1)(w).

The third issue the court addressed was whether Clackamas County had to amend its zoning ordinance to bring it into compliance with ORS 215.283(1)(w) prior to the siting of the proposed fire station. The court found that Clackamas County did not have to so amend its zoning ordinance because ORS 197.646(3) expressly states that upon failure of the local government to so amend its zoning ordinance, the new or amended goals, rules, and statutes are directly applicable to the local government's land use decisions. Thus, amendment of the local zoning ordinance was irrelevant. Moreover, the court noted that ORS 215.283(1) does not permit the local government to impose additional conditions on the permitted uses set forth therein. Petitioner relied in part on OAR 660-033-0130, which permits local governments to impose additional limitations to address local concerns. But the court disagreed with petitioner's interpretation and essentially found that ORS 215.283(1) overrode contrary local land use regulations.

The fourth and final issue the court addressed was whether a failure to give notice pursuant to ORS 197.047 of the enactment of ORS 215.283(1)(w) meant that Clackamas County should have ignored ORS 215.283(1)(w) and instead relied on ORS 215.283(1)(d), which permits utility facilities in EFU zones. Petitioner argued that, whereas a fire station serving urban areas may have been allowed to be sited on EFU land under ORS 215.283(1)(d), upon passage of ORS 215.283(1)(w) the legislature expressed an intent to limit fire stations on EFU land to those that serve rural areas only. The court disagreed. Not only did the court find ORS 197.047 to be inapplicable, but it also found that ORS 215.283(1)(w) did not apply a new restriction, but instead, created a new permissive use. Moreover, the court ruled that a fire services facility is not a utility facility as that term is defined in ORS 215.283(1)(d) because, although it does provide a public service, it does not produce, treat, or deliver a

measurable commodity, as do more typical utility facilities such as water treatment plants and electric generating facilities. The court cited with approval the fact that the legislature differentiated between utility facilities and fire service facilities by creating two distinct categories under ORS 215.283(1). As such, the Court of Appeals affirmed LUBA's finding that ORS 197.047 and ORS 215.283(1)(d) were inapplicable.

#### **William R. Joseph**

*Keicher v. Clackamas County*, 175 Or. App. 633 (2001).

Mr. Joseph is an attorney with Bullivant, Houser, Bailey PC.

### **■ Denial of Direct Access to State Highway Does Not Support Claim for Relief**

In *Deupree v. State of Oregon*, 173 Or. App. 623 (2001), the Court of Appeals affirmed the trial court's decision granting ODOT's motion for summary judgment, holding that there is not a claim for relief when a property owner is denied direct access to a state highway, provided the property owner still has indirect access. The court refused to find compensable damage absent deprivation of all access and the related economically viable use.

Deupree owns property abutting a state highway. ODOT widened the state highway, and in doing so, changed the grade, cancelled Deupree's direct access permits, and eliminated two alternative direct access points. Deupree sought review of ODOT's administrative decision and filed a complaint seeking \$1 million for diminished property value and loss of business. Deupree's complaint contained three claims: (1) a statutory claim for change of grade under ORS 105.755; (2) an inverse condemnation claim; and (3) a section 1983 claim.

The trial court dismissed all three claims, holding that the claims were all about access and were not ripe until the administrative review case was decided. The Court of Appeals took a different approach.

With regard to the statutory change of grade claim, the Court of Appeals looked to the language in ORS 105.755. The statute provides that ODOT is liable for "just and reasonable compensation for any legal damage or injury" as a result of a change of grade. ORS 105.755(2). The Court of Appeals held that the change of grade must deprive a plaintiff of "all highway access to their property" to constitute "legal damage or injury" giving rise to a claim for relief under ORS 105.755. In this case, Deupree still had the access to the state highway. Therefore, the Court of Appeals found that the trial court properly dismissed the statutory change of grade claim.

With regards to the inverse condemnation claim, Deupree did not demonstrate that ODOT deprived him of "all substantial beneficial or economically viable use of the property." The Court of Appeals found that Deupree only alleged diminution in value of the property. Inconvenience, "reduction in profits or depreciation in the value of property that occurs as a result of a legitimate exercise of the state's police power is *damnum absque injuria* and not a compensable taking." (Citing *Curran v. ODOT*, 151 Or. App. 781, 787 (1997); *Gruner v. Lane County*, 96 Or. App. 694, 697 (1989)). Deupree failed to demonstrate that the highway widening deprived Deupree of all economically viable use of the property. Therefore, the Court of Appeals found that the trial court properly dismissed the inverse condemnation claim.

Because Deupree's inverse condemnation claim failed, so did the section 1983 claim. The Court of Appeals restated existing law: "Section 1983 'is not itself a source of substantive rights' but merely provides 'a method for vindicating federal rights else-

where conferred.” (Citing *Albright v. Oliver*, 510 U.S. 266 (1994)).

The court’s decision in this case solidifies the requirement that ODOT must deny a plaintiff all access to a state highway before a plaintiff can successfully recover damages. Stay tuned for different decisions under Measure 7 or its progeny.

Marnie Allen

*Deupree v. State of Oregon*, 173 Or. App. 623 (2001).

## Cases From Other Jurisdictions

### ■ Ninth Circuit Finds Due Process Violation of Plat Vacation Without Hearing

In *Weinberg v. Whatcom County*, 241 F.3d 746 (9th Cir. 2001), plaintiffs owned several lots in short-plat subdivisions approved in 1992 and 1994 and undertook land clearing activities that an enforcement officer found violated local ordinances. When plaintiffs did not desist, the enforcement officer brought a stop-work order and moved to vacate the short plats unless plaintiffs paid fines for the alleged violations. Ultimately, the county revoked the development permit given on the property and vacated the plats following a hearing before a hearings officer and the county governing body. The governing body concluded that it did not have jurisdiction to hear an appeal over the vacation proceedings nor did the hearings officer have jurisdiction to hear an appeal of the stop-work order. After this action, plaintiffs sold their interest to another, who commenced proceedings to challenge these decisions along with plaintiff as a nominal party. However, the case partially settled and was ultimately dismissed without prejudice for lack of prosecution.

In 1997, plaintiffs filed an action in federal court alleging negligence, a taking under the state and federal constitutions, and civil rights violations of procedural and substantive due process. Defendant County, ultimately rescinded the plat vacation order; nevertheless, the court proceedings continued.

At the trial level, plaintiffs failed to show damages as required by local court rules, and defendants moved for summary judgment on the procedural due process issue. (The trial court found, and the Ninth Circuit apparently agreed, that the substantive due process claim was subsumed by the takings claim.) Defendant also moved for summary judgment on all claims for lack of proof of damages. The trial court found plaintiffs’ interests in the lots were a protectable property interest, but nevertheless dismissed all claims for lack of proof of damages.

On appeal, the Ninth Circuit, through Judge O’Scannlain, found no *res judicata* based on the state court proceedings, as there was no decision on the merits. The court also found that the trial court did not abuse its discretion in considering summary judgment despite plaintiffs’ requests that they be indulged for a time to allow them to choose an expert to deal with the damages claims. The court ruled plaintiffs failed to comply with the local rules of federal procedure regarding a request for a continuance.

Moving to the damages issue, the court upheld dismissal of the negligence and the federal and state takings claims, assuming, but not deciding, that those takings claims were ripe. However, the procedural due process claim could have resulted in nominal damages and did not depend on the merits of the

substantive claims. Following rules and the “feeling of just treatment” is the essence of a procedural due process claim. The court noted that plaintiffs had a cognizable property interest recognized by the state under *Board of Regents v. Roth*, 408 U.S. 564 (1972). In that case, the voiding of the two lots required some kind of hearing before plaintiffs could be deprived of their property interests in the lots. To determine whether a pre-deprivation hearing was required, the court used the three factor analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976). This analysis examines (1) the private interest involved, (2) the risk of deprivation of that interest through existing procedures and the probable value, if any, of substitute procedures, and (3) the governmental interests, including the function involved and the fiscal or administrative burdens created by the additional or substitute process. The court said the *Mathews* factors presented a fact question with respect to the stop-work order, but found these factors weighed toward requiring a pre-deprivation hearing on the proposed vacation order. The court said that

“Weinberg’s private interest in his approved plats was considerable. By vacating the plats, the County effectively deprived Weinberg of the economic value of his property and rendered nugatory his prior efforts and expenses incurred to develop it. There was a marked absence of any alternative procedural safeguards, as well. Not only did the County’s Technical Committee vacate Weinberg’s short plats without providing him a prior opportunity to be heard, it did so without holding a Committee meeting of any kind. The attendant risk of an erroneous determination by the Committee was, accordingly, significant. With respect to the third *Mathews* . . . factor, providing Weinberg an informal hearing prior to the deprivation would have entailed only minor administrative costs and burdens for the County.

Nor does the County’s vacation of the plats fall within one of the exceptions to the general rule favoring a hearing before the deprivation of a cognizable property interest. The Technical Committee’s action was duly authorized by County officials and, hence, was quite foreseeable. Provision of a prior hearing was otherwise practicable. There was simply no nexus between any possible emergency Weinberg’s continued construction might have occasioned and the County’s vacation of his short plats. At the time the County vacated his plats, all work on the property had been suspended for over a month. In these circumstances, we hold that the County violated Weinberg’s right to procedural due process as a matter of law by failing to provide a hearing prior to vacating his short . . . plats.”

241 F.3d at 754 (footnotes omitted).

The court thus found plaintiffs were entitled only to nominal damages and did not remand the matter for trial on the merits; however, it did remand the case for a determination of costs and attorneys fees.

This case presents a timely warning to local governments to provide for a pre-deprivation hearing under the *Mathews* factors for a possible deprivation of a recognized property right.

Edward J. Sullivan

*Weinberg v. Whatcom County*, 241 F.3d 746 (9th Cir. 2001).

### ■ Challenge of Allegedly Unlawful House Too Late to “Bea” Legal, Says Washington Supreme Court

In *Skamania County v. Columbia River Gorge Comm’n*, 144 Wash. 2d 30, 26 P.3d 241 (2001), the Washington Supreme Court

brought closure to a long and controversial case. In 1996, Brian and Jody Bea (the Beas) sought approval for the construction of a residence and associated structures on their land in Skamania County. Because the land use was in the Columbia River Gorge National Scenic Area, the application was required to meet the Columbia River Gorge National Scenic Act (Act), which is implemented through both a management plan adopted pursuant to the Act, as well as an ordinance adopted by plaintiff, Skamania County. A year after Skamania County approved the application, defendant, the Columbia River Gorge Commission (the Commission), brought a contested-case proceeding, alleging that the structures, as completed, did not meet the requirements of the Act. In the contested-case proceeding, the Commission determined that the structures violated the Act, and plaintiff and the Beas appealed. The trial court upheld the Commission's order. The Washington Supreme Court granted a petition for direct review based on plaintiff's principal contention that the Commission had no authority to review the decision because it did not appeal the decision within the time period provided by law.

The Washington Supreme Court reversed the trial court, emphasizing the openness of the local hearings process, which gave all the parties notice of the appealability of the original approval within twenty days of the decision. The parties did not appeal this approval. The Beas began construction and, in doing so, allegedly violated some of the thirty-three conditions of approval. Skamania County admitted it was lax in enforcing the regulations, but determined that the discrepancies between the structure built and the conditions imposed were "insignificant." After the Commission began enforcement proceedings, plaintiff contended the Commission had no jurisdiction to bring the contested-case proceeding, as no appeal had been taken from the original approval. The Commission relied on a provision of the Act allowing it to monitor county actions and to take necessary action to ensure compliance with the Act.

The Washington Supreme Court used a *de novo* standard of review for errors of law, including errors involving the federal statute. The Commission contended that the court should use the deferential standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, the court first examined whether Congress has spoken on the issue. The court ruled that, while the "monitor" and "ensure" language read in isolation would support the Commission's interpretation, it had a duty to interpret and read the Act consistently with the entire text. The court further found the Commission's interpretation inconsistent with the appeal period limitations under the Act, as it would permit a collateral attack on a decision the Commission failed to appeal. Moreover, the court stated the "private attorney general" provisions of the Act, which allowed other interested persons to bring suit, would also allow collateral attack that was inconsistent with the Act. Given all the specific powers granted to the Commission by Congress under the Act, the court concluded that the reading of the "monitor" and "ensure" language suggested by the Commission went beyond the wording of the Act itself. The court also concluded that the Commission's reading was inconsistent with the policy favoring administrative finality so as to conserve administrative resources and allow affected persons to rely on final decisions. The court stated that such a reading would lead to an "unjust result," as the Beas' house was already half finished when the administrative proceedings were commenced.

The court also noted that the Commission had approved plaintiff's ordinance under the Act and, thus, had delegated its powers over applications to the plaintiff. Given this delegation, the court held the Commission's failure to exercise its authority amounted to

estoppel, as if the Commission had made the decision itself. The court further criticized the Commission for not undertaking site visits, transmitting specific informed comments, or appealing decisions that were inconsistent with the Act. The court observed that the Commission's principal concerns regarding the structures—location and height—were apparent with only a cursory review of the original application site plan and county planning director decision. (Not all familiar with the case might agree that the site plan and project description were so clear, however.) The court added that the Commission's reading of the Act removed any incentive for it to work with local governments to review applications in a timely and thorough way.

Finally, the court disagreed with Multnomah County and the United States that the decision in this case would lead to inconsistent construction of the Act, noting that the Commission's participation in the local appeals process and its final say over applications, as well as local land use ordinances, brought uniformity of interpretation. The court added that the use of the quasi-judicial appeals process particularly improved the goal of uniformity, so that collateral attacks on final land use decisions were unnecessary. The court also dismissed the same parties' argument that *Chevron* required deference to the Commission's interpretation of the Act, noting that *Chevron* deference applied only if the statute were silent or ambiguous. Even if the statute were ambiguous, the matter of jurisdiction is not a subject for deference, as it is not within the Commission's field of expertise and is not supported by prior administrative practice by the Commission, nor sufficiently rational to withstand judicial scrutiny.

The court also was unpersuaded by the Commission's assertions that it could not have filed an appeal because the illegality of the location and height of the Bea house was only apparent after construction commenced. In the court's view, the Commission could have filed a late appeal or sought an injunction in lieu of the collateral-attack remedy it chose. The court added that its order was without prejudice to the Commission's ability to pursue other remedies, specifically noting that certain questions, such as whether the Beas complied with the original permit decision or whether the county adequately enforced its decision, were not before it.

Justice Ireland concurred, but stated that the property owner flagrantly disregarded the law, and the matter should be remanded for further superior court proceedings, omitting those predicated on the collateral-attack mechanism used by the Commission. Justice Ireland noted the violation of conditions for which the Commission could bring an enforcement action—the testimony regarding violations by the Beas and the county's lack of enforcement. Justice Ireland found no good reason to go through yet another proceeding to craft an appropriate enforcement remedy.

Whether or not the Washington Supreme Court is correct, it is final, and the lesson of this case is that both the Commission and those who seek to enforce the Act must be vigilant in examining each permit application before each county. The Commission and its adherents can expect no assistance, or sympathy, from the courts in the face of disingenuous applicants or staff ambiguities. The next test for the Commission is whether it has the stomach to undertake the enforcement of the conditions allegedly violated or whether it will fall over in exhaustion.

#### Edward J. Sullivan

*Skamania County v. Columbia River Gorge Comm'n*, 144 Wash. 2d 30, 26 P.3d 241 (2001).

Note: Edward J. Sullivan provided advice to the Columbia River Gorge Commission in the early phases of this case.



## ■ Colorado Supreme Court Finds Nollan/Dolan Not Applicable to Sewer Fees

In *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001), defendant, special district, imposed a “plant investment fee” (PIF) on all development within the district to pay for infrastructure investment. Plaintiffs claimed the fee constituted an unconstitutional taking. The Colorado Court of Appeals held the fee was not subject to a takings analysis, and plaintiffs sought *certiorari*.

The fee was devised following an engineering report that addressed the broad expanse of the district’s boundaries, which encompassed a number of recreational-use areas, and the fact that the district’s sewage treatment plant discharged near a reservoir. The report also dealt with the number of water quality problems faced by the district. To finance its work, the district charged connection fees, services fees, and the PIF. The PIF at issue in this case was calculated in terms of a single-family equivalent (SFE) of \$4,000 per unit. For residential units, the SFE differentiated between year-round and part-year uses, charging more for the latter because of their higher average peak flows. Plaintiffs proposed a residential development comprised of duplexes and triplexes and sought review of the fees set by the district. The governing body called in a utility rate expert, who found that the fees were supportable. The plaintiffs claimed that the fees were subject to a constitutional takings analysis under *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Plaintiffs sought review of the board’s decision in an action comparable to Oregon’s writ of review statutes and also alleged a takings claim. On the writ action, the trial court upheld the district and denied a motion for leave to amend the complaint to bring a civil rights action under 42 U.S.C. § 1983 because all claims in Colorado must be brought within thirty days of the challenged action. Both parties then filed motions for summary judgment on the takings claims. The court ruled for the defendant, finding that the fees were not unconstitutionally defective and, in any event, that the PIF met the “roughly proportional” test of *Dolan*.

The Colorado Court of Appeals affirmed, noting the district had no power of condemnation, nor the ability to deny or to delay building permits and, therefore, could not extort or exert the leverage to obtain more funds. Moreover, the court found that *Dolan* was only applicable to exactions of real property.

On review, the Colorado Supreme Court prefaced its determination as follows:

“We hold that the PIF is a valid, legislatively established fee that is reasonably related to the District’s interest in expanding its infrastructure to account for new development, and that the District’s specific PIF assessment on the Krupps’ project was fairly calculated and rationally based. As such, the PIF does not fall into the narrow category of charges that are subject to the *Nollan/Dolan* takings analysis.”

The court found the district had the power to impose fees for the services it provides and that the SFE unit of measurement was an appropriate one for PIF assessments. In any event, the setting of such fees is a legislative function, according to the court. The PIF is thus a service fee—a one-time charge for offsetting the infrastructure investments in existing facilities—which had been upheld on many occasions by the Colorado courts. That fee must be reasonably related to the overall costs of providing the service, although mathematical precision is not required and deference is given to the legislative function of the

district board. The methodology chosen will not be set aside unless it is inherently unsound. The court found the methodology in this case was specifically examined by a consultant and found to be correct.

On the basis of the record before it, the Supreme Court affirmed. In particular, the court found rational the difference between the higher-intensity use duplexes and triplexes and the lower-peak use of single-family residential dwellings as a basis for rate differentials. Triplexes were not on the SFE conversion chart used by the district staff; however, the court also affirmed that staff’s selection of a conversion rate in this case.

The court then turned to the takings claim under the federal and state constitutions and used the two-prong analysis of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Under that analysis the regulations must advance a substantial public interest and not deny all economically viable use of the land. Development exactions have a special sequence of tests under *Nollan* and *Dolan*, that there be an essential nexus between the exaction and legitimate governmental interests and that this nexus be “roughly proportional” following an “individualized determination.” The court noted the individualized determination wording in *Nollan* and *Dolan* and said that the case applies to specific discretionary adjudicative impositions of conditions that involve exacting real property for public use. The court said this was not such a case.

The court noted the Colorado legislature had codified *Nollan/Dolan*, but limited application of the statute to an individualized discretionary determination. Other (more deferential) review applies to assessing fees. The court also pointed to cases from other states that did not apply *Nollan* and *Dolan* to generally imposed fees where the courts have deferred to the legislative and political processes “to formulate adjusting the benefits and burdens of economic life to promote the common good.” *Ehrlich v. City of Culver City*, 911 P.2d 429, 446 (Cal. App. 1996). There is no danger in such situations that the fees can be used to extort. The fee is legislatively set and does not, therefore, undergo a *Nollan/Dolan* analysis.

The court also considered whether *Nollan/Dolan* applied to fees, in addition to real property exactions. The court noted *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), in which the Court said it did not extend *Nollan/Dolan* beyond exactions involving the dedication of real property for public use, a position previously taken by other states and lower federal courts. The Colorado Supreme Court adhered to that same view. Although the *Del Monte Dunes* case may leave open the possibility that some fees may be subject to a *Nollan/Dolan* analysis, the court believed the only possible use of such test would be an adjudicatory setting of fees. The court thus upheld the fees.

This case analyzed the use of legislatively established fees for municipal services and found them not to be subject to the reasonable nexus or rough proportionality standards of *Nollan* and *Dolan*. The court’s observations on the legislative and adjudicative distinction, as well as the distinction between fees and real property exactions, are sound ones and should give greater depth to the understanding of *Nollan* and *Dolan*.

**Edward J. Sullivan**

*Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001).



## ■ Columbia Gorge Commission Requires Complete Application Materials as a Condition of Approval

In *Friends of the Columbia Gorge v. Skamania County*, CRGC No. COA-S-99-01 (2001), the Columbia River Gorge Commission held that when an applicant fails to provide complete application materials for a proposed land use, and the County nevertheless approves the use, the County has not based its decision on substantial evidence and has denied the public and reviewing agencies a meaningful opportunity to comment on the proposed development. The Commission also held that the same result occurs where a County requires, as a condition of approval, the submission of adequate application materials in the future.

The Columbia River Gorge Commission is a bi-state agency that administers the land use rules for the Columbia River Gorge National Scenic Area, a 265,000-acre region encompassing lands in both Oregon and Washington. Congress created the National Scenic Area in 1986 in order to preserve the scenic, natural, cultural, and recreation resources of the Columbia River Gorge. See generally *Columbia River Gorge National Scenic Area Act*, 16 U.S.C. § 544–544p. Appeals stemming from county land use decisions are heard by the Gorge Commission. The Commission acts much like Oregon's Land Use Board of Appeals in this respect.

This case, which is commonly referred to as the *Eagle Ridge* case, after the applicant, involved a proposed aggregate quarry and related extraction, crushing, screening, and stockpiling operations. The applicant did not submit adequate application materials, including perspective drawings, wildlife management plans, and reclamation plans. All these materials were required under Skamania County's scenic area ordinance. Despite the defects in the application, the County continued to process the application and then approved the development conditioned upon the submission of adequate materials in the future.

In its unanimous decision, the Gorge Commission rejected the County's approach. The Commission held that application materials, by definition, must be submitted with the application. Without mandatory application materials, a County cannot properly review the application for compliance with approval criteria, and neither can tribal governments, state and local agencies, and the public. Furthermore, when a County requires application materials after-the-fact as a condition of approval, the County has failed to render a decision based on substantial evidence because the evidence does not yet exist.

The Gorge Commission's approach in the *Eagle Ridge* case mirrors that of LUBA. See, e.g., *Miller v. City of Joseph*, 32 Or. LUBA 478 (1996); *Foland v. Jackson County*, 18 Or. LUBA 731, 773 (1990).

### Nathan Baker

*Friends of the Columbia Gorge v. Skamania County*, CRGC No. COA-S-99-01 (2001).

Mr. Baker serves as counsel for Friends of the Columbia Gorge.

## ■ ODOT at LUBA: Is This Now a Two-Way Street?

Since adoption of the Transportation Planning Rule, ODOT has substantially increased its participation in land use decision-making processes. (By the author's count, ODOT did not petition LUBA to review a city or county land use decision until 1991 and has filed twenty-two such petitions since.) LUBA has just served notice that ODOT's foray into the world of land use may be double-edged. In *Witham Parts & Equipment Co. v. ODOT*, LUBA No. 2001-176 (1/17/02) (order on motion to dismiss), the Board agreed to review ODOT's decision to proceed with a proposed \$40 million reconstruction of the I-5/Hwy 62 interchange in north Medford. This appears to be the first time in nearly two decades that the Board has agreed to review an ODOT decision.

ODOT, of course, routinely undertakes construction projects that are financed in part by the federal government. In such cases, the National Environmental Policy Act (NEPA) requires the agency to first assess whether the project's impact on the human and natural environment will be significant. This "environmental assessment" (EA) results in either a "finding of no significant impact" (FONSI) or preparation of a full blown Environmental Impact Statement.

The EA for the North Medford Interchange project found that the project will require public acquisition of more than ten acres of private property and displacement of twelve businesses. This notwithstanding, the EA concluded that the project would have no significant impact on the human and natural environment. The Federal Highway Administration (FHWA) agreed and issued a FONSI.

Opponents of an ODOT decision to finalize an EA may challenge the sufficiency of that assessment in federal court. However, the federal courts have long pronounced reluctance to second guess agency determinations of the nature and extent of a project's impacts.

The petitioners in *Witham* filed notices of intent to appeal the EA to the Board. Expressing surprise at the novel filing, ODOT quickly moved to dismiss. Asserting that the decision to be reviewed was FHWA's FONSI, ODOT argued that LUBA had jurisdiction over neither the decision nor the decision maker.

*Witham* responded by clarifying that the decision to be reviewed was ODOT's publication of the EA. It then asserted that the EA constituted an exercise of the agency's "planning responsibilities," under ORS 197.180(1). That provision requires the agency, in such instances, to demonstrate compliance with the goals and local comprehensive plans.

*Witham* next argued that the EA fell within the category of actions governed by ORS 197.180(1) based upon provisions of ODOT's adopted State Agency Coordination (SAC) program that explicitly refer to the NEPA process. That is, according to the SAC Program, any ODOT "Class 3" project (i.e., one that results in a FONSI), by definition, significantly affects land use.

Finally, *Witham* went on to demonstrate that ODOT's final Environmental Assessment (which contained FHWA's FONSI) constituted the state agency's final decision on the project. Initially disputing that argument, the agency agreed at oral argument that the final EA indeed constituted the agency's final decision.

LUBA agreed that both ORS 197.180(1) and ODOT's SAC Program requires it to demonstrate consistency with the statewide goals and local comprehensive plans when it under-

takes a project that “significantly affects” land use.

ODOT argued that the decision made the necessary findings of compatibility, as follows:

“The Build Alternative is consistent with the Medford Comprehensive Plan and Transportation System Plan, and the interchange improvements are encompassed within the City’s roadway classification system. The Build Alternative has been determined to be consistent with the Regional Transportation Plan (RTP).”

The Board agreed that that might be the case. However, the statute and rules already discussed obligate the agency to establish such compatibility by citation to a record (which the Board did not yet have). Given its relatively brief initial findings, it will be interesting to see how ODOT fairs in that endeavor.

### **Ty K. Wyman**

*Witham Parts & Equipment Co., Inc. v. ODOT, LUBA Nos. 2001-176/177/178 (1/17/02)*

Mr. Wyman is an attorney with Dunn Carney Allen Higgins & Tongue LLP.

## **■ Housing**

In *DLCD v. City of McMinnville*, LUBA No. 2001-093 (12/19/01), LUBA concluded that once a city begins the process of updating its residential buildable lands inventory under ORS 197.296 for the purpose of reviewing its urban growth boundary, it must complete all steps of the process. Completing only part of the process is legal error.

DLCD and others appealed McMinnville’s adoption of an ordinance amending the city’s comprehensive plan to include an updated residential land needs analysis. The analysis concluded that the city may need to expand its urban growth boundary to include an additional 449 acres for housing and an additional 412 acres for parks, schools, and other public services to cover the city’s housing needs through the year 2020. Other than adopting the analysis as part of its comprehensive plan, McMinnville took no other action to address the residential lands deficit.

Under ORS 197.296(2), at the time of periodic review or any other legislative review of its urban growth boundary, a city must provide in its comprehensive plan or functional plan sufficient buildable land within the boundary “to accommodate estimated housing needs for 20 years.” The first step of the process is described in ORS 197.296(3), which requires a city to inventory the buildable land supply within its urban growth boundary, determine the actual density and average mix of housing types of residential development that have occurred within the boundary since the last periodic review or five years, whichever is longer, and analyze housing need by type and density range to determine the amount of land needed for each housing type for the next twenty years. The applicable administrative rules, OAR 660-008-0005 and 660-008-010, identify the “housing needs projection” as a key to determining the adequacy of the residential buildable land supply and define specific requirements for this projection, including consistency with Goal 14 requirements.

If a city’s analysis under ORS 197.296(3) shows that there is not sufficient buildable residential land within the urban growth boundary to meet housing needs for the next twenty years, under ORS 197.296(4) the city must either amend its boundary, amend its plan and regulations to increase residential densities within the boundary, or take a combination of these actions. The city must also use the housing needs analysis to determine

whether changes in density or housing type mix are required to meet housing needs over the next twenty years, under ORS 197.296(5). Finally, ORS 197.296(6) and (7) impose requirements for both of these actions.

In this appeal, McMinnville conducted the analysis required under ORS 197.296(3), but did not take any of the remaining steps under ORS 197.296(4)–(7). LUBA phrased the dispositive question in the appeal as: “Did the city commit legal error in adopting a final comprehensive plan amendment addressing the requirements of ORS 197.296(3), that concludes that action will be required under ORS 197.296(4) and (5), but that fails to complete the process set forth in the statute by taking such action . . . ?” LUBA concluded the answer to this question is “yes.” LUBA agreed with DLCD that McMinnville cannot determine whether the challenged comprehensive plan amendment is consistent with Goal 14 until it completes the process and takes action under either ORS 197.296(4) or (5) to address the need for additional residential land. LUBA explained its reasoning as follows:

“In sum, because LCDC’s rules implementing the statute require that the city’s housing needs *must* be consistent with Goal 14 requirements, the consequence in the present case is that the city committed reversible error in adopting a *final* comprehensive plan amendment that concludes that action will be required under ORS 197.296(4)–(7), but fails to complete the process set forth in the statute by taking action under those provisions. Like the county’s partial compliance with the rule in *Dept. of Transportation v. Douglas County*, the city’s decision partially fulfills a task that under applicable legal requirements must be fully completed before a final decision is adopted. Partial completion of a task that under applicable legal requirements must be fully completed requires remand for that reason alone.”

Slip Op. At 16. LUBA also concluded that its resolution of this issue was consistent with its earlier denial of a motion to dismiss this appeal for lack of jurisdiction. While McMinnville’s action resulted in a final land use decision over which LUBA had jurisdiction (a comprehensive plan amendment), the decision itself was legally flawed because McMinnville failed to complete the statutorily required steps for reviewing its urban growth boundary. Accordingly, LUBA remanded the decision.

### **Kathryn S. Beaumont**

*DLCD v. City of McMinnville, LUBA No. 2001-093 (12/19/01).*

## **■ LUBA Procedure: Withdrawal of Appealed Decision**

Under ORS 197.830(13)(b), a local government may withdraw an appealed decision for reconsideration “at any time subsequent to the filing of a notice of intent to appeal and *prior to the date set for filing the record.*” If a local government files the record early, may it subsequently withdraw the appealed decision if it does so before “the date set for filing the record?” LUBA concludes that it may in its Order on Notice of Withdrawal of Decision for Reconsideration in *Jordan v. Columbia County*, LUBA No. 2001-152 (11/15/01).

Petitioners filed their Notice of Intent to Appeal (NITA) with LUBA on September 14, 2001. While petitioners served the county planning commission on the same date, they did not serve the NITA on either the county board or county counsel. LUBA received the record on October 15, 2001. Seven days later, the county filed a notice of withdrawal of the appealed decision. The county argued the notice was timely because it was filed

before the “date set for filing the record.” In the county’s view, there is no “date set for filing the record” until the NITA is served on the governing body. Petitioners never argued that the NITA was served on the governing body more than twenty-one days before October 22, 2001, the date LUBA received the record.

LUBA agreed with the county, noting that before ORS 197.830(13)(b) was adopted, there was no legal consequence if the governing body filed the record before its due date. As this case illustrates, the statute now creates a potential legal consequence for filing the record early. That is, a local government may file a notice of withdrawal *after* it files the record as long as the notice of withdrawal is filed before the due date for the record. LUBA acknowledged that this may be a result the legislature never intended, but concluded the language of ORS 197.830(13)(b) and its implementing rule is clear.

**Kathryn S. Beaumont**

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*Jordan v. Columbia County, LUBA No. 2001-152 (11/15/01).*



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