OREGON STATE BAR 1935

OREGON REAL ESTATE AND LAND USE DIGEST

Published by the Section on Real Estate and Land Use, Oregon State Bar

Vol. 24, No. 3 • October 2002

Highlights

OREGON SUPREME COURT AFFIRMS INVALIDATION OF MEASURE 7, REQUIRING COMPENSATION FOR PROPERTY DEVALUATION

In *League of Oregon Cities v. State of Oregon*, 334 Or 645, ___ P3d ___ , 2002 WL 31235582 (October 4, 2002), the Oregon Supreme Court invalidated Measure 7, passed by the Oregon voters in 2000. Measure 7 amended the Oregon Constitution by requiring state and local governments to compensate property owners for any government restriction that had the result of reducing property values.

Under review in *League of Oregon Cities* was an injunction issued by the Marion County Circuit Court that prevented the Oregon Secretary of State from canvassing the votes cast for and against Measure 7 and the Governor from proclaiming the results of the vote on the measure. The Circuit Court first granted a preliminary injunction and then a permanent injunction after it determined that the measure as filed and voted upon violated, *inter alia*, the "separate vote" requirement of Article XVII, Section 1 of the Oregon Constitution. On appeal, the Oregon Court of Appeals certified the matter to the Supreme Court as a matter of great public importance and the Supreme Court accepted review.

The Supreme Court first considered a challenge to the jurisdiction of the circuit court. Defendant State of Oregon contended that the circuit court had no jurisdiction under the Oregon Declaratory Judgment Act (Act) before the Secretary of State canvassed the votes and the Governor proclaimed the results and that Oregon elections statutes provided for an exclusive remedy. The Supreme Court rejected those contentions, finding that the Act allows litigation to declare the rights of the parties, whether or not other remedies are available, unless the other remedies are exclusive or are more appropriate. The court found no exclusivity of remedy in the state election law scheme. That law allows a constitutional challenge to be brought within six months of the date election results are certified. The Supreme Court noted that Measure 7 was challenged in these proceedings before the certification process was complete and that the remedy provided for under the election statutes was also in the nature of a declaratory judgment.

The court also rejected challenges alleging that the Secretary of State had acted improperly by allowing Measure 7 to be placed on the ballot in the first place. The 60-day period following certification of the ballot title is the appropriate time for such a challenge to be made. Since that period had long since passed, the court held the Secretary of State's pre-election actions were beyond review.

Turning to standing, the court noted two lawsuits were consolidated in this appeal. One lawsuit was filed by the widow of former Governor Tom McCall and other individuals (the "individual plaintiffs") and the other was filed by the League of Oregon Cities, individual cities and counties and several named public officials (the "League plaintiffs"). Under the Act, plaintiffs must show some injury or other impact to a legally recognized interest and the injury cannot be "too speculative." The circuit court had before it cross motions for summary judgment and had granted summary judgment in favor of the plaintiffs.

As to three of the individual plaintiffs, including Mrs. McCall, the court ruled their allegations of the effects increased development under Measure 7 might have on them were too speculative to give them standing. However, the other two individual plaintiffs adequately established standing because they presented detailed affidavits describing the effects of Measure 7 on their interests. Similarly, the League and individual public officials failed to establish that Measure 7 had any specific impacts on them. In contrast, the individual city and county plaintiffs that had joined the League demonstrated that Measure 7 would have a fiscal impact on them of $3.8 billion, which was sufficient to confer standing.

As to ripeness, the evidence before the trial court showed that, although the votes had not been officially canvassed and certified, the measure had been approved by 53% of the voters, which result was undisputed. The court found the case ripe and proceeded to the merits.

The court said that Article XVII, Section 1 of the Oregon Constitution required a separate vote by the voters on each measure proposing to amend the state constitution. Thus, if a measure proposing a constitutional amendment contains more than one amendment, any vote passing that measure would be invalid unless the amendments were "closely related" to each other. *Armatta v. Kitzhaber*, 327 Or 250, 289, 959 P2d 49 (1998). All parties agreed that Measure 7 amended the "takings" provisions of the Oregon Constitution in Article I, section 18, but they disagreed on whether the measure amended other constitutional provisions or, if so, whether the amendments were "closely related." Before Measure 7, Article I, section 18 provided that a landowner would be entitled to compensation for a regulatory taking only if the regulation

deprived the owner of all economically viable use of his property. Measure 7 broadened this right to include compensation for any reduction in the value of private real property resulting from the enforcement of a restrictive regulation, even if the reduction in value falls well short of depriving the owner of all economically viable use of the owner's property.

Plaintiffs contended that Measure 7 also amended Article I, Section 8 of the Oregon Constitution, which protects free expression of opinion and the right "to speak, write or print freely on any subject whatever." Plaintiffs alleged Measure 7 amended the "free expression" clause because the measure specifically excluded from its compensation provisions government regulations

> "prohibiting the use of a property for the purposes of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor"

even if the government regulations clearly reduced the value of property. The court brushed aside arguments by the State and supporters of Measure 7 that landowners of these uses would not lose money, finding that the question was whether these owners would "experience any change in the constitutional right to free expression to which they are currently entitled under Article I, Section 8."

The court had previously construed Article. I, section 8 to prohibit government from treating uses involving free expression more restrictively than uses involving other products or merchandise. *See City of Eugene v. Miller*, 318 Or. 480, 491, 871 P2d 454 (1994). Thus, if Measure 7 required government to offer a benefit to some businesses, but not to others because of the content of their expression, the measure would amend Article I, Section 8. The court said that it may be possible for a regulation limiting expression to pass constitutional muster if it was focussed on the deleterious impacts of the expression, but noted that no case had come to it with such a claim.

The court concluded that the changes to Article I, Sec. 18 (the takings clause) were not "closely related" to the changes to Article I, Section 8 (the free expression clause), because they involved two very different constitutional rights. In addition, the court noted that the amendment to Article I, Section 18 *expanded* a right, while the impact of Measure 7 on free expression under Article I, Section 8, *contracted* a constitutionally protected right.

In a footnote, the court noted the plaintiffs' allegations that other Oregon constitutional provisions were allegedly amended by Measure 7, but the court chose to deal only with the changes made to Article I, Section 8. In another footnote, the court noted plaintiffs' other challenges under the Oregon Constitution, including the "full text" provisions of Article IV, Section 1(2)(d) and the provisions relating to revision of the entire constitution under Article XVII, Section 2, but chose not to deal with those matters.

The Court thus held that Measure 7 was invalid in its entirety because a constitutional amendment must be adopted in "strict compliance" with constitutional provisions relating to amendments. Under *Armatta*, failure to adhere to those provisions results in invalidation, notwithstanding submission to and approval by the voters. The court remanded the case for a determination of the individual plaintiffs' request for attorney fees, which had not been acted upon by the circuit court.

Justice Durham concurred and dissented, and would have allowed the challenges to the pre-election actions of the Secretary of State and would have allowed standing to the individual plaintiffs.

The jurisdictional, standing and ripeness discussions in this case are beloved only to lawyers. However, the discussion of the nature and meaning of the "separate vote" requirements of the constitution is valuable. The Oregon Constitution provides for separate votes to prevent confusion and "logrolling." This case confirms that, in order to protect the substantive rights granted by the Oregon Constitution, the procedural provisions for amending the state constitution have significant teeth.

Edward J. Sullivan

League of Oregon Cities v. State of Oregon, 334 Or 645, ___ P3d ___ , 2002 WL 31235582 (October 4, 2002).

RELU ONLINE

The Executive Committee is proud to announce the launch of our new Section website. The address is:

www.osbrelu.homestead.com

This new website brings together exciting section information and internet resources to create a powerful tool for section members to use in your everyday practice.

Our RELU Digest issues from 2000 onward are now available online. As a section member, you receive exclusive access to the most up-to-date real estate and land use opinions and decisions. All issues are presented in convenient PDF format and can only be accessed using your member password. Please make a note that your password is **relu0827**.

Stay current on all section news and information. Minutes, annual reports, budgets and agenda are all available online. Also available is a list of Executive Committee members whom you can write or email with questions or comments.

The internet provides an endless resource for today's attorney. Everything from case law to statutes, legal services, reference material and email groups are listed here for your convenience. All of these links bring valuable knowledge and information to your desktop with only the click of a mouse.

Track section happenings and plan your own involvement using this yearly calendar of events.

Make sure to check the website frequently for additional information and new features, including CLE news and announcements. Bookmark this address now!

www.osbrelu.homestead.com

Cases from other Jurisdictions

SIXTH CIRCUIT REVERSES SUMMARYJUDGMENT FOR CITY IN FAIR HOUSING CASE

In *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir., 2001), the Foundation brought a civil rights suit against the city for allowing a referendum and, for that reason, failing to issue building permits consistent with the Foundation's lawfully approved site plan. The Foundation claimed that these actions violated its constitutional and statutory rights.

The Foundation is a non-profit provider of low-income housing and uses limited partnerships to provide federal tax credits. The city's planning commission approved the Foundation's site plan for proposed housing, but the mayor opposed the proposal at the city council level in several meetings on the matter (although he had expressed no concern to the Foundation when the project was first proposed and before the Foundation purchased the subject site). Nevertheless, the city council approved the site plan on a split vote.

A referendum petition was filed and the Foundation filed suit in state court to enjoin certification of the election results because

it claimed the city's decision was administrative, rather than legislative in nature. The trial court granted a preliminary injunction against certifying the election results but did not require the city to issue building permits. That case ultimately went to the Ohio Supreme Court, which found otherwise. On reconsideration, however, the Ohio Supreme Court ruled the Ohio constitution only allowed a referendum on legislative actions of the city and that this proposed referendum violated the state constitution.

The Foundation brought this federal action alleging violation of the Fair Housing Act ("FHA"), equal protection and substantive due process, all based on the city's refusal to issue building permits while the referendum was pending. The federal district court granted the Foundation's motion for summary judgment based on the unconstitutionality of the referendum, but dismissed the other statutory and constitutional claims. The Foundation appealed.

Turning first to the Foundation's equal protection claim, the Sixth Circuit cited *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252, 265 (1977) for the proposition that proof of racially discriminatory intent or motive must be shown for an equal protection claim to succeed in a housing case. Such a showing requires a "sensitive" inquiry into the direct and circumstantial evidence of intent. In this case, the city approved the site plan and withheld building permits based on its understanding of its charter and the Ohio Constitution. The equal protection clause applies to both city legislative actions and to use of the referendum.

Under *Arlington Heights*, the United States Supreme Court uses a four-factor test to determine whether the city's actions evidenced an unconstitutional discriminatory intent. These factors include the racial impact of the city's decision, the historical context of the decision among other official actions, the specific sequence of events leading to the decision including any departures from normal procedures, and the legislative and administrative history of the decision (including official statements made by participants). The court found the first factor cut towards the Foundation, while the second factor was neutral. The third factor also favored the Foundation, because there was no other site plan that had been subject to this much planning commission scrutiny or the subject of a referendum. The fourth factor could lead a jury to decide race was a motivating factor in the decision, especially given the comments of some of the planning commission members on the "element" of people to occupy the housing. Additionally, the mayor criticized placement of this housing as the same type of "social engineering" that gave the city busing. The mayor also confused the proposal with Section 8 federally subsidized housing, which this project was not.

The court noted that Cuyahoga Falls was 98% white and concluded that there was a material fact issue as to whether the city's action demonstrated a discriminatory racial motivation by giving in to the racially biased opposition to the Foundation's project. This was especially important when viewed against the Ohio Supreme Court's conclusion that the site plan could not be referred for a vote under the Ohio Constitution. If the local government acts for the sole purpose of effecting the desires of citizens and it is aware that racial considerations were a motivating factor behind those desires, there is an equal protection violation. The court said that by giving effect to the "camouflaged racial expressions" of the opponents there was an equal protection violation, concluding at 639:

> "In sum, plaintiffs have produced sufficient evidence to raise a genuine issue of material fact as to whether (1) the opposition to the low-income housing project reflected racial bias; and (2) whether the defendants gave effect to that racial bias by allowing the referendum to stay the effectiveness of plaintiffs' City Council-approved site plan. Accordingly, the district court erred in dismissing plaintiffs' equal protection claim on summary judgment."

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published six times a year by the section on Real Estate and Land Use, Oregon State Bar, 5200 SW Meadows Road, Lake Oswego, OR 97035-0889.

Subscription Price: free to Real Estate and Land Use Section Members: $24.50 per year to others. To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

Editor
Kathryn Beaumont

Associate Editors
Alan K. Brickley
Sharon Smith
Edward J. Sullivan

Contributors
Marnie Allen
Nathan Baker
Kathryn Beaumont
Alan K. Brickley
Larry Epstein
Edward Gerdes
Susan Glen
Raymond W. Greycloud
Christopher A. Gilmore
Peggy Hennessy
William R. Joseph
Michael E. Judd
Mark Jurva
William Kabeiseman
Joan Kelsey
Jeff Litwak
Peter Livingston
Michael Magnus
Stephen Mountainspring
Todd Northman
Susan N. Safford
Steven R. Schell
Ruth Spetter
Edward J. Sullivan
Eric J. TenBrook
Troy Wood
Ty K. Wyman

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

Turning to the Foundation's FHA claims, the Sixth Circuit found the intent standard for equal protection cases applied to the analysis of the FHA claims and remanded the trial court's decision for the same reasons. The FHA prohibits making unavailable or denying housing to any person on grounds of race, color, religion, sex, familial status or national origin.

The court also ruled that, under the *Arlington Heights* decision, there was a separate ground under the FHA on which the Foundation could also prevail: that the city's actions had a disparate impact on housing for racial minorities, even without regard to intent. *Arlington Heights* set out three factors to consider, all of which supported the Foundation's position in the court's view. These factors require analysis of (1) the strength of the showing of a discriminatory effect; (2) the city's interest in taking the action complained of; and (3) whether the Foundation seeks to provide affirmatively for housing for minority groups, as opposed to removing obstacles to private provision of such housing.

Even if it might otherwise prevail, the Foundation must also show unusual circumstances, which the court found present in this case. The court noted that this was the only site plan to go to referendum in Cuyahoga Falls and that the Ohio Supreme Court had found that the referendum process could not be used for site plans. The court concluded that there were sufficient issues of material fact as to whether the city's actions had a disparate racial impact to preclude summary judgment in the city's favor. The court also found a material fact issue with regard to anti-family statements by opponents that the influx of children in the proposed housing would change the character of the neighborhood and over-crowd schools, and that children would vandalize the neighborhood.

Finally, the court found a substantive due process claim that would survive summary judgment in this case. The Foundation must have a legitimate claim of entitlement in order to bring a due process claim. However, the court ruled the Foundation satisfied that requirement because the underlying use was allowed and the site plan was approved by the council. It was the neighbors' action and the city's acquiescence in refusing to issue building permits while the referendum was pending that deprived the Foundation of its legitimate claim for reasons that were irrational. The court concluded at 644:

> "*** when a city denies a landowner the benefit of a general zoning scheme, despite its belief and/or knowledge that the landowner's property is entirely consistent with that scheme, it runs afoul of the Fourteenth Amendment's guarantee of due process."

The court thus reversed all three summary judgment grants of the trial court and remanded the case for further proceedings.

This case illustrates that constitutional and FHA claims may survive summary judgment and generate liability even though the city litigated the merits of the proposed referendum in another forum. The city's argument that it was just following the law, while true until the law changed on the referability of the site plan, rang hollow in the face of the FHA requirements that the city not cause disparate housing impacts on minorities through its actions.

Edward J. Sullivan

Buckeye Community Hope Foundation v. City of Cuyahoga Falls, 263 F.3d 627 (6th Cir., 2001)

Note: The United States Supreme Court has granted certiorari and agreed to review the Sixth Circuit's decision. City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 2002 WL 386361, 70 USLW 3562 (6/24/02) (No. 01-1268)

Appellate Cases — Land Use

INTERVENING STATUTORY CHANGE DEFEATS COLLATERAL ESTOPPEL CLAIM

In *Lawrence v. Clackamas County*, 180 Or App 495, 43 P3d 1192 (2002), the Court of Appeals concluded that issue preclusion does not bar consideration of successive applications to verify the same nonconforming use. A statutory change adopted between the first and second applications rendered the legal issues in the second application different than those in the first application.

After the county denied Patricia Lawrence's first application to verify her nonconforming Go-Kart business, the law governing nonconforming status changed and she filed a second application seeking to confirm nonconforming use status for the same use. At the time of the first application, Ms. Lawrence had the burden to prove that the use was lawful when it was established in 1960 and that it had continued, without interruption, since 1964 when the zoning laws changed and it became nonconforming. She failed to carry that burden in the first proceeding because there was evidence that the use had been interrupted between 1969 and 1971.

Ms. Lawrence appealed the denial to LUBA. However, while that appeal was pending, the Oregon legislature enacted ORS 215.130 (11), which provides:

> For purposes of verifying a [nonconforming use that was lawful at the time of the restrictive zoning] under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application.

This new statute changed the applicant's burden of proof. Ms. Lawrence was no longer required to show that the use had continued without interruption since it became nonconforming in 1964. Under the new statute, once she proved the business was lawful at the time it began, the County could not look beyond the 20-year period immediately preceding the date of the application. Consequently, the 1969-1971 interruption would be irrelevant.

Based on the statutory change, Ms. Lawrence decided to file a second application rather than pursue her appeal of the original denial. The County's zoning ordinance allows an applicant to refile at any time if there has been a change in applicable law that is material to the application. ZDO 1305.02(E)(2)(a). In any event, an applicant may refile two years after the final denial. LUBA found, and the Court of Appeals agreed, that the statutory change in the applicant's burden of proof triggered ZDO 1305.02 (E)(2)(a) and Ms. Lawrence was not required to wait two years to file her new application.

In opposing the second application, the neighbors argued that Ms. Lawrence was bound by the prior determination that her Go-Kart use had no nonconforming status because of the two-year interruption between 1969-1971. The Court questioned the applicability of issue preclusion to land use proceedings because local codes often anticipate the serial filing of the same or substantially similar applications for the same use. Even if issue preclusion applies to land use cases, the court concluded the first element is not satisfied in this case.

In order for issue preclusion to apply, the issue in both proceedings must be identical. The Court found that the intervening enactment of ORS 215.130 (11) dramatically altered the legal scope and content of the [nonconforming use] issue to be determined. In reality, the issue is *not* the same. Due to the enactment of ORS 215.130 (11), the interruption of the Go-Kart use between 1969 and 1971 that defeated the first application is no longer relevant to the determination of whether the use is entitled to non-

conforming status. Now, Ms. Lawrence need only prove that the business was lawful when established in 1960, and that it has continued uninterrupted from 1980 through 2000. Therefore, even if issue preclusion applies to land use decisions, it does not bar consideration of Ms. Lawrence's nonconforming use claim under the new statute.

Peggy Hennessy

Lawrence v. Clackamas County, 180 Or App 495, 43 P3d 1192 (2002)

COURT STRIKES DOWN COUNTY TEST FOR NON-FARM LOT OF RECORD DWELLING

The Court of Appeals' decision in *Friends of Linn County v. Linn County*, 177 Or App 453, 14 P3d 1213 , let counties know that they cannot adopt their own criteria for determining whether to allow non-farm lot of record dwellings.

The Warnocks applied for a permit to construct a lot of record dwelling on a 7.8-acre parcel with primarily high value farmland soils. Among other things, the applicable statute (ORS 215.705(2)(a)(C)(i)) requires that the following criterion be met:

> "The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity."

LUBA remanded the county's initial approval of the application on the basis that in applying this standard the county only looked at evidence of whether the property could be used for *commercial* farm operations.

On remand, the county adopted a test, proposed by the Warnocks, that a parcel "cannot practicably be managed for farm use" if it is incapable of generating at least $10,000 per year in gross farm income. Finding this standard was not met, the county again approved the application, and that approval was again appealed to LUBA. LUBA again remanded, concluding that the $10,000 test was just another way of measuring suitability for commercial farming, and the county was also required to consider noncommercial farming. The opinion noted that the inquiry should not focus solely on past use of the property, and that the statute also requires a finding of "extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity."

On appeal, the Court of Appeals first dealt with, and rejected, the Warnocks' contention that the Friends waived the right to challenge the $10,000 test, finding that their chairman sufficiently raised the issue before the county. Turning to the merits, the court dismissed the petitioners' contention that LUBA erred in holding farm use was practicable and substituted its judgment for the county on this point. The court agreed with the Friends' argument that LUBA simply held the $10,000 income test was invalid. Finally, the court held that LUBA could consider the "extraordinary circumstances" question in this second appeal, even though LUBA's first opinion had not reached that issue.

Mike Judd

Friends of Linn County v. Linn County, 177 Or App 453, 14 P 3d 1213 (2001)

Appellate Cases—Real Estate

COURT SAYS EVIDENCE IS INSUFFICIENT TO SUPPORT OFFSETTING SPECIAL BENEFITS IN CONDEMNATION CASE

In *State of Oregon vs. Fullerton*, 177 Or App 254, 34 P3d 1180 (2001), the Court of Appeals held that before a condemning authority is entitled to a jury instruction regarding offsetting the special benefits of an improvement project, there must be a showing of a direct effect on the fair market value of the remaining property.

The Oregon Department of Transportation condemned part of landowner's land along Highway 26 near the Camelot/Sylvan interchange. Landowner operated a seven-unit apartment complex that had two means of access to public roads and had garages for each apartment prior to the condemnation. After the condemnation, the garages were useable only for storage and there was only one means of vehicle access to public roads.

During pre-trial discovery, none of the appraisers engaged by the parties found any measurable "special benefit" accruing to landowner's remaining land. Accordingly, landowner moved *in limine* to exclude consideration of the issue. ODOT conceded that it would not introduce evidence of a numerical assessment of the monetary value, but argued that it would produce evidence from which special benefits could be inferred. Landowner's motion was denied.

At trial, there was evidence of the amount by which the retained parcel had been devalued, but neither party introduced evidence of a monetary value of any special benefits to the retained property. Witnesses testified that access to the property was structurally better and that the newly paved parking lot was superior to the gravel lot that existed prior to condemnation, although at least one expert stated that the property was "different, not better."

The parties argued the issue of special benefits to the jury at closing. ODOT relied on inferences arising from the paving, landscaping, and new drainage work done by ODOT to show that there was a special benefit to the remaining property from the project.

The Court of Appeals said the proper question was whether the evidence is "sufficient in the circumstances *of this case* to permit the 'jury to pass intelligently upon the question of whether the market value of the remaining land has been increased as a result of the improvement,' without having to resort to speculation or guesswork." 177 Or App at 263 (emphasis in the original; citation omitted). The Court's analysis focused on the testimony that there was no change in the rent that defendant received. The "inability of the witnesses to measure or calculate the amount of added benefit to the property from the improvements required the jury to speculate impermissibly on the fair market value of any special benefits." Id. at 266.

The Court stated that there must be some showing that the remaining property "has *increased* in value as a result of the improvements." Id. at 271. The evidence at trial didn't allow the jury to calculate the special benefits from the improvements, so the Court reversed the award and remanded the case for a new trial.

Tod Northman

State of Oregon v. Fullerton, 177 Or App 254, 34 P 3d 1180 (2001)

COURT OF APPEALS REVERSES AWARD OF ATTORNEYS FEES AND COSTS IN CONDEMNATION ACTION

A condemning authority's 20-day offer to a landowner, required by ORS 35.346(1), does not have to be separate from the offer made at least 30 days prior to trial required by ORS 35.346(7) in order to avoid an award of attorney fees, expenses and costs, held the Court of Appeals in *State of Oregon v. Kesterson*, 182 Or App 105, 47 P3d 546 (2002).

Tillamook County offered landowner $410,000 on April 11, 1996. Landowner rejected the offer, and the County filed suit on May 8, 1996. Landowner answered that $950,000 was $950,000, and added a number of counterclaims. The County amended its complaint once, adding several tort claims but leaving the alleged just compensation at $410,000, then filed a second amendment reducing the alleged just compensation to $156,000, and finally amended the amount to $0 at trial.

The jury determined the amount of just compensation was $410,000, but rejected all other claims by the parties. The trial court awarded landowner his attorney fees, expenses and costs, under ORS 35.346(7). The court reasoned that in order for an offer to be made at least 30 days prior to trial, it must be available to defendant at trial. The Court of Appeals rejected the argument as unsupported by the plain language of the statute and reversed the award of fees and costs.

Tod Northman

State of Oregon v. Kesterson, 182 Or App 105, 47 P3d 546 (2002)

BONDING COMPANY WINS BATTLE OVER CONSTRUCTION LIEN, BUT LOSES WAR OVER ATTORNEY FEES

In *Tualatin Valley Builders Supply v. TMT Homes*, 179 Or App 575, 41 P3d 429 (2002), the Court of Appeals ruled that, under ORS Chapter 87, notice of the filing of a bond is mandatory to allow recovery of a construction lien against that bond. The facts of this case were not disputed, TMT was a general contractor who hired Tualatin Valley Builders Supply ("TVBS") to be a subcontractor. TMT did not pay TVBS and TVBS perfected a construction lien on the property within the statutory time period. After TVBS perfected its claim, TMT purchased a bond as allowed by ORS 87.076, which, if properly done, frees the property from the lien and shifts the lien to the bond under ORS 87.083. However, ORS 87.078 requires the purchaser of the bond to serve the lien claimant with notice of the filing of the bond. The statute goes on to state that if notice is not given, "filing of the bond ... is of no effect and the provisions of ORS 87.083 shall not apply." TMT never notified TVBS of the bond. The trial court nonetheless allowed recovery against the bond (or the property, at the claimant's option), largely because the notice provisions were designed to benefit the lien claimant and the purchaser of the bond. TVBS elected to pursue the bond and the bonding company appealed.

In a straightforward application of *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993), the Court of Appeals held that the statutory language was clear; because ORS 87.083 does not apply unless notice is given, no lien ever attached to the bond and TVBS could not recover against it.

The bonding company had also appealed the failure to award attorney's fees. The bond company had requested attorney's fees under ORS 87.060(5), which provides that "in a suit to enforce a lien perfected under ORS 87.035" the court shall award reasonable attorneys fees to the prevailing party. The Court of Appeals held that this statute only allows attorneys fees for liens perfected under 87.035, which pertains only to liens perfected against the property. An action to enforce the lien against the property becomes one against the bond only if the lien claimant had notice of the bond, as discussed above. Because TVBS' action was to enforce a lien against the bond and because the bonding company had no notice of the bond, the lien was never perfected. Thus, in winning the battle over the lien, the bonding company may have lost the war.

William Kabeiseman

Tualatin Valley Builders Supply v. TMT Homes, 179 Or App 575, 41 P3d 429 (2002)

Attorney Fees Provision of Commercial Lease Applicable to FED Action

In *Desmarais v. The Stayers, Inc., 182* Or App 338, 51 P3d 1 (2002), the Oregon Court of Appeals addressed the issue of whether a forcible entry and detainer (FED) action is an action to enforce the lease when the landlord claims the right of possession based on expiration of the lease between the parties. The landlord of a commercial property had unsuccessfully sought to evict the tenant, arguing that defendant's attempt to renew the lease between the parties was ineffective and the lease expired. The trial court denied defendant's request for attorney fees because defendant's successful defense was independent of the lease. The Court of Appeals reversed, holding that the FED was an action to enforce the terms of the lease, and consequently, defendant was entitled to an award of attorney fees pursuant to the terms of the lease.

This case arose out of a commercial lease between the plaintiffs as lessors and defendant as lessee. Under the terms of the lease, the expiration date was August 31, 2000, but defendant had an option to renew the lease for an additional five years provided that defendant gave plaintiffs at least 180 days notice of the intent to renew. On January 24, 2000, plaintiffs notified defendant that defendant was in default for failure to maintain prescribed insurance coverage. Three days later, defendant gave plaintiffs notice of its intent to renew the lease. About three weeks later, plaintiffs' attorney notified defendant that it was in default for failure to insure the property and therefore, could not exercise the renewal option.

In August 2000, plaintiffs filed an action for a declaratory judgment that defendant was not entitled to renew the lease. At this time, the parties' attorneys agreed that while the declaratory action was pending the plaintiff would not file an FED based the contention that the lease was expired. The parties also agreed that plaintiff could accept rent checks from defendant without waiver by either party of rights asserted in the pending action. This agreement was memorialized in two letters from plaintiffs' attorney to defendant's attorney.

However, in December 2000, while the declaratory action was still pending, plaintiffs filed the present FED action alleging plaintiffs were entitled to possession of the lease premises and an award of attorney fees in the case. Defendant answered with several affirmative defenses, including its contention that the FED was barred by the prior agreement of the parties. Defendant also alleged the right to recover attorney fees from plaintiffs pursuant to the lease. The trial court subsequently granted defendant's motion to dismiss on the grounds that the action was barred because of the agreement of the parties.

The trial court denied defendants' request for an award of attorney fees pursuant to the lease. The trial court judge concluded that plaintiffs had brought the action to enforce their common-law right to possession, not the lease or remedies under the

lease.

In its appeal of the denial of attorney fees, defendant contended that plaintiffs' claim was actually based on the lease. Plaintiffs' right to possession rested on the contention that defendant had lost its right to renew the lease due to its breach of its obligations under the lease to maintain insurance coverage on the premises. The FED action was therefore an action to enforce the terms of the lease and evict Defendant. Defendant argues that as the prevailing party in an action to enforce the lease, defendant is entitled to an award of its attorney fees under the attorney fee provision of the lease.

In response, Plaintiffs argued that an FED action is strictly a statutory proceeding for possession of real property and not related to contractual rights. Additionally, plaintiffs asserted that plaintiffs' right to possession was absolute once the lease had expired and was not dependent on the terms of the lease. Finally, plaintiffs argued that defendant's successful defense was based on the letter agreement, not the lease.

In rejecting plaintiffs' first and second contentions, the Court referred to its decision in *Anderson v. Garrison-Reed Enterprises*, 66 Or App 872, 676 P2d 350, *rev denied* 296 Or 829 (1984) as dispositive on those issue. In *Anderson*, the landlord of a commercial property sought possession in a FED action based on the tenant's alleged breach of the terms of the lease. The tenant prevailed at trial and requested attorney fees based on the attorney fee provision of the lease. The landlord objected on the basis that a FED action was strictly statutory in nature and its claim for possession was not based on the lease. The *Anderson* Court disagreed and concluded that the lease authorized an award of attorney fees in the FED action.

> "An FED action is an action to determine the right to possession, and the right to possession of the commercial property at issue was created by the lease. Moreover the lease was the basis for the FED proceeding, i.e., plaintiffs' right to possession was premised on a violation of the terms of the lease, and the trial court was required to determine whether defendant's alleged violation of certain provisions of the lease justified its termination." 182 Or App at 344, quoting *Anderson* at 877.

Plaintiffs attempted to distinguish *Anderson* on the basis that the lease in this case had already expired. In *Anderson* the landlord sought early termination of the lease based on the tenant's breach of the certain lease provisions during the lease term. In this instance, plaintiffs assert that the lease had expired and no longer defined that parties relationship.

The Court was not persuaded by plaintiffs' argument. "In this case Plaintiffs' right to possession could not be determined in a legal vacuum that ignored the parties' rights and obligations under the lease." *Id.* The Court noted that plaintiffs' position rested on the determination that the lease had expired, which in turn depended on the assertion that defendant could not renew the lease because it failed to maintain certain required insurance coverage. Therefore, plaintiffs' claim for possession constituted an action to enforce the tenant's obligation under the terms of the lease to quit the premises after expiration of lease term. "In sum, plaintiffs' claim for possession – although based on the alleged expiration of the lease term – nonetheless was an action to 'enforce' the lease." *Id.* At 345.

The Court summarily dismissed plaintiffs' third argument that defendant was not entitled to an award of attorney fees because defendant's successful defense was based on the letter agreement. The Court found the issue was not dispositive because defendant was entitled to recover attorney fees under the governing lease provision as the prevailing party in an action to enforce a lease. "That defendant defeated plaintiffs' claim based on what may have been a 'non-lease' defense is beside the point." *Id.* at 345. The Court reversed and remanded for award of attorney fees to defendant.

Obviously, the plaintiffs in this case believed the FED proceeding would provide faster results than the declaratory judgment. In the end, however, their decision to circumvent the letter agreement was very costly given that the original issues regarding possession were never addressed. Sometimes quicker is not better.

Raymond Greycloud

Desmarais v. The Stayers, Inc., 182 Or App 338, 51 P3d 1 (2002)

LUBA CASES

EFU ZONES

In *Bechtold v. Jackson County*, LUBA No. 2001-187 (5/23/02), LUBA wrestled with the meaning of the word "church" in ORS 215.283(1). Under that statute, churches are allowed outright in an EFU zone. Petitioner's property consists of a dwelling, guesthouse, barn, accessory buildings and a well and pump house, all located on a 63-acre parcel of property. On behalf of the contract purchaser, Spruce Island Foundation, petitioner applied to use the existing dwelling as a rectory, to remodel and use the existing guest house as a church office and dormitory for visiting clergy, and to remodel the existing barn as a main chapel. Additionally, petitioner sought permission to build new structures consisting of a 1500 square foot convent, a 1575 square foot private chapel and five 144 square foot private study/prayer rooms. Spruce Island is an existing church in the San Francisco Bay area and intends to develop the property as a church and retreat center. On appeal from the county staff's approval of petitioner's application, the county hearings officer approved the main chapel and private chapel, as well as the study/prayer rooms. The hearings officer denied the proposed convent, rectory and office/dormitory.

On appeal to LUBA, petitioner argued the hearings officer erred in interpreting ORS 215.823(1)(b) by refusing to approve the convent, rectory and office/dormitory as part of the "church" use. LUBA began its analysis of the statutory term "church" by assuming that the term is not necessarily limited to buildings that are exclusively devoted to worship services. LUBA also noted that the county's ordinance could not allow church uses on more permissive terms than ORS 215.823(1)(b) and that the statutory meaning of the word "church" is controlling for purposes of its analysis. Since the text of the statute does not define the term "church," LUBA examined the relevant context in which this term is used, applying the "text and context" approach to statutory construction outlined in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

The relevant statute, ORS 215.283(1) expressly authorizes "churches" and "cemeteries in conjunction with churches" in EFU zones. Since the legislature chose to separately authorize "cemeteries in conjunction with churches," but not rectories, convents, offices or dormitories, LUBA reasoned that the statutory context is some indication that these latter uses are not permitted outright in EFU zones. In contrast, LUBA observed that the legislature took a different approach to schools in EFU zones in ORS 215.283(1)(a), which permits public or private schools, "including all buildings essential to the operation of a school." The more restrictive statutory authorization for churches, compared to the more open-ended authorization for school uses, suggests the legislature did not intend to grant open-ended approval for uses that are accessory to churches. Finally, LUBA observed that the legislature also took a different approach with wineries and described in detail the features that can be included in wineries in EFU zones.

In LUBA's view, this indicates the legislature is capable of explicitly describing the features of a particular use that are permissible or improper.

LUBA also noted that a common theme among the three buildings the hearings officer denied as part of the church use is their intended use for residential purposes. Again, since state law regulates many kinds of residential uses in EFU zones, LUBA found it significant that the legislature did not provide for church-related residential uses. Additionally, LUBA pointed to ORS 215.441, which was adopted after the county made the land use decision challenged in this appeal and which limits county authority to deny land use approval for churches and customary related activities. That statute refers to churches, synagogues, temples, mosques, chapels and meeting houses as "*nonresidential* places of worship." LUBA found nothing to suggest that the legislature intended "church" in ORS 215.441 to mean anything different than the same term used in ORS 215.283(1)(b) or that the legislature intended to allow residential buildings that may commonly accompany churches in EFU zones. Accordingly, LUBA concluded, "the church buildings authorized by ORS 215.283(1)(b) do not include residential church buildings such as the proposed rectory, convent, and office/dormitory" and affirmed the county's decision.

The petitioner in this appeal did not argue that the county's decision violated ORS 215.441 or the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). As a result, LUBA had no opportunity to consider whether either statute might require reversal or remand of the county's decision.

LOCAL PROCEDURE

Impartial Tribunal

A key issue before LUBA in *Friends of Jacksonville v. City of Jacksonville*, LUBA No. 2001-132 (5/14/02), was whether two city councilors who were members of the applicant, First Presbyterian Church of Jacksonville, were biased and should have disqualified themselves from participating in the review of the church's conditional use application. The church applied to build an 18,000 square foot church to accommodate almost 450 people on a 10-acre parcel located within the city limits, but outside the city's urban growth boundary. The church has outgrown its current quarters, an historic church near the city center, which has a capacity of 125 persons. Attendance often exceeds 300 and requires use of a nearby school gym.

Local proceedings on the church's conditional use application culminated in a close 4-3 vote and a decision upholding the planning commission's denial of the application. While the church's subsequent appeal to LUBA was pending, the city council held elections. Two new councilors were elected and replaced two council members who had voted in the majority to deny the conditional use application. At the request of the city and the church, LUBA remanded the decision to the city for further proceedings. The city council held a public hearing at which petitioner filed a "motion for recusal" directed at three of the councilors, including one newly elected councilor, on the ground that they were members of the applicant church and biased. Petitioner also sought disclosure of ex parte contacts. The council continued the hearing and at the continued hearing heard ex parte contact disclosures from various councilors and arguments from the parties. The council concluded that the declaration of ex parte contacts resolved petitioner's motion for recusal and request for ex parte contact disclosures and voted 5-2 to approve the conditional use application.

On appeal to LUBA, petitioner argued that two of the councilors, Schatz and Mathern, were biased based on the fact that they are church members and on actions that in petitioner's view showed that they had prejudged the application. With respect to councilor Schatz, the record showed that she is a member of the church, voted in favor of the church's application each time it was before the council and was asked for her opinion on the church's application several times while she ran for reelection during 2000. A report of a candidate meeting described her as "analytical and diplomatic" and that she intended "to be honest, looking at every aspect of the issue and then basing her decision on what her conscience dictates." In other reported statements, councilor Schatz acknowledged the inadequacy of the existing church facilities and expressed concern about some of the limitations on the church contained in proposed conditions of approval.

Councilor Mathern is also a church member and, until his election in 2000, the church employed his wife. Unlike councilor Schatz, however, councilor Mathern advocated in favor of the church's application before the planning commission in 1999 and stated in a candidates' forum held in 2000 that he did not feel the need to be objective regarding the church. He further stated that "we [the church] will fight this even if we have to fight all the way to the Supreme Court." After he was elected, councilor Mathern was active in seeking a remand of the appeal from LUBA, telling reporter that he wanted to "bring it back to the council and try to work out our differences on a local level" in an effort to avoid another LUBA appeal. His name appeared on a petition supporting the church's application that was submitted into the record during the council's remand hearing. Finally, councilor Mathern submitted a document into the record that explained why he believed the church's application satisfied the approval criteria with conditions and he made the motion to approve the application with those conditions.

Not surprisingly, LUBA reached different conclusions concerning petitioner's claims of bias toward each councilor. LUBA easily concluded that councilor Schatz's actions do not show bias or prejudgment. At most, they suggest a predisposition toward the church, which is insufficient to disqualify her from participating. On the other hand, LUBA concluded that councilor Mathern "believed he was elected on a mandate to support the proposed siting of the church and that for him, the only question was what conditions were necessary to mitigate the impacts the church would cause." Unless his participation was necessary for the council to make a decision, LUBA ruled he should have recused himself from the hearings on the church's application. Based on his active participation in the local proceedings and on the uncertainty over how much his participation influenced other council members, LUBA remanded the decision for further city proceedings without his participation.

LUBA rejected petitioner's related claim that both councilors violated a section of the Government Ethics statutes, ORS 244.040(1)(a), because they received a pecuniary benefit as church members from the city's decision to request a voluntary remand (avoidance of legal fees for a LUBA appeal). Despite councilor Mathern's statement that he favored a voluntary remand to save the church the costs associated with an appeal, LUBA concluded that mere membership in the church did not show that the councilors received a pecuniary benefit or loss as a result of the voluntary remand.

Continued Hearing under ORS 197.763

LUBA's decision in *Hawman v. Umatilla County*, LUBA No. 2001-188 (5/29/02) underscores the confusion that can arise and the prejudice to the parties that can be created when local land use procedures are not clear. The intervenor in *Hawman* applied for a comprehensive plan amendment and zone change for 3,878 acres from Agriculture/EFU to Non Resource. The county board held a *de novo* hearing to consider the planning commission's recommendation of denial on June 13, 2001. At the end of the hear-

ing, the board granted intervenor's request to leave the record open so intervenor could submit an updated rangeland report by July 16th. The opponents then had until August 14, 2001 to submit any written testimony they wished in response to the report. The county board continued the hearing to August 21, 2001. Before the board voted on the motion to continue the hearing, the board chairman advised the parties:

> "be sure to specify***not later than the 14th [of August] whether you want to make the request for testimony because that's going to determine how much time we have to block out on the 21st."

The intervenor submitted the additional rangeland report on July 14th. No one submitted written testimony or evidence in response to the report and no one made a written request before August 14th to submit oral testimony at the continued hearing on August 21st. However, petitioners and others attended the August 21st hearing and sought to testify. The board declined to hear oral testimony, closed the record and continued deliberations to August 29th, when the board voted to approve the application.

The issue before LUBA was whether the Board erred in refusing to accept oral testimony at the August 21st continued hearing. Petitioners argued that they understood the county board required all written responses to be submitted by August 14th. Nevertheless, because the hearing on the 21st was a continued hearing and all of their testimony to that point had been oral, petitioners argued the board knew or should have known that their response to the updated rangeland report would be oral, too. The intervenor argued that the June 13th hearing transcript made clear that if petitioners wanted to present oral testimony on August 21st, they had to notify the county by August 14th. Since petitioners failed to do so, intervenor contended the board properly denied their request to do so at the August 21st hearing. Both parties pointed to correspondence and testimony in the record to support their respective positions concerning oral testimony on August 21st.

LUBA examined ORS 197.763(6) and noted that a local hearings body can respond to a party's request to present additional evidence in two ways: by continuing the hearing to a time, date and place certain or by leaving the record open for additional written evidence. The problem here was that the county board used a blended approach. While this approach does not violate the statute, it created sufficient confusion that LUBA concluded the county erred by refusing to allow petitioners to present oral testimony at the August 21st hearing. LUBA reasoned:

> When a local government departs from the statutory procedures in this manner, it is important that the revised procedures be clearly communicated to all of the parties and, preferably, reduced to writing. Here, this is some question whether a critical element of the revised procedure—the circumstances under which the county would allow oral testimony at the continued hearing—was clearly communicated. ***In short, the county's attempted blend of ORS 197.763(6)(b) and (c), and its failure to clarify the extent it was blending and revising those statutory approaches, created significant uncertainty regarding the county's and the parties' obligations with respect to the hearing on August 21, 2001. Although the question is a close one, we believe there was sufficient uncertainty regarding the opportunity to present oral testimony at the continued hearing that the county's refusal to allow oral testimony was error and resulted in prejudice to petitioners' substantial rights. (Slip op. at 9-10)

As a result, LUBA remanded the decision to the county for further proceedings.

Takings

In two recent LUBA decisions, petitioners addressed *Dolan*'s "rough proportionality" requirement for exactions from very different perspectives. In *Dudek v. Umatilla County*, LUBA No. 2002-048 (8/01/2002), petitioners faulted the county for analyzing a code-required easement dedication and roadway improvement under *Dolan* and for declining to impose these requirements as conditions of approval because the county believed they were not roughly proportional to the impact of the approved development. In contrast, petitioner in *Carver v. City of Salem*, LUBA No. 2001-140 (6/24/02) argued the city erred by requiring the applicant to dedicate land for parks and open space without analyzing whether the required dedication is roughly proportional to the proposed development. LUBA concluded the county correctly determined *Dolan* was applicable in *Dudek* and sent the city's decision back for "rough proportionality" findings in *Carver.*

Dudek v. Umatilla County

Petitioner in *Dudek* appealed the county's approval of a minor partition, which divided a 20-acre parcel into three parcels. As proposed, Jerico Lane, an existing private road easement, will provide access from the west. Other properties also have access to Jerico Lane before it reaches the partitioned property, as do properties to the north. The Jerico Lane easement is 50 feet wide and has an improved gravel surface that varies from 14 to 20 feet in width. During the county proceedings on the partition request, petitioners argued the minor partition could only be approved if the county required the applicant to improve the entire 3,500-foot length of Jerico Lane to county standards, consistent with the county's ordinance. Petitioners also argued that county standards require the right-of-way width to be expanded to 60 feet.

The county agreed that its standards require the applicant to obtain a 60-foot wide easement and improve the entire 3,500-foot length of Jerico Lane, including portions of the easement area that do not abut the property to be partitioned. However, the county approved the partition and declined to apply this requirement after determining that imposing such a condition would violate the takings clause of the federal constitution and run afoul of *Dolan*'s rough proportionality analysis.

On appeal, petitioners argued that *Dolan* does not apply to the type of exaction the county's ordinance requires, relying on the Court of Appeals' recent decision in *Rogers Machinery, Inc. v. Washington County*, 181 Or App 369, 45 P3d 966 (2002) for support. As LUBA pointed out and petitioners acknowledged, however, the Court of Appeals has ruled that conditions requiring the dedication of easements and roadway improvements *are* the kind of conditions that are subject to *Dolan's* rough proportionality analysis. *See Clark v. City of Albany*, 137 Or App 293, 904 P2d 185 (1995). Additionally, LUBA concluded that the *Rogers Machinery* decision is inapplicable because the alleged exaction at issue in that case, a systems development charge, is non-possessory, whereas the potential exaction challenged here is possessory (i.e., it involves the dedication of an easement and roadway improvements) and is like the exactions challenged in *Dolan.* Because petitioners challenged only the applicability of *Dolan's* rough proportionality analysis to the proposed exactions, LUBA limited its ruling as follows:

> Today we decide that the "rough proportionality" test established by *Dolan* applies to the exactions at issue in this appeal. We do not, however, consider whether the exactions at issue would violate the rough proportionality text of *Dolan* as the county found. Petitioners challenge only the county's decision to apply the *Dolan* rough proportionality test; they do not assign error to the county's finding that the exactions fail that rough proportionality test. We also do not decide whether it is proper for the county to decline to apply [the

> county ordinance] because the county believes the exactions that provision would require in this case are unconstitutional. (Slip Op. at 7-8)

Based on petitioners' limited challenge to the county's decision and its narrow ruling, LUBA affirmed the county's decision.

Carver v. City of Salem

Petitioner in *Carver* owns a vacant 8.75-acre parcel of property that is located inside the city's urban growth boundary and city limits, and outside of the city's urban service area (USA). The USA is the part of the Salem area where water, sewer, storm drainage, transportation and parks are in place or committed to by developers. Any development outside of the USA requires an urban growth area (UGA) permit. Under the applicable UGA code provisions, an applicant for a UGA permit must dedicate to the city land necessary for an "adequate neighborhood park" if one is not available within a one third mile radius.

Petitioner applied for a UGA permit to develop a 51-lot subdivision on his property. The city's Development Review Commission (DRC) found that all services, except parks, were in place or fully committed. The DRC approved the permit on the condition that petitioner either dedicate five acres for a neighborhood park or dedicate one acre that could be combined with four acres of open space on adjacent school grounds to make a neighborhood park. On appeal, the city council approved the UGA permit and imposed a condition requiring petitioner to dedicate, no later than final plat approval, one acre of property consistent with the proposed site plan. That plan showed a 95' by 477' strip of land parallel to the school property to satisfy the condition. This approximately one acre strip does not adjoin the four acres of open space on the school property.

On appeal to LUBA, petitioner argued that the city's decision violates the takings clauses of both the federal and state constitutions. Before analyzing the substance of petitioner's argument, LUBA first addressed petitioner's underlying assumption that Article I, Section 18 of the state constitution imposes requirements that are identical to the Fifth Amendment of the federal constitution as interpreted in *Dolan*. LUBA noted that no Oregon court has so ruled and that, in fact, Oregon cases suggest that *Dolan* imposes more and different requirements than Article I, Section 18. Since petitioner's arguments were all based on the Fifth Amendment, LUBA declined to consider or analyze any of petitioner's claims under Article I, Section 18.

Turning to the merits, LUBA rejected petitioner's argument that there is no nexus under *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987) between the required dedication of park land and any harm or impact from the proposed subdivision. Petitioner's argument was based on his belief that the city misinterpreted its UGA code provisions concerning the "area" to be served by a neighborhood park and that, under a proper interpretation, existing parks are adequate to serve the area. LUBA concluded the city's code interpretation is sustainable and, absent any other argument by petitioner, there is no other basis under *Nollan* to find the required nexus is missing.

Of greater interest, LUBA also disagreed with the city's argument that the required dedication of parkland is not an exaction because it is voluntary and not compelled. The city contended that petitioner had the choice not to proceed with development and wait for the city to first provide any necessary park land. Since the petitioner chose to pursue development before the city could provide park land, the city argued that petitioner voluntarily agreed to the UGA code's requirements for any necessary dedications. In the city's view, this is true even if the condition requiring the one-acre dedication of parkland is not roughly proportional to the impact of petitioner's development. In the alternative, the city posited that if it can deny development because of the lack of necessary park land, it can also offer petitioner the option of providing necessary park facilities even if petitioner's cost of doing so is disproportionate to the impact of his development.

LUBA noted the lack of case law directly addressing petitioner's underlying premise "that any dedication of property that is accurately characterized as 'voluntary' does not implicate the Takings Clause." In LUBA's view, however, *Nollan* and *Dolan* indirectly answer the question of "whether and to what extent the government can condition permit approval on dedication of land, but nevertheless fail to make the finding of rough proportionality required by *Dolan*, by relying on the allegedly 'voluntary' nature of a landowner's exercise of options under a land use permitting process."

LUBA reasoned that to avoid being characterized as a taking, a required dedication of land must fit within some recognized exception to the taking clause. Under one exception, a dedication may be sustained if the government shows that it has a nexus and the dedication is roughly proportional to the impacts of development under *Nollan* and *Dolan*. Similarly, a dedication is constitutionally permissible if the property owner voluntarily waives or obviates any takings issue in one of several ways: (1) by choosing a development track that requires an exaction that exceeds *Dolan* over a development track that satisfies *Dolan*; or (2) by agreeing to provide missing public facilities and expressly waiving his rights under the takings clause in order to avoid a permit denial based on the lack of these facilities.

LUBA concluded that there "is no shortcut to either complying with *Dolan* or obtaining petitioner's unambiguous waiver of his rights under the Takings Clause." As a result, LUBA ruled that the city could not view petitioner's application for a UGA permit to be a waiver of petitioner's rights under the Takings Clause by operation of law. LUBA noted the record does not support the city's assertion that petitioner's forbearance from development now will be rewarded by the city's provision of a park within a reasonable or definite period of time. This option is, in LUBA's view, too indefinite or speculative to be meaningful. Additionally, LUBA ruled that the city's power to deny an application for a UGA permit does not also allow the city to approve a permit with an exaction and proceed as if petitioner had voluntarily waived any objection to that exaction. The higher value of the public facility required here (parks) over the values at issue in *Nollan* and *Dolan* (beach views, greenways, encouraging bicycle and pedestrian use) does not allow the city to require an exaction from petitioner that is unrelated to the impacts of development.

Finally, LUBA rejected the city's argument that any reimbursement petitioner is entitled to under the code for dedicating and improving park land will be adequate to compensate petitioner for any taking. In LUBA's view, any systems development charge credits other reimbursement the city's code allows is not the constitutionally required "just compensation" because it does not entitle petitioner to the fair market value of the land taken and severance damages to the remainder, as the Fifth Amendment and *Dolan* require.

LUBA summarized its basis for remanding the city's decision as follows:

> The city's effort to ensure that the provision of public facilities keeps pace with growth in the city is both prudent and laudable. Nonetheless, the city may not pursue that objective by requiring that petitioner transfers title to his property to the city without complying with the Takings Clause. For the foregoing reasons, remand is necessary to allow the city to address its obligations under the Takings Clause.
>
> In remanding the city's decision, we emphasize that we do

not reach the question of whether the one-acre park dedication requirement violates Dolan's rough proportionality requirement. We only decide that the city cannot impose the challenged dedication without addressing that question. We also emphasize that nothing in this opinion should be read to suggest that, in the event the city ultimately concludes that all or some of the one-acre park dedication cannot be justified under Dolan, the city must necessarily approve the application without the required dedication. The city's options under that circumstance would presumably include denial of petitioner's application. (Slip op at 31-32)

Editor's Note: The City of Salem appealed LUBA's decision to the Court of Appeals. The Court heard oral argument on September 4, 2002 and affirmed LUBA's decision without opinion on October 16, 2002.

Kathryn S. Beaumont

LUBA AFFIRMS NONFARM DWELLING APPROVAL

In *King v. Washington County*, LUBA No. 2002-034 (7/18/2002), LUBA affirmed a nonfarm dwelling approval under the county's ordinance, which implements ORS 215.213(3). That statute provides in pertinent part, "a single family residential dwelling not provided in conjunction with farm use * * * may be established upon written findings showing:

> " (b) the dwelling is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions drainage, and flooding, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of its size or location if it can reasonably be put to farm use in conjunction with other land."

The subject property is a 17-acre parcel located in an area of mixed farm and forest use within the county's EFU zone. About 5.2 acres of the site contain soils that are rated high value soils. Site slopes on the parcel are between 15 to 40 percent, although one portion of the site is flat enough to support a building site. The parcel is undeveloped. A majority of the parcel is covered by trees that range from 100 to 140 years in age. The past use of the property has been for timber production.

LUBA rejected Petitioners' first claim that the hearings officer failed to properly apply ORS 215.213(3) because he placed an undue focus on the size of the parcel and the area that could be used for farm production. Additionally, petitioner argued that the property is generally suitable for farm use based on the fact that the parcel is capable of generating farm income. LUBA began its analysis by applying existing case law regarding the "generally unsuitable" standard, namely, that: (a) ORS 215.213(3)(b) requires consideration of whether the entire parcel is unsuitable for farm use, considering the factors listed in the statute. *Smith v. Clackamas County*, 103 Or App 370, at 375-376, 797 P2d 1058 (1990), aff'd 313 Or 519, 836 P2d 716; *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990); *Futornick v. Yamhill County*, 13 Or LUBA 216, 227 (1985); (b) the size of a parcel may have some bearing on its suitability for farm use. *Smith*; (c) when the size of the parcel is at issue, there must be evidence that the parcel may not be combined with another parcel for farm purposes. *Nelson v. Benton County*, 23 Or LUBA 292, aff'd 115 Or Ap 453, 839 P2d 233 (1992); and (d) the site where the proposed nonfarm dwelling is to be situated must not be suitable for farming. *Hearne v. Baker County*, 89 Or App 282, 748 P2d 1016 (1988).

LUBA rejected Petitioners' categorical argument that if *any* part of the parcel is suitable for farming, then the parcel as a whole cannot be "generally unsuitable." Similarly, LUBA was unpersuaded by Petitioners' specific claim that the hearing officer erred in considering the relative proportion of the land within the parcel that could grow grapes to the larger portion that is not suitable for any crops, as well as the relatively small size of the parcel. LUBA noted that in *Hearne,* LUBA affirmed a county's findings of general unsuitability of a 20 acre parcel with 12 acres which had limited irrigation rights and minimal suitability for grazing. Tthe Court of Appeals also rejected a categorical argument that a parcel cannot be "generally unsuitable" for farm use unless a majority of the parcel is unsuitable. Finally, in *Smith* the court rejected an argument that the county must base its generally unsuitable determination only on the characteristics of a 7 acre portion of a 54 acre parcel.

LUBA observed that nothing in *Smith* detracts from any part of *Hearn*e, or suggests that the generally unsuitable standard can be met only if each acre of the parcel is unsuitable for farm use, and stated: "Accordingly, that a small portion of the subject property can theoretically generate some farm income does not necessarily compel a conclusion that the property as a whole fails the generally unsuitable standard." LUBA concluded that the hearing officer properly construed the applicable law in reaching the conclusion that the parcel is generally unsuitable for farm use based on consideration of the listed factors, including: (1) steep topography; (2) limited access to irrigation water; (3) relatively small parcel; (4) size of the farmable area on the parcel; and (5) inability to combine farm operations on the subject property with other farm operations.

LUBA rejected Petitioners' claim that there was no evidence that the farm operations on the subject parcel could not be combined with farm operations on nearby parcels owned by Intervenor and his family, or that the property could not be combined with the adjacent Christmas tree farm. Intervenor relied upon evidence that combination with nearby farm operations was not possible because the owner of the adjacent tree farm was not willing to expand his operations, and in any event, it was not possible to grow Christmas trees on the parcels due to the presence of laminated root rot. Intervenor also pointed to difficulties attributable to steep slopes separating the parcel from adjacent farm operations. LUBA held that the presence of the laminated root rot prevented combining the parcels with the adjacent tree farm. The findings demonstrate that the hearings officer considered the topography and existing adjacent uses to conclude that the parcel could not reasonably be combined with adjacent farm properties, and that there was no evidence that other farm activities in the vicinity could be reasonably expanded onto the subject parcel.

Finally, LUBA rejected Petitioners' claim that the hearing officer's findings or ultimate conclusion were not supported by substantial evidence. Petitioners argued that there was substantial conflicting evidence that the parcel is suitable for growing Christmas trees by use of proper management to limit the effect of the laminated root rot. But LUBA found that Petitioners' evidence was undermined by conflicting evidence from the Intervenor, who is an expert forester, regarding the nonviability of Christmas trees due to laminated root rot. The hearing officer's findings adequately explained the reasons for his conclusion and his conclusion was supported by substantial evidence.

Petitioners argued that there was substantial conflicting evidence that the entire parcel is generally suitable for farm use based on evidence that a three to four acre portion of the parcel is suitable for growing wine grapes and will result in revenue that will justify retaining the entire property as a farm parcel. LUBA found that the hearings officer properly relied on the evidence

that grapes could be grown on the three to four-acre portion of the parcel to conclude that grapes could be grown on the property. However, LUBA rejected Petitioners' argument that this compels a conclusion that the entire parcel is generally suitable for farm use for the same reason it earlier rejected Petitioners' categorical claim that if *any* part of the parcel is suitable for farming, then the parcel as a whole cannot be "generally unsuitable", saying that "petitioners' view of the law on that point is mistaken."

Accordingly, LUBA affirmed the hearing officer's approval of the nonfarm dwelling application and it was not appealed.

King vs. Washington County is particularly significant for a couple of reasons. First, in contrast to a long line of remanded nonfarm dwelling cases that identify those considerations that *cannot* be considered as a basis for finding "general unsuitability", this affirmed nonfarm dwelling case provides helpful guidance to practitioners by identifying those considerations that *can* be relied upon as a basis for such a finding. This case not only restates the parameters of the non farm dwelling "generally unsuitable" test outlined in *Smith, Hearne* and other cases, but it also recognizes that the proportion of farmable land to nonfarmable land within the parcel *is* a relevant consideration, among others, as is the size of the entire parcel.

Second, this case illustrates the application of a case-by-case review that does not rely on any hard and fast formulas of the kind which have been used in legislatively adopted standards, such as the required amount of revenue to be produced. Instead, the findings in this case provided a very fact specific basis for determining whether the general character of the parcel was suitable or unsuitable for farm use, and suggested that the ultimate conclusion will vary depending on the size of the parcel and the farmable area within the parcel. The hearings officer found that the three to four- acre farmable area, is small (less than 25% of the site) and does not reflect the general character of the site. But the hearings officer went on to say that he might have reached a different conclusion if the farmable area constituted a large proportion of the overall site (e.g. three to four-acre area within a 5-acre property) or if a larger contiguous area of the site were farmable (e.g. a 20-acre area within a 100-acre property).

John C. Pinkstaff

Presorted Standard
US Postage
PAID
Portland, OR
Permit #341

Oregon State Bar
Section on Real Estate and Land Use
5200 SW Meadows Road
Lake Oswego, OR 97035-0889

Recycled/Recyclable