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Appellate Cases — Land Use

UNITED STATES SUPREME COURT AFFIRMS NINTH CIRCUIT CLEAN WATER ACT CASE

In *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided court*, 123 S. Ct. 599 (2002), defendant and the Environmental Protection Agency (EPA) found the plaintiff's agricultural practice of "deep ripping" of wetlands without a permit violated the Clean Water Act (CWA). The trial court affirmed and plaintiff challenged that decision, as well as a determination that the CWA also applies to isolated vernal pools.

The lands at issue had been used for agricultural purposes, particularly for cattle grazing, and had several distinctive hydrological features, including vernal pools, swales, and sloped wetlands that allowed for the movement and filtering of drainage. However, these features depended upon a dense clay pan that prevented surface water from penetrating deeply into the soils.

Plaintiff desired to convert the land from ranching to vineyard and orchard use and to subdivide it into smaller parcels for sale. To allow for vineyards and orchards, the clay pan must be penetrated by the deep ripping process to gouge through it and allow for drainage into the deeper earth. Defendant Corps stated that the CWA requires a permit to undertake this activity. Plaintiff disagreed and began deep ripping, but later sought and received an "after the fact" permit with certain mitigatory conditions. The Corps allowed most activities that plaintiff desired, but forbade deep ripping in the vernal pools and wetlands.

When the Corps found that such unpermitted activity had, in fact, occurred, it issued two cease and desist orders. When plaintiff continued the deep ripping of the wetlands, the EPA issued an administrative order, after which plaintiff filed an action challenging the regulation of deep ripping. Defendant then filed a counterclaim for an injunction and civil penalties.

Both parties moved for summary judgment, and the district court found the Corps had jurisdiction over deep ripping in jurisdictional waters, but determined that there was a factual issue over whether the deep ripping had indeed occurred. The court conducted a bench trial at which it concluded that there were 348 separate violations in 29 drainage areas and another ten violations in vernal pools. It ordered plaintiff to either pay a civil penalty of $500,000 and restore four acres of wetlands or to pay a penalty of $1.5 million. Plaintiff appealed.

The Ninth Circuit turned first to whether the Corps had jurisdiction over deep ripping. The CWA prohibits discharge of any pollutant into the nation's waters, which includes wetlands so long as they are adjacent to navigable waters. The CWA defines "discharge" as the addition of a pollutant from any point source. 33 U.S.C. § 1362(12). Initially, plaintiff contended there had been no pollutant discharge because it had merely churned and redeposited soil. The court rejected that contention, citing Ninth Circuit precedent, and stated that redeposits can constitute discharge of a pollutant under the CWA even without new pollutants being introduced. This is especially true when the effect of deep ripping is to poke a hole into the soil under wetlands and allow water to drain out. Backhoes and bulldozers thus may constitute a point source under the CWA, as would deep ripping.

The court also rejected plaintiff's contention that deep ripping constituted normal farming activities, which are exempt from the CWA. The Corps' position that activities involving substantial hydrological alterations would require a permit was thus upheld.

As for the vernal pools, the court held that they were not subject to Corps regulation, as the United States Supreme Court found recently in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), decided after the trial court decision in this case. That case applied here, and vernal pools may not be regulated under the Supreme Court's determination of jurisdiction of the Corps of Engineers under the CWA.

Next, the court turned to the trial court's factual findings on the violations under the CWA and found no clear error on the face of the trial court's extensive factual findings (except those regarding the vernal pools). Similarly, the court upheld the trial court's method of calculating penalties by treating each individual ripping as a separate CWA violation. The court rejected a construction of the law under which a $25,000-per-day fine was the maximum monetary penalty that could be imposed, as this would encourage landowners to "bunch" violations into one or a few days. Instead, each violation during one day is subject to the $25,000 maximum. The court also rejected plaintiff's contention that the penalty imposed here was disproportionately large compared to the penalty imposed in another case in which the violating company deep ripped a much larger acreage. The facts leading to the settlement in that case were different than the facts here, and the court observed that by litigating, the plaintiff took his chances that litigation might result in a judgment more unfavorable than what he could have obtained through a settlement. Thus, except for the ten vernal pool violations, the court upheld the administrative determinations under the CWA regarding penalties.

Judge Gould dissented, characterizing plaintiff's activity as a farm use, even though it changed the type of farming. The activity was, in Judge Gould's view, exempt from CWA regulation, especially because there had been no addition of materials into the waters of the United States. Judge Gould also noted that the CWA does not speak to modification of the hydrological regime, but rather to the discharge or addition of pollutants.

The United States Supreme Court affirmed this decision by an equally divided court, with Justice Kennedy not participating. The significance of the case is limited by the failure of either side to gain a maority of votes, which might change if the personnel of the court changes or if Justice Kennedy determines he may vote on a similar case.

Edward J. Sullivan

Borden Ranch P'ship v. United States Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001), aff'd by an equally divided court, 123 S. Ct. 599 (2002).

METRO NEED NOT PROVIDE QUASI-JUDICIAL HEARINGS TO CHALLENGE METRO'S NEEDED HOUSING ANALYSIS

In *Homebuilders Association of Metropolitan Portland v. Metro*, 184 Or App 663, 57 P3d 204 (2002), the Court of Appeals considered whether Metro must provide quasi-judicial hearing procedures to allow local governments, special districts, or property owners to seek review of Metro decisions to adjust the Metro UGB to satisfy housing needs.

In addition to conducting periodic review to assure that the UGB contains sufficient land to accommodate 20-year housing need projections, ORS 197.299 requires a number of additional interim measures, such as a five-year housing need reassessment and a requirement that Metro take "corrective action" to increase the supply of buildable land if its previous actions prove insufficient. In following these obligations, Metro adopted Ordinance 01-929A, which provides a system whereby Metro inventories and analyzes its supply of buildable land every five years.

Prior to adoption of the ordinance, the Metro UGB could be amended through either a legislative process initiated by Metro or through four types of quasi-judicial procedures initiated by cities, counties, special districts, or property owners in order to address housing needs. Ordinance 01-929A retains the procedure for a Metro-initiated legislative amendment. However, the ordinance removes any right for local governments, special districts, or property owners to seek, through a quasi-judicial review, a UGB amendment to satisfy housing needs.

Petitioners argued at LUBA and the Court of Appeals that Ordinance 01-929A was invalid because it violated Statewide Land Use Planning Goal 1 (Citizen Involvement), Goal 2 (Land Use Planning), Goal 10 (Housing), and Goal 14 (Urbanization), as well as a number of Oregon Administrative Rules and Metro regulations. Principally, petitioner asserted that Metro's limitation of the available processes for expanding the UGB to accommodate housing needs was inconsistent with its obligation to maintain an adequate supply of housing because it left no means to remedy an unexpected housing need that might arise out of a miscalculation of the housing needs.

Affirming LUBA's opinion, the Court of Appeals denied petitioner's claim, finding no requirement that Metro provide any sort of quasi-judicial process to seek review of Metro's housing needs analysis. Beginning with the general notion that land use regulation in Oregon is governed by statute, neither the Court nor the petitioner could find any statutory requirement that Metro provide quasi-judicial procedures when addressing UGB expansion for housing. The only legal authorization for Metro's obligation to review housing needs and its UGB is found in ORS 197.299, ORS 197.301, and ORS 197.302. These provisions require only that Metro conduct certain analyses and reviews of its framework plan and implementing measures on a frequent basis. Nothing in these statutes requires that Metro provide a quasi-judicial hearing process to ensure that Metro conducts the required analysis or requires that Metro provide a right for local governments or private parties to initiate such a review. Finally, the Court of Appeals agreed with LUBA's analysis that Metro ought to be able to meet its responsibility to accurately accommodate housing needs through the legislative process, where third parties would have an opportunity to petition the Metro Council to initiate a UGB amendment. Since the statutes do not require the application of quasi-judicial procedures to review Metro's housing needs analysis, no additional review procedures are required.

Carrie Richter

Homebuilders Ass'n of Metropolitan Portland v. Metro, 184 Or App 663, 57 P3d 204 (2002).

MODIFICATIONS OF SIDEWALKS FOR DISABLED REQUIRED UNDER FEDERAL LAW, SAYS NINTH CIRCUIT

In *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), the Ninth Circuit was asked whether public sidewalks were a city "service program . . . or activity" under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, or under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Plaintiffs were disabled persons who alleged violations of both acts by the city's failure to install ramps in newly constructed and newly altered sidewalks and by its failure to maintain the existing sidewalks to ensure access by the disabled. The parties stipulated to the entry of an injunction regarding curb ramps, but disagreed on the obligation to remove other barriers to sidewalk accessibility, such as power poles, wires, and sign posts. The parties filed cross motions for partial summary judgment on the issue of applicability of the ADA and the Rehabilitation Act. The trial court granted the city's motion and certified an interlocutory appeal.

The Ninth Circuit treated the question before it as one of law, which it reviewed de novo. After reviewing the language of both acts, the court cited the implementing federal regulations, 28 C.F.R. 35.149–.151, which specifically require curb ramps to make pedestrian walkways accessible and which require newly constructed or altered roads and walkways to include curb ramps at intersections. The court also noted that the broad language of both acts encompassed anything done by a public entity in its everyday activities. *See Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d. Cir. 1997) (local zoning falls under ADA requirements). The court found that the legislative history of this legislation supported a broad mandate for eliminating discrimination against people with disabilities.

As for barriers to existing sidewalks, the court held that the regulations "would be meaningless if . . . sidewalks between . . . curb ramps were inaccessible." 292 F.3d at 1077. The court cited with approval the position of the United States Department of Justice (DOJ), the agency that issued the regulations. The coverage of sidewalks is ambiguous, but clearly curb ramps are covered under the regulations. However, curb ramps could not be covered without sidewalks also being covered, as indicated by the DOJ. The court deferred to this interpretation because it is neither plainly erroneous nor inconsistent with the regulations themselves. The trial court's grant of partial summary judgment was thus reversed.

This case represents a far-reaching view of the ADA and the Rehabilitation Act in ordinary local government affairs. The case is not unprecedented, but now provides Ninth Circuit authority for sweeping remedial action in removing barriers to the disabled.

Edward J. Sullivan

Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002).

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Appellate Cases—Real Estate

CREDITS AGAINST SYSTEM DEVELOPMENT CHARGES MAY, BUT DO NOT NECESSARILY, "RUN WITH THE LAND"

In *Summer Oaks Limited Partnership v. McGinley*, 183 Or App 645, 55 P3d 1100 (2002), the Court of Appeals determined that under the facts of the case, system development charges (SDCs) did not as a matter of law "run with the land" sold to defendants, and therefore plaintiffs' claim of unjust enrichment could not be determined on summary judgment. The Court reversed the trial court grant of summary judgment.

Plaintiffs owned a large undeveloped parcel of land that they improved with infrastructure. As a result of those improvements, the City of Eugene granted to plaintiffs SDC credits against future development fees. Plaintiffs chose to accept the credits in a general pool of SDC credits that could be used on a first-come-first-served basis as the property was further developed (the "draw-down balance" method), rather than apportion the credits to particular parcels (the "allocation" method). Plaintiffs then subdivided the large parcel and sold one of the resulting parcels to defendants.

Defendants applied for a building permit and the city assessed defendants with $127,025.00 in SDCs. The city then offset the SDCs by $74,779 in SDC credits previously granted to plaintiffs and held in the pool under the draw-down method of allocation.

Plaintiffs sued defendants for the value of the SDC credits, asserting the existence of an oral contract whereby defendants had agreed to reimburse plaintiffs for the amount of credits used to offset defendants' permits, misrepresentation by defendants when they said they would pay plaintiffs the value of the SDC credits, and unjust enrichment. The contract of sale between the parties failed to address the SDC credits, yet the contract contained an integration clause. The trial court ruled that the SDCs categorically run with the land and that transfer of title necessarily includes transfer of the SDCs. Since the contract of sale was a fully integrated document, extrinsic oral evidence could not change its terms, and since the SDCs ran with the land, unjust enrichment was unwarranted. Thus, the trial court granted summary judgment infavor of defendants.

After dismissing the defense argument that plaintiffs failed to preserve their unjust enrichment argument, the Court of Appeals first clarified that defendants knowingly received a benefit by receiving the SDCs, and the issue to consider was whether it would be unjust to allow defendants to keep the benefit without paying for it. If defendants purchased the SDCs under the written contract of sale, as the trial court ruled, then no injustice had occurred.

The court directed itself to determine whether the SDCs "touch and concern" the land itself so that the SDCs ran with the land upon sale. To "touch and concern" the land, the SDCs "must concern the land or its use in a direct and not a collateral way." 183 Or App at 655.

In considering this issue, the court found important two facts. First, the infrastructure improvements underlying the SDC credits were not located on the land sold to defendants, but rather on adjacent land. Thus, the improvements and the SDC credits that stemmed from them did not "touch and concern" the specific land sold to defendants.

Second, whereas the allocation method of applying SDCs would have attributed a specified amount of credit to an identified parcel of land so that it could be said to "touch" that land, plaintiffs' chosen draw-down balance method of applying SDCs did not guarantee that any SDC credits would exist when defendants applied for a building permit. Under the draw-down balance method, it is possible that by the time a buyer of a particular parcel seeks a building permit, the credits obtained by the original developer will have already been applied to building permits on other parcels. By choosing the draw-down method of allocation, plaintiffs did not assign specific credits to defendants' land, and the potential that credits would be available for defendants' use at the time they applied for a building permit was, "at best, speculative." 183 Or App at 655. This speculative aspect prevented the court from ruling that the SDC credits "touched" the specific parcel sold to defendants.

C. Edward Gerdes

Summer Oaks Ltd. P'ship v. McGinley, 183 Or App 645, 55 P3d 1100 (2002).

Cases from Other Jurisdictions

FEDERAL CIRCUIT FINDS NO TAKING IN APPLICATION OF SPOTTED OWL RULE

In Boise Cascade Corporation v. United States, 296 F.3d 1339 (Fed. Cir. 2002), *petition for cert. filed* (U.S. Nov. 27, 2002) (No. 02-862), the Federal Circuit rejected plaintiff's takings claims involving northern spotted owls.

The case involved a 65-acre tract in Clatsop County, Oregon on which a spotted owl pair had lived until 1996 and were protected by state and federal law. When one owl died and the other moved away, the state lifted its restrictions, but advised plaintiff to consult with the U.S. Fish & Wildlife Service (FWS), which in turn advised plaintiff that new owl pairs might use the site and that plaintiff could either leave the land without timber cutting or request an "incidental take" permit under the Endangered Species Act of 1973 (ESA).

Plaintiff then filed a takings claim in the District of Oregon, and defendant counterclaimed for an injunction to stop logging in the unit at issue. When a new juvenile spotted owl moved into the unit, the District of Oregon granted defendant's injunction request and dismissed plaintiff's claims. Plaintiff did not appeal. The owl was later found dead and the FWS determined that an incidental take permit was no longer required.

Plaintiff then filed the instant action in the Court of Federal Claims seeking compensation for a temporary taking on four grounds:

1. A physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because plaintiff could not exclude spotted owls from its property and was required to admit governmental officials to monitor them;
2. A categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), due to a total logging ban for 18 months;
3. An exaction taking under the first prong of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), because allegedly no substantial governmental interest was advanced by the regulation; and
4. A temporary regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Defendant moved to dismiss. Plaintiff moved for summary judgment on all four claims. The Court of Federal Claims granted defendant's motion and plaintiff appealed to the Federal Circuit, which reviewed the dismissal on a *de novo* basis.

The United States asserted that the requirement to obtain a permit prior to any logging was not a taking, citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). The mere assertion of regulatory jurisdiction by a governmental agency, according to *Riverside Bayview*, does not work a taking at least until a permit is requested. Plaintiff responded that it had accepted the injunction and was now seeking damages for a taking. However, the court noted that Riverside Bayview expressly declined to determine whether a temporary halt in timber cutting could work a taking and whether such claims must be analyzed under *Penn Central*. The court also noted the most recent United States Supreme Court pronouncement regarding "temporary regulatory takings" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1489 (2002).

Where there might be a taking claim if the government imposed, then lifted, a restriction, there still must be a permit requested. An enforcement action that leaves open potential relief through the permit process does not equate to a taking. Moreover, after the *Tahoe* case there is no *per se* rule, but rather an ad hoc factual inquiry is used. *Tahoe* did not purport to overrule the ripeness rule in *Riverside Bayview*, which requires that a permit application be decided before a taking claim may be made.

As to plaintiff's *Loretto* claim for a physical taking, the trial court found that the prohibition of excluding spotted owls and the requirement to allow federal inspectors on the property were incidents of the permitting process and did not effect a permanent government presence on plaintiff's property or work any additional burdens beyond temporary curtailment of logging. The court found *Loretto* to be a "quite narrow" case in scope because it deals with permanent and physical occupation, which is distinguished from a temporary physical invasion or a regulation restricting use. Only a permitted occupation constitutes a *Loretto* per se taking. Plaintiff lost the "right" to exclude spotted owls once that species had been listed as an endangered species under the ESA, and the injunction prohibited logging without a permit and did not constitute anything more than a restriction on use. The court also agreed with an Oregon Court of Appeals holding on the *Loretto* issue, *Boise Cascade Corporation v. Oregon State Board of Forestry*, 164 Or App 114, 991 P2d 563 (1999), *rev. denied*, 331 Or 244, 18 P3d 1099 (2000), *cert. denied*, 532 U.S. 923 (2001), in which the state court rejected similar takings claims involving the same 65-acre tract at issue here:

> We agree with the Oregon Court of Appeals that Boise's argument is merely an attempt to convert a regulatory takings claim, governed by *Penn Central* (and in this case barred by the ripeness doctrine of *Riverside Bayview* . . .) into a per se taking governed by the more generous rule of *Loretto*. Boise claims that application of *Loretto* is appropriate here because it views occupation by wild spotted owls as indistinguishable from a forced government intrusion upon its land. These two situations are, however, very different. The government has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land. The government simply imposed a temporary restriction on Boise's exploitation of certain natural resources located on its land unless Boise obtained a permit. As explained above, that the Service never denied Boise's permit—and in fact lifted the permit requirement—is fatal to Boise's regulatory takings claims, and it remains fatal notwithstanding Boise's attempt to recharacterize those claims as a forced physical occupation by owls.

296 F.3d at 1354–55.

The inspectors, said the court, invaded the property only for a period of five months following the injunction and their presence did not constitute any permanent occupation, as they did not permanently usurp plaintiff's right of exclusive possession, use, and disposition of its property. The decision of the Court of Federal Claims was thus affirmed.

There are at least two remarkable portions of this case for the practitioner. The first relates to ripeness and the requirement to seek and get a decision on most permits before a takings claim can be made. The second relates to the Loretto physical occupation requirement not applying to brief incursions or restrictions on uses. Practitioners should consider both issues in evaluating takings claims.

Editor's Note: *In January, the U.S. Supreme Court denied certiorari in a similar case, also involving a physical takings claim associated with spotted owl habitat.* Seiber v. Oregon, *17 Or App 319, 37 P3d 259 (2001),* rev. denied, *334 Or 260, 47 P3d 486 (2002),* cert. denied, *71 U.S.L.W. 3470 (Jan. 13, 2003).*

Edward J. Sullivan

Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002), petition for cert. filed (U.S. Nov. 27, 2002) (No. 02-862).

TENTH CIRCUIT NIXES LIMITS ON EXPRESSIVE ACTIVITY ON PUBLIC EASEMENT

In *First Unitarian Church v. Salt Lake City Corporation*, 308 F.3d 1114 (10th Cir. 2002), plaintiffs, a coalition of church and private organizations and individuals, brought a civil rights suit against defendant city's limitation of expressive activity on a public pedestrian easement it retained after selling a public street to the Church of Jesus Christ of Latter Day Saints (Mormon Church). The trial court ruled for the city, and plaintiffs appealed.

Defendant sold a portion of Main Street, which it had previously closed, and which was adjacent to Temple Square. The city's planning commission recommended that the city retain a perpetual public pedestrian easement "to maintain, encourage, and invite public use," and that there be no restrictions on any activities beyond those that would be applicable to a public park. The city council adopted all of these recommendations, except the last. The deed allowed only non-speech conduct, expressly declared that the easement area was not a public forum, and indicated that the easement was not intended to allow the following activities: "loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace." The Mormon Church was given the right to deny access to disorderly or intoxicated persons or those engaged in the above activities, as well as to deny access to "habitual violators" of those regulations. The church was permitted to distribute its literature, erect signs or displays, and to project music and the spoken word.

Plaintiffs contended that the pedestrian easement is both public property and a public forum where speech cannot be restricted under the federal or state constitutions. Plaintiffs also asserted that the transaction violated the establishment clause and that the city had improperly delegated enforcement discretion to the Mormon Church. In addition to the First and Fourteenth Amendment claims, plaintiffs claimed an equal protection violation because the restrictions improperly distinguished between the Mormon Church and the public.

The trial court found for the city and granted its cross-motion for summary judgment, finding that the pedestrian area was no longer a public forum and that the easement restrictions were consistent with the new property owner's use of the area as an "ecclesiastical park." The court also found that as a private property owner of the site, the Mormon Church had greater rights than others and did not engage in prohibitive viewpoint discrimination. The trial court also ruled that no power was given to the church by the city, but that the church could enforce its rights as a private property owner on the site. It also found no establishment or equal protection clause violations.

The Tenth Circuit turned first to the free-speech claims, noting that the trial court had only considered some of the challenged restrictions (*e.g.*, demonstrating, assembling, picketing, and the like) and not others (*e.g.*, offensive speech, dress or conduct), which it had found not to be ripe. The Tenth Circuit found all of the restrictions ripe because the church had claimed all speech except its own speech was barred from the pedestrian easement. The Tenth Circuit said that, while the deed reserved only pedestrian access and expressly disclaimed both public speech use and a public forum, the words of the deed do not insulate the city from constitutional review of its actions regarding the easement. If those actions were unconstitutional as applied, the easement terms were also unconstitutional and must be revised. The city and the church also contended that the easement was not "property," but rather a nonpossessory interest; however, the court said that a possessory interest was not an element of a First Amendment public forum analysis; either governmental ownership or regulation would be sufficient for that analysis and, in any case, an easement was itself a sufficient property interest to trigger that analysis.

The court then turned to the nature of the forum to determine whether it was a traditional public forum, a public forum so designated by the government, or a nonpublic forum. The court found that the words of the deed denying public forum status were not dispositive, especially because the particular area at issue was a former public forum, *i.e.*, a street, where the public has the right of passage and public discussion. The site was also found not to be a designated public forum, which is traditionally associated with the creation of a public forum where no such forum had traditionally existed (such as open public meetings and space on public transit and the like). For nonpublic fora, other factors may open up the area to make them public fora to an extent beyond that intended by the government. The court quoted from Justice Kennedy's concurring opinion in *International Society for Krishna Consciousness v. Lee (ISKON)*, 505 U.S. 672, 698–99 (1992):

> If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.

The express purpose of the easement is for public passage, to increase public open space in downtown Salt Lake City, to encourage pedestrian traffic, to buffer auto traffic, to provide access to adjacent residential areas, and to stimulate business activity. These public reasons were the basis for the retention of the easement so as to "maintain and encourage and invite public use" and the basis for insertion of a right of reverter. For these rea-

sons, the court rejected city and church contentions that the purpose of the easement was primarily for ingress and egress to church facilities. Rather, the purpose of the easement was for public passage and it was based in part on the downtown Salt Lake City pedestrian transportation grid. As such, it shared the characteristics of public sidewalks, traditional public fora under *ISKON*. The court also noted that before the closure and sale, this area had been a traditional public forum, and that under First Amendment case law the government may not transform the character of such property merely by "including it within the statutory definition of what might be considered a non-public forum." *United States v. Grace*, 461 U.S. 171, 180 (1983). Given these factors, the court concluded that the subject site was a public forum.

Restrictions on speech in a public forum are very limited, *i.e.*, they must either be (1) reasonable time, place, and manner restrictions that are content-neutral, narrowly tailored to serve a significant governmental interest, and that leave open adequate alternative channels of communication, or (2) necessary to serve a compelling state interest and narrowly drawn to achieve that end. The position of the city and church that the church may ban all speech was invalid, like the attempt to create a "First-Amendment-free-zone" at the Los Angeles Airport in ISKON. Such a total ban is unconstitutional. Unless the site becomes entirely private, it cannot become "expression-free." The court concluded that the restrictions were invalid, and did not address plaintiffs' remaining claims. The court added that its decision would not entangle church and state activities in violation of the establishment clause because the city, not the church, controls free speech in the easement. Finally, the court said that the church has no right to be protected from public speech.

This is a significant First Amendment case dealing with the identity and nature of public forums. It reminds state and local officials of the considerable burdens created by the First Amendment in this context. If the easement remains, then reasonable time, place, and manner regulations may be adopted, but the odds are that there will be at least one more trip to the Tenth Circuit in dealing with the court's decision on remand.

Edward J. Sullivan

First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002).

COURT OF FEDERAL CLAIMS APPLIES TAHOE-SIERRA AND PENN CENTRAL

In *Bass Enterprises Production Company v. United States*, 54 Fed. Cl. 400 (2002), there had been an initial ruling finding a taking and awarding $1,137,808 for the loss of plaintiff's oil and gas leases. The government moved to reconsider that decision following the federal Supreme Court decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Authority*, 535 U.S. 302 (2002), which narrowed the per se grounds for a takings claim and applied instead the *Penn Central* factors.

Plaintiff had oil and gas leases, some of which were condemned in an action in which the United States asked for surface rights and a portion of subsurface rights, so that a federal nuclear facility storage area could be built. Congress withdrew a portion of the leases, but recognized plaintiff's existing rights, so long as the Environmental Protection Agency (EPA) certified that the leases could be applied consistently with the Solid Waste Disposal Act under its regulatory scheme. The EPA had developed criteria for assessing the leases when plaintiff applied for some drill permits. The Bureau of Land Management (BLM) initially denied the permits, but then recharacterized the matter as a delay until the EPA could issue its regulations.

The court found that plaintiff had been deprived of all reasonable economic use from August 1994 to May 1998, and plaintiff claimed a per se taking during that period. The subsequent trial resulted in the $1,137,808 verdict in favor of plaintiff.

The government requested reconsideration of the case on the basis of the Court of Federal Claims' reliance on the *per se* analysis, which it claimed had been modified through the subsequent *Tahoe-Sierra* decision, in which the federal Supreme Court declined to apply a categorical taking analysis and had instead used the three-factor approach of *Penn Central*. The *Tahoe-Sierra* court recognized a temporal dimension in the use of these factors in order to prevent an overly rushed planning process, a notion used by the court in this case. The court found the rationale of *Tahoe-Sierra* controlling and applied the *Penn Central* factors in place of a categorical taking analysis.

In applying those factors, the court first dealt with the character of the governmental action, which it said was a regulatory exercise that balanced the government's needs to protect the public against the interests of the plaintiff, which could be curtailed for the public good. Deferring drilling to assure that it would not make the storage facility unstable was reasonable under the circumstances.

As for the reasonable investment-backed expectations factor, plaintiff was aware that BLM was the landowner and could regulate the leases. However, the court found that plaintiff's expectations concerning its ability to develop oil and gas under the leases were reasonable. This factor militated in favor of the plaintiff.

The final factor was the economic impact of the regulation on the plaintiff, who claimed that there had been no viable economic use for the 45-month period. The court, applying *Tahoe-Sierra*, looked to the entirety of the economic value over time (*i.e.*, $1.1 million out of a total value of $22 million) and, under that perspective, found the impact amount not substantial. Applying the three-factor analysis, the court found no taking.

This is one of the first applications of *Tahoe-Sierra*, whose effect on the temporal dimensions of regulations is already apparent.

Edward J. Sullivan

Bass Enterprises Prod. Co. v. United States, 54 Fed. Cl. 400 (2002).

WASHINGTON SUPREME COURT DEALS WITH TAKINGS, SUBSTANTIVE DUE PROCESS, AND STATUTORY AUTHORIZATION OF PLAT CONDITIONS

In *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 49 P.3d 867 (2002), plaintiff developer challenged certain conditions of approval of its residential subdivision, including requirements that 30 percent of the land be set aside for open space and that plaintiff provide a secondary access road for emergency vehicles.

Plaintiff sought approval of a 13.4-acre subdivision, called Dove Hill, which would have 51 lots. Fire safety concerns raised by the neighbors and by the local fire departments were the genesis of the imposition of the secondary access road condition. The open space requirement arose from an ordinance requiring the retention of 30 percent as open space in certain zoning designations. The city had a policy under which the requirement might be satisfied by the use of funds in lieu of dedication, at the discretion of the city.

The trial court reviewed the matter under the Land Use Petition Act (LUPA) and invalidated both conditions. The trial court found that the secondary access requirement violated substantive due process and state law because the condition would be "impossible to satisfy, unduly burdensome, arbitrary and capricious and would deny all viable use of the property." The trial court also held the open space requirement to be a taking under the state constitution and state law because the city had made no individualized determination of rough proportionality. The court also said the city's imposition of park and open space impact fees was unlawful, even though the city's decision did not require these fees (which were imposed under a separate city ordinance).

The Washington Court of Appeals upheld the road requirement but not the open space requirement. That court also found the challenge to the impact fees not ripe for adjudication.

The Washington Supreme Court stood in the place of the trial court in these LUPA proceedings and was limited to the record before the city, placing the burden of showing invalidity upon the petitioner. The Court turned first to the 30-percent set-aside requirement, finding that the trial court's determination that the condition violated state law precluded any takings considerations. The statute at issue was RCW 82.02.020, which generally prohibits imposition of any tax, charge, or fee on development subdivision, classification, or reclassification decisions, except as otherwise provided by law. Exceptions to this general rule include impact fees and dedications of land where a locality can demonstrate that the dedication or easement is reasonably necessary to meet impacts of the approval. The statute requires strict compliance, and the trial judge found no showing that the 30-percent set-aside was justified in terms of the statute. The city responded that the 30-percent figure was not a tax, charge, or fee, and it was justified by a legislative determination, as well as evidence in the record. The court determined that the set aside was indeed a tax, charge, or fee because the statute does not exclude non-monetary exactions and specifically allows dedications and easements, but only if the local government shows that they are reasonably necessary as a direct result of a development or subdivision. The statute places the burden of proof on the city to justify the dedication or easement, and the court found that the city did not meet its burden in justifying the 30-percent set-aside, neither generally nor with regard to the specific proposal. The court found no evidence in the record to justify the specific exaction and found that the legislative determination was not sufficient. The Supreme Court affirmed the lower court in invalidating the set-aside requirement, but limited its determination to noncompliance with the statute, rather than dealing with the constitutional matter.

Turning to the access road requirement, plaintiff contended that the condition was impossible to perform because of the opposition of an adjacent property owner and that the condition deprived it of any viable economic use of its land. The Supreme Court agreed with the Court of Appeals that these contentions were not supported by the record. The city did not specify in its final order where the road must be located, and plaintiff conceded that the condition generally served a legitimate public purpose. So, under a substantive due process analysis, the goal was legitimate. Instead, plaintiff challenged the means by which the city chose to achieve that goal, and contended that the condition was impossible to perform and thus unreasonable. However, the plaintiff failed to show that it had attempted to negotiate with adjacent property owners—including the one who stated that she would never give an easement—or to undertake any other alternative means to fulfill the conditions. Thus, plaintiff had not established that the city's choice to require a secondary access road for emergency vehicles was unreasonable.

There is a third substantive due process factor: whether the condition is "unreasonably burdensome" to the property owner. To fulfill this prong of substantive due process, the record must establish that unreasonableness. In this case, the record shows that the fire hazard was real and that the proposed development would contribute to that problem. The record also showed that the city's solution would solve the problem and did not show that the condition was unduly oppressive to plaintiff. The court concluded that the condition did not violate plaintiff's substantive due process rights. The court also upheld the Washington Court of Appeals' view that the challenge to the impact fees was not yet ripe.

There was a concurring opinion that lamented the city's record and suggested a remand to the city for the development of a record on the open space issue. There was also a concurring and dissenting opinion that would have upheld the trial court on the set-aside, but would have rejected the access road condition as giving a neighbor veto power over development.

Edward J. Sullivan

Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wash. 2d 740, 49 P.3d 867 (2002).

WASHINGTON SUPREME COURT ENDS LONG DOLAN SAGA

In *Benchmark Land Co. v. City of Battle Ground*, 146 Wash. 2d 685, 49 P.3d 860 (2002), the Washington Supreme Court put an end to an exaction case begun shortly after *Dolan* was decided in 1994. Plaintiff developer sought to subdivide 20.25 acres into 56 single-family lots. Plaintiff originally proposed to make improvements to several adjacent streets. The city approved the plat and included the proposed improvements, but without adopting findings to justify them. Plaintiff subsequently rescinded the offer to make improvements along one street, finding them too costly. The city thereafter adopted findings to justify all of its previous actions and cited an ordinance provision that requires half-street improvements to roads abutting parcels being developed.

Plaintiff appealed to the Superior Court under the Washington Land Use Petition Act (LUPA), and that court remanded the matter for further consideration of the exaction. On remand, both the city and the plaintiff provided transportation studies. The city's study found that the subject road was not up to current standards and that such improvements would mitigate additional traffic impacts. The applicant's study found that its development would cause a 1.4-percent increase in traffic, which would be "virtually indistinguishable" to the average motorist.

In January 1997, the city again imposed the same improvement requirements, but did not impose any dedication of street right-of-way. The city found the improvements "reasonable and proportional" to the impacts created by the proposed use. Plaintiff again appealed under LUPA to the Superior Court, which found that the city had not justified its exaction. The Washington Court of Appeals upheld the Superior Court's ruling and declined to change its opinion on reconsideration in view of *City of Monterey v. Del Monte Dunes*, 526 U.S. 647 (1999), which indicated that *Dolan* might be limited to real property exactions, rather than those for money. The Washington Supreme Court granted the city's petition for review.

The Supreme Court said it stood in the same position as the Superior Court in analyzing a case under LUPA, *i.e.*, it acted as a reviewing court on appeal on the six possible statutory grounds provided under RCW 36.70C.130(1). Plaintiff alleged error under the substantial evidence and violation of constitutional rights grounds; however, the court said it would not reach the constitutional rights grounds if it could resolve the case on non-constitutional grounds. The court easily found a lack of substantial evidence to justify the monetary exaction, because the required expenditure was not related to the traffic generated by the development and there would be little to no operational or safety impact by the proposed use on the subject road, nor any effect on school pedestrian trips by children residing in the subdivision. The Supreme Court thus sustained the Court of Appeals decision on non-constitutional grounds.

One justice concurred only in the result without writing separately. Justice Sanders concurred and wrote separately, suggesting a state ground which he believed disposed of the case. RCW 82.02.020 prohibits local governments from imposing any tax fee or charge on the subdivision of land except, *inter alia*, "to mitigate a direct impact that has been identified as a consequence of a proposed . . . subdivision." The local government must, under the statute, meet the burden of showing that payment was reasonably necessary as a direct result of the proposed subdivision. Any fee beyond this standard is treated as a tax, which is prohibited unless a statutory nexus can be shown. Justice Sanders found no conformity with this statute and suggested that the case be decided solely on that basis.

This case ends a long argument over the imposition of monetary improvement obligations, to which the Washington Supreme Court apparently applies a *Dolan* analysis. The most interesting part of this case is speculation over why the city pursued an appeal in this case where justification of the condition was so wanting. Perhaps it was because the city believed that *Dolan* did not apply to monetary exactions. Or perhaps it was because the city hoped to avoid, as it did, attorneys fees for a civil rights claim by having the matter decided on non-constitutional grounds.

Edward J. Sullivan

Benchmark Land Co. v. City of Battle Ground, 146 Wash. 2d 685, 49 P.3d 860 (2002).

LUBA Cases

LOCAL PROCEDURE

Local proceedings on reconsideration

LUBA's decision in *6710 LLC v. City of Portland*, 43 Or LUBA ___ (LUBA No. 2002-050, Oct. 15, 2002), *aff'd*, ___ Or App ___, ___ P3d ___ (Jan. 29, 2003), addresses the city's authority to make a decision on reconsideration after the underlying LUBA appeal is dismissed. This appeal was the third in a series of appeals involving efforts to correct a zoning map. In the first round, LUBA remanded the city's decision changing zoning lines on several lots with split zoning. *6710 LLC v. City of Portland*, 40 Or LUBA 389 (2001). Following the remand, the city hearings officer denied the map correction, and the applicant appealed to LUBA. The city subsequently withdrew the hearings officer's decision for reconsideration. Then, LUBA granted petitioner's motion to dismiss the applicant's appeal because it had not been timely filed. *Larner v. City of Portland*, 41 Or LUBA 471 (2002). After LUBA dismissed the appeal, the city hearings officer continued his proceedings on reconsideration and, reversing his prior decision, approved the map correction.

In this third appeal to LUBA, petitioners argued that the hearings officer lacked the authority to make his decision on reconsideration after LUBA dismissed the appeal in *Larner*. Pointing to ORS 197.830(13)(b), which authorizes a local government to unilaterally withdraw an appealed decision for reconsideration, and LUBA's administrative rules implementing this statute, petitioner argued that the city's ability to make a decision on reconsideration was dependent on the existence of the *Larner* appeal. Once that appeal was dismissed, petitioners asserted that the city's ability to proceed with reconsideration ended and the city's final decision was the denial of the zoning map correction that was appealed in *Larner*.

LUBA acknowledged that neither the statute nor its rules concerning reconsideration contemplate the situation presented in this appeal. However, LUBA concluded that the language of both provisions make it clear that the city retains the authority to make a decision on reconsideration regardless of whether LUBA dismisses the underlying appeal. As LUBA explained,

> The fact that our rules provide that such a decision on reconsideration does not require a new appeal does not mean that the city's decision on reconsideration has no separate identity from the matters before LUBA. The procedures for reconsideration are best viewed as a shortcut to a full review by LUBA in those circumstances where the local government believes that the decision appealed to LUBA is not defensible. Rather than have the appeal to LUBA continue, followed by a remand and the submission of a new application, the local government has the opportunity to take back its decision and modify it so that it may withstand an appeal, thereby avoiding time and resources spent on an appeal and a new application. In such a context, the reconsideration process is one avenue to expeditiously reach a final land use decision.

43 Or LUBA at ___ (slip op at 6). LUBA concluded that the city hearings officer had the authority to approve the zoning map correction on reconsideration, despite LUBA's dismissal of the *Larner* appeal. Because the petitioners in this appeal had not identified any substantive error in the hearings officer's decision, LUBA affirmed the decision.

DLCD 45-day notice requirement

In *Stallkamp v. City of King City*, 43 Or LUBA ___ (LUBA No. 2002-082, Nov. 27, 2002), LUBA concluded that a minor deviation from the Department of Land Conservation and Development's 45-day notice requirement is not a substantive error that warrants remand of a local decision. Petitioners in *Stallkamp* appealed a city ordinance adopting the West King City Comprehensive Plan, including a new zoning map. Among other things, the ordinance rezoned a recently annexed portion of tax lot 191 from a county Rural Residential (RR-5) zone to a city Recreational Open Space (ROS) zone. In areas outside of the urban growth boundary, such as the annexed portion of tax lot 191, permitted uses in the ROS zone are limited to parks and open spaces. Conditional uses are limited to utility facilities necessary for public service and components of sanitary sewer systems or stormwater systems if necessary to serve lands inside the UGB. The challenged plan identified the annexed portion of tax lot 191 for use as a park and part of a stormwater system.

On appeal to LUBA, petitioner argued that the city had violated ORS 197.610 by failing to provide adequate notice to the DLCD of the amendments adopted by the ordinance. Specifically, petitioners contended the city had erred by failing to identify its proposal to rezone portions of tax lot 191 as ROS. Although the text of the city's notice did not identify the proposed ROS zoning, the map included with the notice showed that the ROS zoning would be applied to the annexed portion of tax lot 191. The city argued that its notice substantially conformed to the notice requirements for post-acknowledgement plan amendments and that its failure to list the ROS zone in the text of its notice was, at most, a procedural error that did not prejudice the petitioners' substantial rights.

LUBA agreed with the city. LUBA noted that the Court of Appeals has held that a total failure to provide the 45-day notice to DLCD required by ORS 197.610 is a substantive error, requiring remand. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993). In LUBA's view, the *Oregon City Leasing* decision left open the question of whether partial or substantial compliance with the notice requirement would dictate the same result. In a 2001 decision, LUBA questioned its earlier rulings that seemed to suggest an affirmative answer to this question. *Donnell v. Union County*, 40 OR LUBA 455, 459–60 n 2 (2001). This appeal gave LUBA an opportunity to resolve this issue and LUBA concluded that "not every deviation from the requirements of ORS 197.610(1) or its implementing rule is a 'substantive' error that must result in remand." 43 Or LUBA at ___ (slip op at 17). At most, the city's error in this case was a procedural error. Because the petitioners had failed to demonstrate any prejudice to their substantial interests resulting from this error, LUBA rejected the petitioners' argument.

LUBA JURISDICTION

In *Dead Indian Memorial Road Neighbors v. Jackson County*, 43 Or LUBA ___ (LUBA No. 2002-089, Oct. 31, 2002), LUBA wrestled with several jurisdictional questions of first impression concerning finality, standing, and exhaustion of administrative remedies in circumstances where a local appeal proceeding is aborted and the initial local decision is thereafter appealed to LUBA.

Although the issues before LUBA were complicated, the underlying facts are relatively straightforward. In April 2002, the county issued a tentative decision administratively approving a quarry and associated processing activities on a portion of a 2,874-acre parcel. The petitioners all live along Dead Indian Memorial Road, which would be used by trucks going to and from the quarry. The county mailed notice of the decision to property owners within 750 feet of the parcel, including petitioner Mitchell. Petitioners Ogden, Paiken and Saydah live more than

750 feet from the affected property and did not receive notice, nor did petitioner Dead Indian Memorial Road Association. The notice gave recipients until May 13, 2002 to request a quasi-judicial hearing on the tentative decision.

On May 13, 2002, Nancy Wojtas filed a written request for a hearing, and a hearing before the county hearings officer was scheduled for June 17, 2002. All of the petitioners appeared at the June 17 hearing, testified orally, and submitted written comments in opposition to the quarry application. The intervenor and applicant below challenged Ms. Wojtas's standing to request a hearing. The hearings officer treated the objection as a motion to dismiss and continued the hearing to July 15 to allow the parties time to brief this issue. On June 18, Ms. Wojtas sent the county a letter withdrawing her request for a hearing. On July 1, 2002, the hearings officer issued an order dismissing the request for a hearing, concluding that he lacked jurisdiction to proceed. Two days later, petitioners filed an appeal with LUBA of the county's April 2002 tentative decision approving the quarry.

The county moved to dismiss the LUBA appeal, arguing that the applicable appeal deadlines are determined by ORS 197.830(4) (appeal from a decision without a hearing) and that petitioners Ogden, Paiken, Saydah and the Association did not file their appeals within the requisite time period. Specifically, the county contended that these petitioners were not entitled to notice of the county's tentative decision and, therefore, their appeal was timely only if it was filed within 21 days of the date the local appeal period expired. Since these petitioners appealed to LUBA more than 21 days after expiration of the local appeal period, the county asserted their appeal must be dismissed.

Although petitioner Mitchell was entitled to and received notice of the county's tentative decision, she did not file a request for a local hearing. Accordingly, the county contended that she had failed to exhaust all available administrative remedies and was not entitled to appeal the county's decision to LUBA.

Petitioners argued that the county's notice of the tentative decision did not reasonably describe the local government's final action in a variety of ways. As a result, petitioners argued they were adversely affected by the decision and were entitled to appeal the tentative decision directly to LUBA under ORS 197.830(3). Additionally, petitioners contended that the county had deviated from its policy of notifying neighbors within several miles of a proposed aggregate operation and, as a result, petitioners asserted that they were adversely affected or aggrieved by the county's decision. Petitioners Ogden, Paiken, and Saydah argued that their appeal was timely because it was filed within 21 days of the date they first learned of the county's tentative decision.

LUBA described the issues presented in the county's motion to dismiss as issues of first impression and noted the lack of case law addressing the key question in this case: what rules govern an appeal to LUBA of a tentative decision that was subject to a local appeal and for which the local appeal was withdrawn by the appellant before it was concluded.

LUBA agreed with the parties that the hearings officer's dismissal of the local appeal meant that the initial tentative decision was the county's final decision. The county, however, argued that the tentative decision retroactively became the final decision on the date the local appeal period expired. LUBA disagreed, noting that "[i]t seems equally plausible that the hearings officer's order had the effect of making the tentative decision the county's final decision . . . as of the date of the hearings officer's order." 43 Or LUBA at ___ (slip op at 10). Citing the lack of authority for either viewpoint, LUBA concluded that it was more logical to treat the decision as final on the date the hearings officer dismissed the appeal. This avoided a result in which the county's land use decision could become final before the date that all required local remedies are exhausted, which would have precluded review of the decision.

Accordingly, LUBA concluded that the tentative decision became final for purposes of appeal to LUBA on July 1, 2002, the date the hearings officer dismissed the appeal. Rejecting the parties' arguments over whether ORS 197.830(3) or (4) governs the timeline for appeal, LUBA determined that ORS 197.830(9) was the relevant statute. Because petitioners Ogden, Paiken, Saydah, and the Association filed their appeals within 21 days of the date the county's decision became final, LUBA ruled that their appeals were timely.

With respect to petitioner Mitchell, LUBA noted that the exhaustion of administrative remedies requirement may be satisfied where an appeal to the highest local decision maker is filed and the petitioner participated in the appeal hearing. In this case, an appeal to the county hearings officer was filed and all petitioners participated in the hearing. Had the local appeal resulted in a final decision, petitioner Mitchell's failure to file her own local appeal would not have precluded her from appealing to LUBA. However, because the local appeal process had been terminated before the hearings officer made a decision on the merits, the issue before LUBA was how to apply the exhaustion requirement under these circumstances. Citing the absence of authority addressing this situation, LUBA concluded that petitioner Mitchell had satisfied the exhaustion of administrative remedies requirement, reasoning,

> We see no reason to interpret ORS 197.825(2)(a) to require, in these rare circumstances, that a petitioner must file its own local appeal in order to satisfy the exhaustion requirement, when the result of announcing such a requirement would be that many parties in more ordinary circumstances will file multiple, and probably unnecessary and redundant, local appeals. A local appeal was filed in the present case, and petitioner Mitchell appeared at the hearing on that appeal, which resulted in a decision by the county's highest decision maker. That decision effectively adopts the tentative decision as the county's final decision. Under these circumstances, we do not interpret ORS 197.825(2)(a) to require more.

43 Or LUBA at ___ (slip op at 13). Accordingly, LUBA denied the County's motion to dismiss the appeal.

Kathryn S. Beaumont

SAVE THE DATE!

The **RELU ANNUAL MEETING** will be held **August 8-9, 2003 at Eagle Crest Resort**. Eagle Crest is a full-service destination resort located just outside Redmond on 1700 acres in the high desert of Central Oregon. A block of rooms has been set aside for the conference. You can call Eagle Crest at 800/682-4786 or check out their website *at www.eagle-crest.com.*

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Topics for the conference include: water law, the new federal legislation regarding small businesses and brownfields, the effect of RLUIPA on land use, periodic review, title problems and solutions, ethics, condemnation, real estate exchanges, system development charges, real estate financial abuse, and more. Legislative and case law updates will be featured on Saturday.

Look for your brochure in early June. If you have any questions, contact Norma Freitas at 503/222-7006 or email to: *nsfreitas@aol.com.*

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