OREGON REAL ESTATE AND LAND USE DIGEST

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Highlights

Appellate Cases—Land Use

COURT ABANDONS "CLEARLY ERRONEOUS" DEFERENCE STANDARD

In *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), the state court of appeals announced that the "clearly erroneous" standard no longer applies when a court reviews a local government's interpretation of its own code. The court noted that this standard had evolved as a "shorthand summary" of the requirements of *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and had resulted in a standard of review that prohibited reversal of a local government's interpretation of its own code unless it was "clearly wrong." Now, recognizing that the "clearly wrong" standard is not precisely consistent with *Clark*, the court has reinstated the standard announced in *Clark*: "LUBA is to affirm the county's interpretation of its own ordinance unless LUBA determines that the county's interpretation is inconsistent with the express language of the ordinance or its apparent purpose or policy." 313 Or at 515.

Under *Church*, LUBA need not sustain all but the most unreasonable interpretations of local land use rules. While the local government's interpretation is still entitled to deference, review of the interpretation must be consistent with the rules of construction set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The applicable standard of review announced in *Clark* and codified in ORS 197.829(1) does not require the degree of deference previously recognized in *Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999), and *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).

In *Church*, LUBA had reversed the county's denial of a permit to place a single-family dwelling on a 5-acre parcel in a rural residential area where the minimum lot size is 10 acres, based on a finding that the county's decision was inconsistent with the text and context of the provision, as well as its apparent purpose. 37 Or LUBA 646 (2000). Section 13.010 of the county code includes an exception to the minimum lot size for "authorized lots," providing that "[t]he minimum area or width requirements shall not apply to an authorized lot as defined in Section 11.030 of this Code."

It was undisputed that the applicant's partitioned property met the definition of an "authorized lot" under section 11.030. However, the county argued that, because the title for section 13.010 is "Non-Conforming Lots or Parcels," the exception applies only to non-conforming lots or parcels that meet the definition of "authorized lots." Therefore, according to the county, because the subject property was not non-conforming, section 13.010 did not apply and the applicant did not qualify for an exception to the 10-acre minimum. The county essentially claimed that the "Non-Conforming Lots or Parcels" title implicitly amended the meaning of "authorized lot" to include only those lots that meet the definition of "authorized lot" and are also non-conforming.

The court of appeals affirmed LUBA's decision, stating that the section title made no implicit amendment and that it was "impermissible to read into an unambiguous and directly relevant definition of a term in an ordinance a requirement that the ordinance simply does not contain." 187 Or App at 526. Therefore, the county's interpretation was contrary to the express language of the code.

The apparent purpose and policy of the "authorized lot" exception to the 10-acre minimum is to allow landowners who possess a right to develop their property to retain that right following the enactment of conflicting county development regulations. The county's limitation of the exception to non-conforming authorized lots would not carry out this apparent purpose of the regulation.

Consequently, the court of appeals agreed "with LUBA that the county's interpretation of LDC 13.010 is inconsistent with the text and context of the provision, as well as its apparent purpose." 187 Or App at 527. Therefore, LUBA properly found that the county had erred in denying the applicant's building permit application.

Peggy Hennessy

Church v. Grant County, 187 Or App 518, 69 P3d 759 (2003).

COURT OF APPEALS AGREES THAT ALL ANNEXATIONS ARE "LAND USE DECISIONS"

In *Cape v. City of Beaverton*, 187 Or App 463, 68 P3d 261 (2003), the city appealed LUBA's acceptance of jurisdiction over an annexation decision. The court affirmed. Hailing LUBA's "well reasoned opinion," the court went on to support LUBA's holding that, under the present regulatory regime, any annexation decision is a "land use decision." 187 Or App at 466.

LUBA's analysis focused on OAR 660-001-0310, under which an annexation that complies with the city's comprehensive plan is presumed to comply with the statewide goals "unless the acknowledged comprehensive plan and implementing ordinances do not control the annexation." Thus, the Board deduced, every annexation must apply either comprehensive plan criteria or the goals. Consequently, every such decision is a "land use decision" under ORS 197.015(10)(a)(A).

Citing the city-county urban planning area agreement (UPAA), the city argued that continuous compliance with the goals was assured by the fact that the annexation area remained subject to the county's comprehensive plan until the city acted to implement its own plan over it. The court was not convinced, finding that the UPAA did not assure that city policies and county policies relate so closely that acknowledgement of the latter necessarily carries over to the former.

The city also suggested that the political decision to annex could predate the land use decision demonstrating that the annexation complies with applicable standards. The court again disagreed, citing *Bear Creek Valley Sanitary Authority v. City of Medford*, 130 Or App 24, 28–29, 880 P2d 486 (1994). Under such a rule, "a significant possibility would exist that the decision to annex could not only avoid, but be in direct violation of, applicable land use criteria." 187 Or App at 470.

Ty K. Wyman

Cape v. City of Beaverton, 187 Or App 463, 68 P3d 261 (2003).

COURT LIMITS MINING ON EFU LAND

In *Beaver State Sand and Gravel, Inc. v. Douglas County*, 187 Or App 241, 65 P3d 1123 (2003), the Oregon Court of Appeals affirmed LUBA's conclusion that ORS 215.298 does not authorize mining as a conditional use at nonsignificant aggregate sites on EFU lands. To make its decision, the court analyzed the interplay between ORS 215.283(2)(b)(B) and 215.298(2) and OAR 660-016-0000(5), which is part of the "old" Goal 5 rule.

ORS 215.283(2)(b)(B) allows, as a conditional use, operations conducted for "[m]ining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298." ORS 215.298(2) provides that a "permit for mining of aggregate shall be issued only for a site included on an inventory in an acknowledged comprehensive plan." The requirement that a site be "included on an inventory" makes the scope of the term "inventory" critical to deciding whether the mining of aggregate will be allowed.

At the time ORS 215.298 was enacted, the "old" Goal 5 rule was in effect and provided a process for identifying and listing Goal 5 resources on a comprehensive plan inventory. After collecting as much data as possible on the location, quality, and quantity of resource sites, a local government could (1) not include the resource on the inventory because it is not significant, (2) delay the Goal 5 process until more information became available, or (3) include the resource on the inventory as a significant resource. OAR 660-016-0000(5).

The mining applicant argued that ORS 215.298 does not require that the site be on an inventory of *significant* sites, but only that it be on an inventory of sites that had been considered for listing as significant. In other words, a site could be on a list of nonsignificant sites and still satisfy the ORS 215.298 requirement that it be "on an inventory in an acknowledged comprehensive plan."

To interpret ORS 215.298, the court looked at the old Goal 5 rule, relying on Oregon Supreme Court cases holding that LCDC's rules provide context for the land use statutes. OAR 660-016-0000(5)(a) states,

> *Do not Include on Inventory:* Based on information that is available on location, quality and quantity, the local government might determine that a particular resource site is not important

> enough to warrant inclusion on the plan inventory, or is not required to be included in the inventory based on the specific Goal standards. No further action need be taken with regard to these sites. The local government is not required to justify in its comprehensive plan a decision not to include a particular site in the plan inventory unless challenged by [DLCD], objectors, or [LCDC] based upon contradictory information.

Based on the plain language of the rule, the court concluded that a site not included on the inventory pursuant to OAR 660-016-0000(5)(a) is not on an inventory for the purposes of ORS 215.298 and cannot be permitted as a conditional use on EFU land.

The court's opinion may not seem surprising in light of the language of the rule, but it will, in fact, act to limit development of nonsignificant aggregate sites on EFU land. In the past, as the court noted, nonsignificant sites have, in practice, been included on some inventories in acknowledged comprehensive plans. Local governments have issued conditional use permits to mine on these sites in EFU zones. The court also noted, however, that in the absence of legislative history to show that the legislature knew about these permits, they have no bearing on the legislature's intent for purposes of statutory construction.

Peter Livingston

Beaver State Sand and Gravel, Inc. v. Douglas County, 187 Or App 241, 65 P3d 1123 (2003).

■ NINTH CIRCUIT FINDS CITY DID NOT DISCRIMINATE IN DENYING SEWER SERVICES TO UNANNEXED ALZHEIMER'S FACILITY

In *Sanghvi v. City of Claremont*, 328 F.3d 532 (9th Cir. 2003), the Sanghvis asserted federal Fair Housing Act claims of discrimination based on disparate treatment resulting from the city's refusal to extend sewer service to accommodate the expansion of a residential Alzheimer's care facility located in an unincorporated area of Los Angeles County adjacent to the City of Claremont. The Sanghvis asserted that the city failed to reasonably accommodate the housing needs of disabled Alzheimer patients. These claims were tried to a jury, which returned a verdict in favor of the city.

On appeal to the Ninth Circuit, the Sanghvis argued that they had established a *prima facie* case of discrimination under the *McDonnell Douglas Corp. v. Green* formula. 411 U.S. 792 (1973). As applied, this formula required compliance with four elements: (1) the plaintiff is a member of a protected class; (2) the plaintiff applied for a sewer connection; (3) despite being qual-

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ified to receive the connection, the request was denied; and (4) the city approved a sewer connection for a similarly situated party during a period relatively near the time the plaintiff was denied. The Sanghvis argued that notwithstanding their showing of compliance with these factors, the lower court had erred by not instructing the jury that all of these factors were met, and therefore, the city was guilty of discrimination.

The Ninth Circuit disagreed with the Sanghvis, finding that although a showing of compliance with all four factors would satisfy the Sanghvis' burden of production, this showing may not necessarily meet their ultimate burden of persuading the jury that discrimination had occurred. Once the Sanghvis met the *McDonnell Douglas* factors, the burden switched to the city to show a legitimate nondiscriminatory basis for its actions. The city showed this by establishing that any inconsistent actions permitting sewer connections without annexation had occurred before city employees were aware of the city's policy against allowing these connections. The court found that after the city responded, the presumption of discrimination dropped out of the case, and the jury needed only to address the ultimate question of whether the plaintiff was a victim of discrimination. Because the jury's decision in favor of the city was contrary to the clear weight of the evidence, the court upheld the jury's finding.

Second, the Sanghvis argued that the city had failed to make "reasonable accommodations" to afford sewer services to handicapped persons. The court rejected this argument, finding that the Sanghvis had failed to show that the sewer service constituted required accommodation for the Alzheimer's patients. Rather, making such an accommodation without annexation would merely provide an economic benefit to the Sanghvis.

Third, the Sanghvis asserted that the lower court had erred by not properly instructing the jury about the *McDonnell Douglas* burden shifting framework. After considering the views in other circuits, the Ninth Circuit held that the technical elements of burden shifting had the potential to confuse juries, and therefore it was inappropriate to introduce the legalistic burden allocation responsibilities to the jury. Moreover, the court found that the framework is intended to establish the orderly introduction of evidence, but does not alter the jury's ultimate responsibility of deciding whether the plaintiff was a victim of discrimination. The court found that there was "abundant evidence" that the city had denied the requested sewer permit for nondiscriminatory reasons. 328 P.3d at 541.

Finally, the Sanghvis asserted claims of retaliation by the city because city officials had openly opposed the expansion of the Sanghvis' facility by lobbying state legislators and county board members and by filing suit against the Sanghvis for operating an impermissible septic tank on the property during the early phases of expansion. The court rejected these claims, finding that under the *Noerr-Pennington* doctrine, municipalities and their officials, like private individuals, are immune from liability under the Sherman Act for lobbying in favor of or in opposition to action on particular laws. The court also held that there was not enough evidence to support the Sanghvis' argument that the city's public opposition to their request was a sham to cover the city's attempts to directly interfere with the business relationships of a competitor in violation of the Sherman Act.

Carrie Richter

Sanghvi v. City of Claremont, 328 F.3d 532 (9th Cir. 2003).

OREGON COURT OF APPEALS HEARS ANOTHER CHALLENGE TO THE OREGON MOTORIST INFORMATION ACT

In *Drayton v. Department of Transportation*, 186 Or App 1, 62 P3d 430 (2003), the Oregon Department of Transportation (ODOT or Department) ordered the petitioner to remove outdoor advertising signs deemed not to comply with the Oregon Motorist Information Act (OMIA or Act), ORS 377.700–.840. In challenging ODOT's orders, the petitioner essentially asserted that the orders must be vacated because (1) ODOT's notices to petitioner of the alleged violations were defective, (2) the orders' findings misinterpreted the OMIA, and (3) the OMIA is unconstitutional.

The matter involved six signs that resided on petitioner's property along Highway 101 in Lincoln City. The OMIA generally prohibits the erection or maintenance of various signs visible to the traveling public from state highways unless a sign complies with the OMIA, its rules, and any applicable federal requirements. One class of signs prohibited under the OMIA are "outdoor advertising signs," which are signs that advertise "goods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located; [f]acilities not located on the premises on which the sign is located; or [a]ctivities not conducted on the premises on which the sign is located." ORS 377.710(23).

The court of appeals considered five issues relevant to the appeal. The first issue concerned the effect of ODOT's failure to cite relevant OARs in its notices to the petitioner. ODOT acknowledged the notices' failure to reference the rules, and conceded that the rules were relevant. However, ODOT argued that the petitioner could not challenge the deficient notice because he had waived his right to do so and because he had not been prejudiced.

Finding for the petitioner on this issue, the court of appeals noted the broad phrasing of ORS 183.415, which requires the notice of a contested case to include, among other things, "a reference to the particular sections of the statutes and rules involved." Finding that the statute did not confine the "rules involved" to those that were purportedly violated, the court held that ODOT's notices violated ORS 183.415, and reversed and remanded two of ODOT's three orders for reconsideration.

The second issue the court considered was whether a sign post on the petitioner's property was exempt from the OMIA because it no longer contained advertising copy. When ODOT initiated enforcement action, the sign advertised an off-premise hotel. At some later point, the copy was removed, leaving only the post. While the petitioner argued that without advertising copy, the sign was not subject to the OMIA, the Department argued that the mere removal of the copy did not bring the sign into conformance with the Act. Relying on the court's decision in *Outdoor Media Dimensions v. State*, 150 Or App 106, 945 P2d 614 (1997), the court sided with ODOT.

As in *Outdoor Media*, the court held that the OMIA provides two exclusive methods for bringing a sign into compliance with the Act: (1) obtaining a permit for the sign or (2) removing the sign. Because a "sign" under the OMIA is defined to include the "sign structure, display surface and all other component parts of a sign," ORS 377.710(29), the court reasoned that "removing" the sign may be accomplished only by removing the entire structure, and not by simply removing its copy.

The third issue was whether a sign erected and maintained by the petitioner was allowed under the OMIA as a "sign of a governmental unit," as the petitioner alleged. Citing his involvement in city politics and his close work with Lincoln City's urban renewal agency, the petitioner argued that his sign reading "Welcome to Lincoln City" should be permitted under ORS 377.735(1) as a governmental unit's sign. The Department countered by arguing "that the sign is not a sign of a governmental unit because petitioner is not a governmental unit." 186 Or App at 15.

Scratching its collective chin, the court noted that the statute defines a "governmental unit" as "the federal government, the state, or a city, county or other political subdivision or an agency thereof." ORS 377.710(14) (2001). Because the petitioner was plainly not included in the definition, the court rejected petitioner's argument without further discussion.

The fourth issue confronting the court was whether one of petitioner's signs was exempt from the OMIA because it had existed on or before June 12, 1975. The OMIA allows outdoor advertising signs in existence on June 12, 1975 to remain in existence. ORS 377.765(1) (2001). The record clearly indicated that on that date, the sign advertised a market on the premises. Much later than 1975, the copy changed to render the sign an "outdoor advertising sign" as defined under the statute. Because the statute only exempts "outdoor advertising signs" in existence on June 12, 1975, and because the sign in question was an on-premise sign on that date, the court held that the petitioner could not claim the exemption.

The final issue was the petitioner's challenge to the Act's constitutionality. The petitioner claimed that the Act violated his right to free speech under the Oregon and U.S. constitutions. The court noted that the petitioner's constitutional challenges had already been rejected in the court's previous rulings in *Outdoor Media*, 150 Or App at 117–18; *Media Art Co. v. City of Gates*, 158 Or App 336, 341, 974 P2d 249 (1999), *rev den*, 332 Or 56 (2001); and *Herson v. DMV*, 157 Or App 683, 686, 971 P2d 492 (1998), *rev den*, 332 Or 56 (2001), *cert den*, 534 US 1113 (2002), and the court declined to reconsider those decisions.

David Doughman

Drayton v. Dept. of Transp., 186 Or App 1, 62 P3d 430 (2003).

Appellate Cases—Real Estate

NINTH CIRCUIT APPROVES TITLE INSURANCE DISCOUNTS BASED ON ECONOMIES OF SCALE AND OTHER ECONOMIC FACTORS

In *Lane v. Residential Funding Corp.*, 323 F.3d 739 (9th Cir. 2003), the Ninth Circuit ruled on the legality under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, of certain discounts on title insurance and flat fees for escrow services. The Ninth Circuit affirmed the trial court's holding that the discounts and flat fees were not prohibited kickbacks under RESPA intended to reward the mortgage lender for referring business to the title company.

Plaintiff bought a house from Residential Funding Corp. (RFC). RFC also served as the mortgage lender. As a condition of sale, RFC required plaintiff to use Chicago Title for title and escrow services. RFC had negotiated an agreement with Chicago Title under which RFC would receive title insurance at 60% of Chicago Title's standard rate and escrow services for a flat $300 fee, which fee might be higher or lower than the escrow fee that would otherwise be charged.

Plaintiff brought an action claiming that the discounts and flat fees violated RESPA's anti-kickback provision. The trial court granted summary judgment for Chicago Title. The trial court concluded that the dis-

counts reflected Chicago Title's lower cost of providing the services based on (1) RFC's volume and the streamlining of escrow services, and (2) the lower cost of furnishing title insurance on RFC properties, given that a foreclosure guarantee or other title report usually would already be available. The trial court found "no evidence that the rates charged to RFC were abnormally low or related to anything other than recognized economic principles." 323 F.3d at 741.

Reviewing de novo, the Ninth Circuit affirmed the trial court's decision. The trial court's analysis paralleled the test used by HUD, reflected in a 2001 published policy, for determining whether yield spread premiums paid by mortgage lenders to mortgage brokers violate RESPA. RESPA Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,054 (Oct. 18, 2001). The Ninth Circuit explained yield spread premiums as follows:

> With a yield spread premium, mortgage lenders establish a hypothetical interest rate that is called the "par rate." When a mortgage broker's client takes out a loan at a rate higher than the "par rate," the lender pays a bonus, the yield spread premium, to the mortgage broker. . . . The higher the loan rate, the higher the compensation paid to the broker.

323 F.3d at 743 (citations omitted).

HUD established a two-part test for evaluating whether a yield spread premium violates RESPA: (1) whether the mortgage broker actually provided goods, facilities, or services, and (2) whether the total compensation to the broker is reasonably related to the value of the goods or facilities actually furnished or services actually performed. 66 Fed. Reg. at 53,054. Last year, in *Schuetz v. Banc One Mortgage Corp.*, the Ninth Circuit held that this test was entitled to substantial deference. 292 F.3d 1004, 1014 (9th Cir. 2002) (affirming a finding that a particular yield spread premium did not violate section 8(a) of RESPA). Here, the Ninth Circuit held that the parallels between *Schuetz* and *Lane* warranted using the same test in *Lane*, and reaching the same outcome.

The Ninth Circuit also upheld the trial court's interpretation of RESPA'S attorney-fee provision. The provision, codified at 12 U.S.C. § 2607(d)(5), states that the court "may" award court costs and attorney fees to the "prevailing party." Reviewing under an abuse-of-discretion standard, the Ninth Circuit held that Chicago Title was not entitled to recover its attorney fees because the plaintiff's action had not been found to be frivolous, unreasonable, or without foundation. 323 F.3d at 746–47. The Court relied on what it described as the "plaintiff-friendly dual standard" set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), a case involving a civil rights statute.

Susan C. Glen

Lane v. Residential Funding Corp., 323 F.3d 739 (9th Cir. 2003).

TRIBES' ABILITY TO TAX RAILROAD FOR RIGHT-OF-WAY OVER RESERVATION LIMITED

In *Burlington Northern Santa Fe Railroad Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, Montana*, 323 F.3d 767 (9th Cir. 2003), the Ninth Circuit Court of Appeals held that tribes claiming taxation rights over non-Indian railroad companies are entitled to the opportunity to establish through discovery that hazardous waste shipments across the reservation pose a direct threat to the tribes.

The Burlington Northern Railroad Company runs a rail line that crosses over reservation land governed by the Assiniboine and Sioux Tribes on a right-of-way granted by Congress in 1887. More than 600,000 rail cars, some containing hazardous materials, cross the reservation each year. The Tribes had levied an ad valorem tax on the value of all utility property, including Burlington Northern's railroad, since 1987.

Burlington Northern had unsuccessfully challenged a similar ad valorem tax in *Burlington Northern Railroad v. Blackfeet Tribe of Blackfeet Indian Reservation* (*Burlington I*), where the court held that the ad valorem tax was valid because the right-of-way was on trust land. 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). However, the U.S. Supreme Court held in 1997 that a right-of-way granted by the federal government crossing Indian trust land is the equivalent of non-Indian fee land. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Following that decision, the Ninth Circuit overruled *Burlington I* "to the extent it upholds an ad valorem tax on property located on a congressionally-granted right-of-way." *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). Burlington Northern subsequently stopped paying the ad valorem tax to the tribes, and the tribes filed suit seeking a declaration that the tax was valid.

The district court granted Burlington Northern's motion for summary judgment, finding under *Strate* and *Montana v. United States*, 450 US 544 (1981), that the Company's right-of-way was presumptively exempt from the tribes' civil authority. The district court found that the two exceptions recognized in *Montana* did not apply: the tribes had not established (1) a consensual relationship with Burlington Northern sufficient to justify the tax or (2) a direct threat to the health and welfare of the tribes posed by Burlington Northern's actions. The district court denied the tribes' pending discovery motions.

The court of appeals rejected the tribes' argument that the tax was justified under the first *Montana* exception. According to the court, the ad valorem tax is not based on the activities of Burlington Northern that create the consensual relationship, but is rather a tax directly on the right-of-way property.

However, the court agreed with the tribes that the trial court should have allowed the tribes discovery in order to develop evidence that Burlington Northern's activities pose a threat to the Tribes:

> Because the Tribes have shown some basis for believing that [Burlington Northern's] use of its right-of-way threatens serious harm to the Reservation and [that the Tribes] had no fair opportunity to develop the record concerning the extent of that threatened harm, it was an abuse of discretion for the district court to decide the summary judgment before granting the Tribes' Rule 56(f) motion.

323 F.3d at 774. Burlington Northern had filed its motion for summary judgment less than a month after filing its complaint, leaving the tribes little time in which to conduct discovery. The court of appeals accordingly vacated the summary judgment ruling and remanded to the district court.

This case points out the changing landscape of tribal sovereignty in the United States. The decision of *Burlington I* was the law of the land upon which native tribes relied for five years, only to have their sovereignty diminished again. It is likely that one result of this decision will be greater financial challenges for many tribes with little ability to compensate for shrinking tax bases in hard economic times.

Raymond Greycloud

Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, Montana, 323 F.3d 767 (9th Cir. 2003).

THE NUTS AND BOLTS OF ADVERSE POSSESSION

Gilinsky v. Sether, 187 Or App 152, 66 P3d 584 (2003), provides a helpful example of a very typical adverse possession claim. The case may serve as a basic reference whenever adverse possession is in issue. In *Gilinsky,* the court determined that each of four defendants established title to property through adverse possession by demonstrating clear and convincing evidence of actual, open, notorious, exclusive, continuous, and hostile possession of the plaintiff's property.

The plaintiff, Robert Gilinsky, purchased a parcel of undeveloped land in 1998. Soon after acquiring the property, Gilinsky surveyed the land. The survey indicated that existing fence lines of four adjoining properties, each owned by different defendants (Sether, Groves, Hess, and Bucan), encroached on Gilinsky's land. Gilinsky filed suit for trespass and ejectment in order to gain control over the property described in his deed. The trial court ruled in favor of each defendant and Gilinsky appealed.

The court of appeals reviewed the case de novo and affirmed the trial court's decision. Applying *Hoffman v. Freeman Land and Timber, LLC*, 329 Or 554, 559, 994 P2d 106 (1999), the court determined that each defendant had demonstrated by clear and convincing evidence actual, open, notorious, exclusive, continuous, and hostile possession of the disputed property.

First, the court found that all of the defendants had "actually" used the disputed property as part of their own backyards. The court held, in accordance with *Nooteboom v. Bulson*, 153 Or App 361, 364, 956 P2d 1042, *rev den*, 327 Or 431 (1998), that each defendant had used the disputed property as a typical owner would. Sether mowed and took care of his property. Bucan gardened, mowed, planted trees, and stored lumber on his property. Hess did not acquire his property until 1989. However, the court held that the actions by the previous owner of Hess's property, Dolmage, established actual use. Dolmage installed a septic system, used the area above the underground septic tank as a turn-around and parking spot, and built a shed on the property. The court also noted that Hess continued to treat the property as his own. Similarly, the court held that while Bobbe Groves had not acquired the disputed property until 1985, actual use was demonstrated by the previous owner, Groves's father, who had cut firewood, constructed a temporary children's playhouse, and constructed and used a paved lane on the disputed property. Each of the above uses demonstrated actual possession.

Next, the court addressed open and notorious use of the land, holding that open and notorious use had been demonstrated by the defendants' use of the property for gardening, storage space, parking, and recreation. The court questioned whether an underground septic system on Hess's property could establish open and notorious use; however, Hess's use of the property for parking and turning cars around satisfied this requirement. Additionally, the court found that the developed condition of the defendants' property compared to the property on Gilinsky's side of the fences added weight to the open and notorious nature of the use. Thus, the court had "no difficulty" in finding each defendants' use to be open and notorious. 187 Or App at 159.

The court then determined that each defendant had demonstrated continuous use of the disputed property. Adverse possession required the defendants to show that their open and notorious possession of the land had continued for at least ten years prior to 1990.

Sether, who acquired the disputed property in 1995, satisfied this requirement by producing a former owner, James Hendricks, as a witness. Hendricks owned the Sether property from 1972 until 1976, and testified that he believed the fence marked the boundary, he had cared for and used the property in much the same way as Sether, and the condition of the Sether property and the Gilinsky property had not changed since the time he lived there. Bucan met the continuous requirement by testifying that he had owned the property since early 1980, always believed that the fence marked the boundary, and treated the property accordingly. Additionally, Bucan offered the testimonies of Sam and Bobbe Groves, neighbors who had observed the use of the Bucan property for more than forty years. The Groveses testified that there had been neither an interruption in the use of the land nor a change in the manner of use for the past forty years.

The court held that Bucan's testimony accompanied by the Groveses' testimony established the ten-year continuous element. Similarly, the court found that the Groveses had satisfied the ten-year continuous requirement by testifying that the use of their property had been the same for more than fifty years preceding the trial. Finally, the court held that Hess had met the continuous requirement by providing evidence that the property has been used for parking and as a turnaround spot since 1970.

Finally, the court addressed the hostility element, holding that "a claimant must show that he or she 'possessed the property intending to be its owner and not in subordination to the true owner.'" 187 Or App at 160 (quoting *Faulconer v. Williams*, 327 Or 381, 389, 964 P2d 246 (1998)). The court also cited *Mid-Valley Resources, Inc. v. Engleson*, 170 Or App 255, 260, 13 P3d 118 (2000), *rev den*, 332 Or 137 (2001), for the proposition that "'possession [of property] under a purely mistaken belief of ownership' satisfies the hostility requirement," which includes mistakenly occupying property believed to be included in a deed. 187 Or App at 160 (quoting *Mid-Valley Resources*, 170 Or App at 260). Each defendant was able to prove hostile use through pure mistake. The court also noted that the defendants and their predecessors had universally believed the fences to be boundary fences and that the fences run parallel to the actual property lines. Additionally, the owners used the property as their own. Thus, the evidence established the element of hostility.

After determining that the defendants had satisfied the elements of adverse possession, the court addressed the question whether a person may convey his interest in property acquired through adverse possession. Both Bucan and Groves had received the disputed property from previous owners who adversely possessed it. The court cited *Evans v. Hogue*, 296 Or 745, 756, 681 P2d 1133 (1984), in holding that an "owner who acquires title to property by adverse possession may transfer that title to third parties." 187 Or App at 161. Furthermore, the court held that the intent to transfer the disputed property was evidenced by the owners' beliefs that the fences marked the boundary.

Christopher Schwindt

Gilinsky v. Sether, 187 Or App 152, 66 P3d 584 (2003).

■ NONEXCLUSIVE EASEMENT HOLDERS CAN'T STOP NEIGHBOR FROM USING PRIVATE ROAD UNLESS NEIGHBOR OBSTRUCTS PASSAGE

Vance v. Ford, 187 Or App 412, 67 P3d 412 (2003) was a dispute among neighbors over the use of a private road adjoining their properties. All of the parcels had been derived from a common grantor, who had conveyed nonexclusive easements for ingress and egress to two of the plaintiffs. The third plaintiff, the defendant, and a non-party had not been granted such an easement, apparently because their parcels also adjoined the public road.

The defendant had used the private road since 1962 as a secondary means of access to his barn. The defendant's tenant also used the private road. In 2000, the defendant built a driveway across his property connecting to the private road, which increased traffic on the private road.

Soon thereafter, the three plaintiffs filed suit for declaratory judgment and an injunction to stop the defendant from using the private road. The defendant responded by acquiring an easement across the private road from a non-party. The trial court found, however, that the defendant's easement applied to only half of the width of the private road. Accordingly, the trial court declared that the defendant had no right to use the whole private road, and issued an injunction.

The defendant appealed, contending that the easement holders had no standing to enforce their rights of use, because they had no right of possession in the private road. The court of appeals disagreed, ruling that easement holders have standing to enforce their rights of use against substantial interference.

The court held further that the plaintiff easement holders had stated a claim for declaratory relief because they had alleged an injury to a recognized interest: the right of enjoyment. However, the court defined their rights of use as limited and confined by the terms of the deeds, which specified the easements as nonexclusive, and for ingress, egress, and utilities.

To prove substantial interference, the court ruled that the evidence must show actual damage to the right of use by the alleged interference. Here, the court

found that the defendant had caused momentary inconvenience to ingress and egress, but had not blocked passage by parking vehicles, installing a gate, creating an obstruction, or restricting use by invitees. Accordingly, the court held that the plaintiffs had failed to prove substantial or unreasonable interference with their own limited rights of use, and reversed the trial court, denying the plaintiff easement holders any relief.

Next, the court turned to the claims of the third plaintiff, which were premised on fee ownership of half of the width of a portion of the private road. By entering judgment in favor of the plaintiffs, the trial court necessarily had sustained that allegation of fee ownership. The defendant argued that the trial court lacked authority to enter the judgment, because in giving half of the road to the third plaintiff, it took it away from the adjoining owner, a non-party. The court of appeals agreed, and held that the non-party was a necessary party, because ownership of the fee in the private road was central to the determination of the rights of the parties, and the non-party's interests would be affected by the judgment. Because failure to join a necessary party is a jurisdictional defect, the court of appeals vacated the trial court judgment and remanded with instructions to dismiss the claims of the third plaintiff unless the non-party was joined within a reasonable time.

Mary Johnson

Vance v. Ford, 187 Or App 412, 67 P3d 412 (2003).

■ CONDOMINIUM ASSOCIATIONS CAN BRING PRIVATE CONTRACT CLAIMS ON BEHALF OF UNIT OWNERS FOR MATTERS AFFECTING THE CONDOMINIUM

In *Association of Unit Owners of Bridgeview Condominiums v. Dunning*, 187 Or App 595, 69 P3d 788 (2003), the Oregon Court of Appeals considered whether a provision of the Oregon Condominium Act (OCA), ORS Chapter 100, authorizes a condominium unit owners' association to assert claims for breach of express and implied warranties on behalf of individual unit owners and also whether a condominium is a product such that strict product liability applies.

The Bridgeview Condominium is an 18-unit, two-building condominium located in downtown Portland. The plaintiff Association of Unit Owners of Bridgeview Condominiums manages its affairs. The association brought suit on its own behalf and, in a representative capacity, on behalf of its members alleging various claims against the condominium's developers, builders, general contractors, and engineers for defects in the design and construction of the condominium. These claims included negligence, fraud, strict liability, intentional and negligent misrepresentation, breach of fiduciary duty, breach of the association's bylaws, violations of the OCA, breach of contract, and breach of express and implied warranties.

The defendants moved to strike most of the claims on the ground that the association was not the real party in interest and could not sue on behalf of its members when the alleged damages were not to the association's common elements. The trial court agreed and granted the defendants' motions. The defendants also filed a motion to strike the strict liability claim, arguing that Oregon law does not recognize strict liability in the defective design and construction of condominiums. That motion was also granted by the trial court.

The plaintiffs appealed. On appeal, the plaintiffs argued that the trial court had erred by ruling that the OCA and existing case law limit the association's ability to sue on behalf of unit owners to those situations where the injury suffered is to common elements, not individual units. The association also argued that existing law allows a claim for strict liability in defective condominium units.

The association argued that the breach of the express warranties the developers made to the owners in their condominium unit sales agreements constituted "matters affecting the condominium" as stated in ORS 100.405(4)(d). Therefore, the association asserted, the OCA authorizes the association to institute proceedings on behalf of the unit owners. In support of its position, the association cited *Towerhill Condominium Association v. American Condominium Homes*, where the court held that a condominium association may bring suit on behalf of its owners for breach of warranty and negligence claims. 66 Or App 342, 675 P2d 1051 (1984). In response, the defendants argued that the express warranties were private contracts between the developer and the individual owners that affect only the individual owners, and that the association may bring suit on behalf of its owners only with respect to the common elements of a condominium, not individual units or personal contracts with the owners of those units.

In deciding the issue, the court of appeals looked to ORS 100.405(4)(d) and applied the tenets of statutory interpretation found in *PGE v. Bureau of Labor and Industries.*, 317 Or 606, 610–12, 859 P2d 1143, 1145–47 (1993), which call for an examination of the text in its statutory context first, followed by legislative history and other aids, if necessary. During its analysis, the court looked at several terms defined in the OCA to determine their context and plain meaning.

First, the court looked at the term "condominium," which the OCA defines as "[t]he land . . . ; [a]ny buildings, improvements and structures on the property; and . . . "[a]ny easements, rights and appurtenances belonging to the property." ORS 100.005(9)(a). The court

then stated that ownership of a condominium entails ownership of both a unit and common elements, both encompassed by the definition of "condominium."

Next, the court scrutinized the terms "matter" and "affecting" as used in ORS 100.405(d). The court used *Webster's Dictionary*'s definitions as "matter" as a "topic under active and usu[ally] serious or practical consideration" and "affect" as "to produce an effect upon" or "produce a material influence upon or alteration in." From these definitions, the court of appeals concluded that breaches of express warranties for the design and construction of a condominium result in defects in the design and construction of the land, buildings and structures that make up a condominium. Thus, the court concluded, it is irrelevant that the alleged breach occurred in a contract between an individual unit owner and the developer because the statute only requires that there be a "matter affecting the condominium" in a broad sense.

Furthermore, the court rejected the defendants' arguments that *Towerhill* applies only to injuries sustained to a condominium's common elements. Instead, the court stated that although the facts in *Towerhill* only dealt with injuries to common elements, nothing in the opinion's language suggested that it intended to limit an association's ability to sue on behalf of its member unit owners to only those situations where the damages were to common elements.

After finding that the association was the real party in interest for the express warranty claim, the court stated that the implied warranty claims naturally followed as valid. The defendants argued that an implied warranties claim could not be brought by the unit owners, who had received express warranties "in lieu of any implied warranties" under ORS 100.185. However, the court disagreed, because it found no evidence that the express warranties conformed to the requirements of ORS 100.185. Therefore, the court upheld the assertion of the implied warranty claims.

The court next examined whether strict product liability applies to condominiums in Oregon. The association argued that, as a matter of public policy, strict product liability should apply in order to deal with an ever-increasing number of construction defect cases. Meanwhile, the defendants contended that strict product liability applies only to chattels.

In ruling on this issue, the court first looked at Oregon's product liability statute, which applies to "any *product* in defective condition unreasonably dangerous to others." ORS 30.920 (emphasis added). The court noted that the statute indicates that it was drafted with the intent that it "be construed in accordance with the *Restatement (Second) of Torts* sec. 402A, Comments a to m (1965)." ORS 30.920(3). The court found that the Restatement comments give a clear indication that the term "product" applies only to chattels. The court also recognized that the Oregon Supreme Court declined to apply strict product liability to a claim for breach of implied warranties for defects in the construction of a custom home. *Chandler v. Bunick*, 279 Or 353, 569 P2d 1037 (1977). Therefore, the court concluded, because a condominium cannot be considered goods or chattels, it is not a "product" under ORS 30.920.

Nevertheless, the court also reviewed plaintiff's policy arguments for extending the scope of the statute to include condominiums. Stating that the Oregon legislature has determined the best possible policy in its adoption of ORS 30.920, the court said that its only role was to determine the scope of the statute. In doing so, the court decided that a condominium is not a "product" and thus declined to extend strict product liability to condominiums.

This case involved the 1997 version of the Oregon Condominium Act, ORS Chapter 100, which was amended in 2001. Among the amendments was the deletion of the "matters affecting the condominium" language. More specific guidelines were included in the statute. The *Bridgeview* decision is consistent with the new statutory language. Nevertheless, it is unclear whether the new language will be interpreted as broadly as the court of appeals appears to have done in *Bridgeview* to empower a condominium association to sue on behalf of individual unit owners.

A. Richard Vial

Ass'n of Unit Owners of Bridgeview Condos. v. Dunning, 187 Or App 595, 69 P3d 788 (2003).

Editors' Note: The author represented the condominium association before the court of appeals.

■ PERSONAL REPRESENTATIVE'S SLIGHT DELAY IN COMPLETING PURCHASE OF DECEDENT'S REAL PROPERTY DID NOT VOID TRANSACTION

The case of *McPherson v. Dauenhauer*, 187 Or App 551, 69 P3d 733 (2003), presents questions regarding options to purchase real property and fiduciary duties, both in the probate context. The respondent, Carl Dauenhauer, is the son of Ida Dauenhauer, deceased, and was personal representative of her estate. Her will contained an option to purchase real property in favor of Carl and stated as follows:

> for a period of six months from the date of my death to purchase [the] farm from my estate for the sum of $200,000, the terms of payment to be mutually agreed upon between the residuary legatees. The proceeds of such sale or any previous sale made by me of the farm if it is

> not sold, shall become a part of the residue of my estate.

The petitioners, sisters of the respondent, filed an action seeking, among other matters, a declaration that the purchase price under the option should be the current market value. Prior to the expiration of the six-month period specified in the will, the petitioner secured an order of the court extending the option until such time as the proceedings regarding the purchase price were complete. The court granted a stipulated order providing for an exercise of the option within 60 days of final determination *and* a closing within 45 days of the exercise of the option.

The court entered a judgment under ORCP 67 B that dismissed the option claim. On January 25, 1999, within 60 days of the ORCP 67 B judgment, the respondent notified the petitioners that he was exercising the option. The transaction closed on March 19, 1999, more than 45 days after the respondent exercised the option.

The petitioners argued that the option had not been properly exercised because of the failure to close within the 45-day period specified in the court's order. The court of appeals held that time was not of the essence: "In the absence of such an agreement, in equity time is not of the essence of a sale of real estate." 187 Or App at 557.

The court of appeals considered one other issue: whether the respondent had a fiduciary obligation as personal representative to cancel the sale when it did not close within the 45-day period. The petitioners argued that because the personal representative acted as both buyer and seller, the transaction was impermissible self-dealing.

The court disagreed, holding that

> [t]he failure to close a sale of land within the contractual time is undoubtedly a breach of the contract and entitles the other party to recover any damages that it may have suffered as a result of the delay. However, only a *material* breach entitles a party to rescind a contract. To be material, a breach must go to the substance of the contract and defeat the parties' object in entering into it.

187 Or App at 560 (citations omitted). The court went on to hold that the delay in closing was not a material breach in this instance and, therefore, the personal representative was authorized to complete the transfer.

Alan Brickley

McPherson v. Dauenhauer, 187 Or App 551, 69 P3d 733 (2003).

JOINT OR SEPARATE TITLE: IMPLICATIONS IN THE EVENT OF DIVORCE

The means by which a married couple holds title to real property—whether separately, as tenants in common, or as tenants by the entirety—can often influence a property division in the event the parties divorce. However, the consequence of titling is not always as the parties predicted or intended. The purpose of this article is to catalog the general rules of real property division upon divorce. Of course, there are many variations on these themes, and each case turns on its unique facts.

ORS 107.105(1)(f) provides that there is a rebuttable presumption that both spouses have equally contributed to property during the marriage "whether such property is jointly or separately held." The statute reflects the policy that contribution as a homemaker or parent or other non-economic contributions should entitle a spouse to an equal division of property acquired during the marriage. The easy case involves real estate the parties purchase during a marriage using income or other property acquired during the marriage. Such property will almost always be divided equally between the parties, regardless of whether it is titled in the name of the husband or the wife or titled in the name of both parties as tenants in common or by the entirety.

In the event one spouse owns a piece of real estate prior to the marriage, that separately acquired property will not be subject to the presumption of equal contribution. If the marriage was short-term and the parties have not "commingled" this separate asset, it will most likely be returned to the party who owned it before the marriage. However, if substantial work to improve the property was performed by the spouse not named in the title, the value of that property will be apportioned upon dissolution. Whether the property is divided equally or by some other percentage depends on what is just and proper. Ultimately, the task of a court in fashioning a property division upon dissolution is to fashion an allocation of property that is "just and proper in all the circumstances." ORS 107.105(1)(f).

The longer the parties are married, and the more they "commingle" their finances, the more likely it is that premarital property or other property separately acquired by inheritance or gift will be swept into the property division calculus, with an award to the non-contributing spouse. In the recent case of *Kunze and Kunze*, 181 Or App 606, 47 P3d 489, *rev allowed*, 335 Or 114 (2002), the wife brought a residence into the marriage. Three years into their 20-year marriage, she also inherited real property, some of which she later sold, using the proceeds to purchase other real property. Upon dissolution, the trial court essentially returned to the wife all of her premarital and inherited property. The court of appeals modified the trial court's order, finding that two of three real properties in dispute should be divided equally

because they had been commingled. The commingling occurred by virtue of the wife having conveyed an interest in the property to the husband so that the parties held title as tenants by the entirety, by the use of marital funds to improve the property, and by joint management of the properties. Although the two properties were purchased with the wife's money, the wife proffered no evidence to rebut the presumption of equal contribution.

The Oregon Supreme Court has accepted review of the *Kunze* case, briefs have been filed, and oral argument is scheduled for September 10, 2003. The supreme court will consider the questions of what constitutes commingling and what role, if any, commingling plays in property division upon divorce pursuant to ORS 107.105(1)(f). One hopes that the supreme court will clarify the rules, thus making it easier for family law lawyers to predict likely outcomes for their clients.

In any event, real estate lawyers should be aware that the status of title counts upon dissolution. While adding a spouse to a title does not assure an equal division of separately acquired property upon dissolution, it certainly makes it more likely. Clients who convey title to a spouse should be forewarned of this risk, even if the conveyance is done solely for estate planning or financing purposes. Further, the longer the marriage, the more likely the court will find that the parties' assets, including real estate, have been commingled and thus subject to equal division.

Finally, the application of these rules can be avoided with the use of either a premarital agreement, a postmarital agreement, or segregation of separately acquired property with great care taken to be certain that the property is not commingled.

Bill Howe

Kunze and Kunze, 181 Or App 606, 47 P3d 489, rev allowed, 335 Or 114 (2002).

Bill Howe is a partner in the Portland office of the divorce and family-law firm Gevurtz, Menashe, Larson & Howe, P.C. Mr. Howe represents the husband in the Kunze matter.

Appellate Cases—Landlord/Tenant

■ YOU CAN RUN, BUT YOU CAN'T HIDE FROM A LANDLORD'S EVICTION NOTICE

A tenant cannot in bad faith evade a landlord's attempts to hand-deliver a termination notice and then claim the landlord failed to comply with the Oregon Residential Landlord Tenant Act (ORLTA), according to the decision of the Oregon Court of Appeals in *Stonebrook Hillsboro, L.L.C. v. Flavel*, 187 Or App 641, 69 P3d 807 (2003).

The brother and sister codefendants in *Stonebrook* shared connected rooms in the plaintiff's hotel. Because the codefendants resided in the hotel for more than 30 days, they became month-to-month tenants pursuant to the ORLTA.

Shortly after their tenancy began, the defendants ceased paying rent and the plaintiff took action to terminate the tenancy by personally delivering termination notices to the defendants. The plaintiff's first attempt at personal delivery failed when one of the defendants simply refused to accept the notice from the hotel's front office manager. The manager then attempted to deliver the notice to the other codefendant, while he was waiting outside the hotel in his car. The manager approached the car and knocked on the defendant's car window with the notice in hand, but the defendant fled the scene when his sister motioned to him to drive away. The manager later tried to deliver the notices to the defendants as they walked to their car, but again the defendants escaped in their car.

In frustration, the manager waited until she was sure the defendants were in their rooms and then slipped the notices under the defendants' doors. She knocked to get their attention, but she received no response.

At the hearing on the plaintiff's statutory forcible entry and detainer action, the defendants did not dispute that they received a 72-hour nonpayment notice and a 30-day "no cause" notice. However, the defendants moved to dismiss the action for failure to comply with the required procedures for personal delivery of notice. They denied that the plaintiff had attempted to personally deliver the termination notices and that they had refused to accept the notices. The defendants contended that the manager's attempt to deliver the notices by slipping them under the defendants' doors was not sufficient because personal delivery requires face-to-face delivery of the notice. The trial court held in favor of the plaintiff.

The court of appeals addressed the narrow issue of whether the plaintiff had given the defendants proper notice of the termination of the tenancy. The court found that the defendants had no right to invoke the protections of ORLTA because the defendants had acted in bad faith. The court noted that ORS 90.130 explicitly requires all parties to act in good faith when performing or enforcing obligations under ORLTA and repeated the Oregon Supreme Court's prior pronouncements that a party's ability to assert ORLTA's protections is contingent on the party acting in good faith. *See Napolski v. Champney*, 295 Or 408, 419, 667 P2d 1013 (1983). Thus, the court affirmed the trial court's ruling

that the defendants had received adequate notice of the termination of their tenancy.

Glenn Fullilove

Stonebrook Hillsboro, L.L.C. v. Flavel, 187 Or App 641, 69 P3d 807 (2003).

Appellate Cases—Takings

■ WHEN FEDERAL COURTS INTERPRET WASHINGTON LAW: SUBSTANTIVE DUE PROCESS AND TAKINGS COLLIDE, BUT THE PUBLIC TRUST DOCTRINE STILL ESTABLISHES "BACKGROUND PRINCIPLES" OF PROPERTY RIGHTS

On June 15, 2003, the United States Supreme Court denied certiorari in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002), a case dealing with the relationship between substantive due process and takings claims, as well as the nature of property rights under Washington law.

In 1991, plaintiff Esplanade Properties purchased tidelands below Magnolia Bluff that were completely submerged for approximately half of each day and classified as first-class tidelands. The purchase price was $40,000. The plaintiff proposed to construct nine homes on a system of pilings and platforms, and began what became a lengthy application process to develop the property. The City of Seattle initially identified several concerns with the proposal's ability to meet city code requirements relating to construction over water. The city's code interpretations were appealed, resulting in the state court of appeals' approval of the city's position in 1997. After the appellate decision, the city requested an alteration of the plans consistent with the city's interpretation of the development restrictions. Instead of altering the plans, however, the plaintiff simply applied for a variance. The city denied all of the applications.

The plaintiff filed suit, claiming inverse condemnation, deprivation of the substantive due process guarantees in the federal and state constitutions, and money damages under 42 U.S.C. § 1983 and RCW § 64.40.020. The Ninth Circuit affirmed dismissal of the substantive due process claim under *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), in which the Ninth Circuit held that federal substantive due process claims are subsumed in takings claims. The Ninth Circuit also affirmed dismissal of the state substantive due process claims, finding that the Washington constitution does not offer more protection than the federal constitution. Citing two Washington criminal cases and one dealing with a civil infraction of a "no sitting ordinance," the Ninth Circuit concluded that under Washington law, "an independent due process analysis is not called for in this case." 307 F.3d at 983.

The problem with the *Esplanade* court's due process holding is that, in contrast to the federal construction, Washington courts have consistently rejected the *Armendariz* doctrine and held that substantive due process claims involving property rights are independent of takings claims. *See generally Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 963–64, 954 P.2d 250, 258 (1998); *Guimont v. Clark*, 121 Wn.2d 586, 594, 854 P.2d 1, 5 (1993); *Robinson v. City of Seattle*, 199 Wn.2d 43, 49, 830 P.2d 318, 327, *cert. denied*, 506 U.S. 1028 (1992); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329, 787 P.2d 907, 912 (1990). The *Esplanade* court did not discuss or distinguish these cases.

The impact of the *Esplanade* holding on Washington constitutional construction is uncertain. At present, the U.S. Supreme Court has not resolved the split among the federal circuits on this issue. On the other hand, as the above-cited cases demonstrate, Washington courts are deeply entrenched in their own construction of constitutional jurisprudence.

The *Esplanade* court also upheld dismissal of the plaintiff's takings claims, despite evidence of denial of all economically viable use. The Ninth Circuit based its holding on the Washington appellate court's views regarding "background principles" of property rights limitations. In analyzing the takings question, the court drew from language in the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, which holds that a takings claim is not valid if the alleged deprivation resulted from a limitation "inher[ing] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. 1003, 1029 (1992).

The *Esplanade* Court found that "Washington's public trust doctrine ran with the title to the tideland properties," and therefore restricted property rights over waters of the state as a "background principle" of property ownership. 307 F.3d at 987. With such a principle in mind, the *Esplanade* Court held that the plaintiff had not suffered a compensable deprivation. Citing *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988), the *Esplanade* court deferred to the *Orion* court's construction of property rights in Washington and denied the taking challenge, "since a property right must exist to be taken." 307 F.3d at 986.

Keith Hirokawa

Esplanade Props., LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002), cert. denied, 123 S. Ct. 5474 (2003).

LOGGING COMPANY NOT ENTITLED TO FUTILITY EXCEPTION IN SPOTTED OWL TAKINGS CASE

In *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 186 Or App 291, 63 P3d 598 (2003), the Oregon Court of Appeals addressed the futility exception to the ripeness defense in the regulatory takings context and clarified some of the relevant standards. Most significant was the court's ruling that a takings claimant asserting the futility exception must show "very little . . . or no likelihood" that unexplored development options would not have been approved. 186 Or App at 303.

The dispute in this case stretches back more than ten years. At issue is a roughly 60-acre tract of land in Clatsop County where a pair of northern spotted owls nested from 1992 to 1997. To protect the owls, the defendant state board of forestry denied Boise's 1992 request to log the tract. Boise brought one action challenging the administrative rule upon which the logging restrictions were imposed and another action seeking inverse condemnation. The board argued that Boise's inverse condemnation claim was not ripe because Boise had not requested an incidental take permit (ITP).

This is the fifth published opinion stemming from Boise's claims, and the third by the state court of appeals. In the prior opinions, the state and federal appellate courts (1) upheld the administrative rule, (2) rejected Boise's "taking by physical occupation" theory, (3) held that the trial court had erred in striking the board's ripeness defense, and (4) rejected Boise Cascade's argument that it would have been futile to request an ITP. *See generally Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002); *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 164 Or App 114, 991 P2d 563 (1999), *rev den*, 331 Or 244 (2000), *cert den*, 532 US 923 (2001); *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 131 Or App 538, 886 P2d 1033 (1994), *rev'd*, 325 Or 185, 935 P2d 411 (1997); *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 131 Or App 552, 886 P2d 1041 (1994), *aff'd*, 325 Or 203, 935 P2d 422 (1997).

On remand from the state court of appeals for the second time, both parties sought summary judgment on the ripeness and futility issues. The trial court granted summary judgment to the board based on the theory of issue preclusion, ruling that Boise should have argued futility when it first challenged the administrative rule, and was prevented from doing so now. The trial court denied Boise's motion for summary judgment, predominantly because Boise had merely demonstrated "predictions" about the likelihood of an ITP being granted. Boise appealed.

On appeal, the board conceded, and the court agreed, that issue preclusion did not bar Boise from arguing futility now. The prior proceeding had involved an attempt by Boise to have the administrative rule declared invalid. Boise was not seeking inverse condemnation in that proceeding, and therefore did not litigate the ripeness and futility issues. The appellate court thus reversed the trial court's grant of summary judgment to the board.

As for Boise's summary judgment claims, the court of appeals first relied on *State v. Pratt*, 316 Or App 561, 853 P2d 827 (1993), to summarily dismiss Boise's claims that the court's prior rulings on ripeness and futility were wrongly decided. Under the law of the case doctrine, an appellate court's rulings are "binding and conclusive" upon the appellate court itself in any subsequent appeal in the same litigation. *Pratt*, 316 Or App at 569.

The court did evaluate Boise's new arguments regarding the futility issue. First, the court rejected Boise's attempt to reverse the burden of demonstrating futility. Boise argued that the board was required to demonstrate that, had Boise sought permission, an ITP would have been granted and the logging authorized. The court disagreed, citing *Curran v. ODOT*, 151 Or App 781, 788, 951 P2d 183 (1997), for the proposition that the takings claimant, not the defendant, bears the burden of demonstrating futility.

The court next rejected Boise's argument that the standard for determining futility is whether it is "more likely than not" that a development application would have been denied. Citing four United States Supreme Court cases and exploring two of them in-depth, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the court held that the futility exception requires a showing "that there was very little likelihood—or no likelihood—that the development would have been approved" had the claimant sought development approval. 186 Or App at 303.

Finally, the court examined Boise's exhibits to determine whether Boise had satisfied the futility standard. In the prior round, Boise apparently referenced only one exhibit, which the court of appeals held did not indicate futility. *See* 164 Or App at 133. This time, Boise pointed to several exhibits, including pleadings and arguments from its other cases, U.S. Fish and Wildlife Service guidelines, and a federal draft species recovery plan. The court, however, found no information in these exhibits pertaining to the likelihood of Boise obtaining an ITP.

After reiterating that neither party had been entitled to summary judgment, the court remanded for a third time, so that the trial court may evaluate the board's ripeness defense.

Interestingly, the appellate court noted in a footnote

that "the legal landscape for 'temporary' takings has changed significantly" because of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (cited at 186 Or App at 294 n 1). Boise's claim involves a temporary taking because the spotted owls were only at the site for five years and the federal government has already indicated that Boise could proceed with the logging. The court's footnote signals that Boise would have difficulty proceeding with the merits of its takings claim even were it to prevail on the ripeness issue.

Nathan Baker

Boise Cascade Corp. v. State ex rel. Board of Forestry, 186 Or App 291, 63 P3d 598 (2003).

■ COURT OF APPEALS HOLDS BRIDGE CLOSURE NOT INVERSE CONDEMNATION DESPITE IMPACT ON NEARBY PRIVATE PROPERTY

The Oregon Court of Appeals held recently in *Robertson v. City of Turner*, 187 Or App 702, 69 P3d 738 (2003), that a bridge closure did not constitute an inverse condemnation despite the impact on nearby private property.

The bridge involved in *Robertson* provided the only road access to eight properties separated from the rest of the city by a stream. The plaintiffs own the only improved site among the eight parcels affected. Their home fronts on a city street that leads to the bridge. A private parcel separates the plaintiffs' property from the nearest alternate road.

The bridge had deteriorated significantly over the years due to both flood damage and apparent neglect. As a result, in 1998 the Oregon Department of Transportation concluded that the bridge was a hazard and recommended to the City of Turner that the bridge be repaired, replaced, or closed. The city chose the latter.

The city told the plaintiffs that they could take ownership of the bridge, pay for the repairs themselves, or petition Marion County to declare a statutory "way of necessity" over the neighboring property to provide new access. Instead, the plaintiffs filed an inverse condemnation action against the city, alleging that the bridge closure effectively took their property.

The trial court dismissed the plaintiffs' inverse condemnation claim, holding that it was not ripe because the plaintiffs had not first attempted to mitigate the impact of the bridge closure by pursuing a statutory way of necessity for alternative access. *See generally Curran v. ODOT*, 151 Or App 781, 951 P2d 183 (1997) (discussing ripeness).

The court of appeals affirmed—but on a more fundamental basis. The court of appeals found that *even if* the claim was ripe, it would still not have constituted a taking. In doing so, the court of appeals focused primarily on the fact that the bridge was closed for safety reasons. The court of appeals held that the closure was an exercise of the city's police power rather than the power of eminent domain: "In the present case, defendant's action does not fall into any grey area between an exercise of eminent domain and exercise of the 'police power'; it is clearly the latter." 187 Or App at 708. Although takings by eminent domain are compensable, economic impacts from the use of the police power are not.

Because the court of appeals focused on the city's use of the police power in light of the safety concern involved, it did not reach broader questions touching on regulatory takings and access rights. A regulatory taking occurs when "the property owner is deprived of all substantial beneficial or economically viable use of the property." *Deupree v. ODOT*, 173 Or App 623, 630, 22 P3d 773 (2001). Here, if it was not practical to either obtain a way of necessity or construct a private bridge, then the continued economic viability of the property may have been in question. With access rights, "an owner of land abutting a street has a common law right of access to his property from the road." *See Gruner v. Lane County*, 96 Or App 694, 697, 773 P2d 815 (1989). Absent practical alternatives, the bridge closure would not simply have made access more circuitous—it might have eliminated it altogether. *Cf. Holland v. Grant County*, 208 Or 50, 54–55, 298 P2d 832 (1956) (new bridge made access more difficult, but did not eliminate it).

In the final analysis, *Robertson* may stand primarily as an example of the scope of governmental authority to act when public safety is directly affected.

Mark J. Fucile

Robertson v. City of Turner, 187 Or App 702, 69 P3d 738 (2003).

Cases from Other Jurisdictions

■ SOUTH CAROLINA COURT FINDS NO TAKING IN DENIAL OF COASTAL DEVELOPMENT PERMIT

In *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 580 S.E.2d 116 (2003), the South Carolina Supreme Court heard a case on remand from the United States Supreme Court, which ordered that the South Carolina court reconsider the case in light of the federal Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

In the early 1960s, the plaintiff had purchased two

non-contiguous lots on man-made saltwater canals for a total of $4,300. Surrounding lots were improved and had bulkhead walls, but the plaintiff's lots were completely unimproved. The plaintiff applied to build bulkheads on his lots in 1991 and reapplied in 1993.

At the 1994 hearing on the applications, the evidence showed that most of both lots had reverted to saltwater tidelands through continuous erosion. The evidence also showed that the proposed backfill would permanently destroy the critical environmental areas on the lots. Without the backfill and bulkheads, the parcels could not be developed and, eventually, the tides would reach the roads, which would themselves need bulkheads to protect them for travel.

Upon denial of both permits on the grounds of the effect on wetlands, the plaintiff sued, claiming a taking. The master in equity at the trial court found a taking and awarded $50,000 per lot as just compensation. The state court of appeals affirmed on a divided vote on the taking but remanded on the amount of the award. In its first review, the state supreme court held that there had been a deprivation of all reasonable economic use, but there had been no taking because no interference with any investment-backed expectation had occurred in light of preexisting wetlands requirements. The United States Supreme Court, as noted, granted certiorari, then remanded in light of its *Palazzolo* decision.

On remand, the court accepted that the lots had no economic value and that a total taking had occurred. However, the court also said that if limitations on the land use are inherent in the title itself, there need be no award. Elaborating, the court went on to say,

> As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.
>
> The State has the exclusive right to control land below the high water mark for the public benefit, and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. The State's presumptive title applies to tidelands.

580 S.E.2d at 120 (citations and footnote omitted).

The court concluded that the subject lots were public trust property subject to control by the state, and that the plaintiff had no right to backfill or place bulkheads on them. The court said that the state's denial of these improvements does not give rise to a compensation claim, adding that any taking plaintiff had suffered would have been through the forces of nature and his own lack of vigilance.

In footnote 5, the court considered an interesting issue as to whether the investment-backed expectations factor of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), continues to exist in a "total taking" case such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), noting much confusion in the federal courts. The court declined to resolve the matter in view of its disposition of this case. However, the relationship between *Penn Central* and *Lucas* will undoubtedly continue to confound the courts.

Edward J. Sullivan

McQueen v. S.C. Coastal Council, 354 S.C. 142, 580 S.E.2d 116 (2003).

■ ARIZONA COURT OF APPEALS NULLIFIES "ANTI-DOWNZONING" STATUTE

In *Emmett McLoughlin Realty, Inc. v. Pima County*, 203 Ariz. 557, 58 P3d 39 (2002), the Arizona Court of Appeals considered whether Ariz. Rev. Stat. § 11-829(G), which prohibited Arizona counties from downzoning without landowner consent, was valid. Here, the defendant county initiated a rezoning from commercial to a residential, to which the plaintiff objected. The defendant contended that the state statute constituted an improper delegation of legislative authority to landowners. The trial court agreed and granted a judgment on the pleadings. The plaintiff appealed.

The appellate court said it must first presume that the statute was constitutional and added that, if it could adopt a construction to find the statute constitutional, it would do so. The court said that the state constitution allocated legislative powers to the legislature, but permitted delegation to other entities, such as cities and counties for zoning purposes. The parties agreed that the challenged rezoning, as well as rezonings generally, were legislative in nature. The plaintiff characterized the legislation as withdrawing a portion of the delegated zoning power from local governments. However, the appellate court said that the county was under a statutory duty to adopt a comprehensive plan and to zone in urban areas in accordance with that plan. It noted that the legislature could reinvest itself with the power of zoning upon withdrawing county zoning powers, but characterized the statute to reallocate those powers to landowners—a group over which the legislature exercised no direct control—as unlawful. The court cited an early zoning case to underscore its conclusion. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).

The plaintiff also presented a second theory: that the

statute merely allowed for a waiver of restrictions which, as so characterized, could be found constitutional. *See Thomas Cusak Co. v. City of Chicago*, 242 U.S. 526 (1917). However, the court distinguished between a waiver of existing restrictions and the enactment of law by landowners given unbridled discretion. In the latter case, the legislative authority is delegated to the landowners, whose authority would prevail over that of the local government. *See*, *e.g.*, *Haggerty v. City of Chicago*, 360 Ill. 97, 195 N.E. 652 (1935). Finally, the court noted that a similar "owner consent" rezoning provision was found invalid in *Brodner v. City of Elgin*, 96 Ill. App. 3d 224, 420 N.E.2d 1176 (Ill. App. Ct. 1981).

The court then examined the statute at issue to determine where it fell in the consent-waiver continuum, and determined that because the statute involved the legislative enactment—rather than the execution—of regulations, it was more like a consent statute as in *Brodner*. The statute allowed the withholding of consent to a legislative enactment purely out of self interest. As such, it might have allowed a property owner to frustrate public health, safety, and welfare concerns, but without recourse or review.

The court also rejected the plaintiff's final theory: that the legislature merely created a different type of vested right. That alleged purpose was clearly inconsistent with the legislative history of the statute. Moreover, the statute only applied to counties and would be nullified if the property were annexed or incorporated by a municipality.

The court also questioned the statute's validity under substantive due process, doubting whether the statute could relate to the public health, safety, or welfare as drafted. Finally, the court rejected the notion that the owner consent provision was severable from the remainder of the statute and that a complete prohibition on county-initiated rezonings would be constitutional. The court said that the essence of the statute was the landowner consent provision, and refused to sever it from the remainder of the text.

This case was not effectively appealed to the Arizona Supreme Court because the plaintiff missed the filing deadlines. Nevertheless, the commercial delegation theory used by the Arizona court appears to be consistent with other cases involving delegation of legislative authority. The fact that Arizona characterizes all rezonings as legislative probably played a big role in this case. One wonders about the outcome had the court accepted a characterization of small tract rezonings as quasi-judicial.

Edward J. Sullivan

Emmett McLoughlin Realty, Inc. v. Pima County, 203 Ariz. 557, 58 P.3d 39 (Ariz. Ct. App. 2002).

WHEN "MAY" MEANS "MUST": THE WASHINGTON SUPREME COURT HOLDS THAT AGENCIES MUST BE PETITIONED PRIOR TO SUING THEM FOR "FAILURE TO ACT"

In *Northwest Ecosystem Alliance v. Washington Forest Practices Board*, 149 Wn.2d 67, 66 P.3d 614 (2003), six conservation organizations filed a declaratory judgment action asking the superior court to apply the Washington Administrative Procedure Act (APA), Chapter 34.05 RCW, to inaction by the Forest Practices Board, the Department of Natural Resources, and the Department of Ecology. The organizations alleged that (1) the agencies had failed to adopt statutorily mandated rules under the Forest Practices Act, Chapter 76.09 RCW, and (2) the existing forest practice regulations failed to meet the statutory requirements of several of Washington's natural resources statutes and were therefore invalid. However, as is relevant to this case, the APA provides that "Any person may petition an agency requesting the adoption, amendment, or repeal of any rule." RCW § 34.05.330(1). The superior court dismissed the challenges based on the organizations' failure to first petition for rulemaking or to appeal the validity claims to the Forest Practice Appeals Board, which had primary jurisdiction.

The state court of appeals reversed on both issues, relying in large part on the recent decision in *Rios v. Dep't of Labor & Indus.*, 103 Wn. App. 126, 5 P.3d 19 (2000), *rev'd*, 145 Wn.2d 483, 39 P.3d 961 (2002), in which the Washington Supreme Court held that the APA allows judicial review of an agency's failure to act. Notably, the court of appeals' *Rios* decision specifically found that "a formal petition for rulemaking under RCW § 34.05.330 was not required in this case before the [appellants] could seek review of [the agency's failure to perform a duty required by law." 103 Wn.App. at 135. Based on the *Rios* holding, the court of appeals found no exhaustion requirement in "failure to act" cases, particularly when there is no rule or decision to challenge.

The supreme court rejected this argument without altering the decision in *Rios*. Instead, the court distinguished *Rios* on the grounds that its own decision in *Rios*, as the precedential authority, does not address the exhaustion argument.

The court then turned to the APA and the exhaustion requirement in RCW § 34.05.534, which allows for judicial review "only after exhausting all administrative remedies available." Contrary to the court of appeals' interpretation, the supreme court held that the term "may" in RCW § 34.05.330(1) "is used to convey that a procedure must be followed if a person wants to achieve what is permitted." 66 P.3d at 618. The permissibility of "may," under these circumstances, indicated that there is "no mandatory duty to pursue an adminis-

trative remedy—a party can simply give up." *Id*. Hence, sometimes, "may" means "must," and the failure to petition an agency to act may preclude judicial review.

The court bolstered its decision with a discussion of the "practical reasons" in favor of the exhaustion doctrine, including agency expertise in complex environmental matters, the public process afforded in agency rulemaking procedures, and the judicial need for a record to review. In addition,

> excusing the requirement that a petition for rule making be filed opens the door wide to judicial inference in agency decision making. Courts lack the expertise and resources to take over agency rule-making decisions. Furthermore, we are concerned that if the APA is construed as it was by the Court of Appeals, all a petitioner need do is complain that an agency has failed to carry out a statutory mandate and thereby bypass the entire administrative process. This would not be a desirable outcome.

Id. at 619.

This decision stands for the practical necessities preserved by the exhaustion doctrine. However, in the author's opinion, the court's mode of transportation was a bit suspect.

Keith Hirokawa

Northwest Ecosystem Alliance v. Wash. Forest Practices Bd., 149 Wn.2d 67, 66 P.3d 614 (2003).

LUBA Cases

■ LOCAL PROCEDURE

Waiver of Right to Raise Issues on Appeal

In *Miles v. City of Florence*, 44 Or LUBA ___ (LUBA No. 2003-007, Apr. 18, 2003), LUBA concluded that the petitioners' failure during the local proceedings to challenge the lack of findings addressing certain applicable approval criteria meant that petitioners had waived their right to assert error on appeal.

The petitioners appealed a city decision granting conditional use and design review approval for a vehicle fueling facility. The city's code requires a conditional use to satisfy six general criteria, including a criterion requiring conformance with the city's comprehensive plan (criterion A) and criteria requiring design review, the adequacy of public utilities and vehicle and pedestrian access, the availability of adequate land for the use, and compliance with any special conditions imposed by the city planning commission (criteria B–F). The planning commission approved the conditional use application and adopted the staff report as its decision. The staff report addressed only criterion A, and did not make any findings of compliance with criteria B through F. The petitioners appealed the commission's decision to the city council, and the council's decision upholding the conditional use approval also failed to address criteria B through F. The petitioners did not raise the lack of findings on these approval criteria in their appeal from the commission to the city council.

On appeal to LUBA, the petitioners asserted that the city's decision was flawed because the city council's findings did not address three of the criteria. The petitioners argued that they were entitled to raise this issue because the applicant/intervenor had identified these criteria as relevant in its application and LUBA may consider issues raised by any participant during the local proceedings. Relying on *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001), the petitioners argued that because the applicant had raised the issue of compliance with the three criteria in its application, petitioners had not waived their right to address noncompliance on appeal.

LUBA acknowledged a similarity between this case and *Central Klamath County CAT*, in which LUBA held that because an applicant had identified and addressed certain code criteria in its application, an opponent could challenge at LUBA the county's failure to adopt findings addressing the criteria, even though the opponent did not dispute the applicability of these criteria during the local proceedings. Nevertheless, LUBA distinguished the *Central Klamath County CAT* case on the basis that the issue there was whether the disputed criteria were in fact applicable to the local decision. In contrast, the issue in *Miles* is not whether the three criteria applied to the city's conditional use decision, but rather whether the city had erred by failing to address some of these criteria in its final decision. LUBA concluded that petitioners had waived their right to challenge the lack of findings addressing the three criteria, because they could have raised this issue in their local appeal but had failed to do so.

Editors' Note: The Miles decision was appealed to the Oregon Court of Appeals. Oral arguments took place on July 1, 2003.

■ DLCD 45-Day Notice

In *Stallkamp v. City of King City*, 43 Or LUBA 333, *aff'd*, 186 Or App 742, 66 P3d 1029 (2003), LUBA held that "not every deviation from the [DLCD 45-day notice requirement in ORS 197.610(1)] or its implementing rule is a 'substantive' error that must result in remand." 43 Or LUBA at 351–52. LUBA's ruling in *Stallkamp* departs from earlier cases in which LUBA held that a local government's failure to comply with the 45-day notice requirement is a substantive error

that requires reversal or remand. In *Stallkamp*, LUBA developed a more nuanced approach to this requirement, distinguishing between a local government's complete failure to give notice (as in *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 854 P2d 495 (1993)), which is a substantive error that requires remand, and a local government's failure to give notice a full 45 days in advance of the first evidentiary hearing, which may be a procedural error that requires remand only if a petitioner demonstrates prejudice to the petitioner's substantial rights.

In two recently decided cases, *Oregon Concrete and Aggregate Producers Association v. City of Mosier* (*OCAPA v. City of Mosier*), 44 Or LUBA ___ (LUBA No. 2002-166, May 1, 2003), and *No Tram to OHSU v. City of Portland*, 44 Or LUBA ___ (LUBA No. 2002-099, June 10, 2003), LUBA attempted to clarify "what kind or degree of deviation from the requirements of ORS 197.610 warrants remand, regardless of whether the petitioners . . . have demonstrated that the deviation prejudiced *their* substantial rights." *OCAPA v. City of Mosier*, 44 Or LUBA at ___ (slip op at 17).

The petitioner in *OCAPA v. City of Mosier* challenged the city's adoption of a comprehensive revision to its zoning ordinance. Although the notices the city mailed to affected property owners stated the correct date of the public hearing on the ordinance revision (November 6, 2002), the city's 45-day notice to DLCD mistakenly identified the date as November 7, 2002. The notice also did not contain the text of a new section of the ordinance (section 3.16) that was prepared during the local proceedings and that the city ultimately adopted. On appeal to LUBA, the petitioner argued that each of these notice errors was a substantive error that required remand of the city's decision.

LUBA found no error in the city's failure to attach section 3.16 to the original DLCD notice, noting that the statutory scheme contemplates that legislative post-acknowledgment amendments may be modified during the local hearing process. The post-acknowledgment statutes provide a remedy where the adopted amendments differ significantly from the amendments originally supplied to DLCD as an attachment to the 45-day notice. That remedy is to allow standing to appeal to "any other person," regardless of whether that person appeared or participated in the local proceedings. ORS 197.620(2). The fact that the city's original 45-day notice had not included section 3.16 as an attachment did not merit a remand.

On the other hand, LUBA termed the city's misstatement of the hearing date in the DLCD notice as "much more problematic" and relied heavily on the rationale underlying the court of appeals' decision in *Oregon City Leasing, Inc.* to conclude that the city's error was substantive and required remand. In the *Oregon City Leasing, Inc.* case, the court of appeals focused on the role of the 45-day notice in the post-acknowledgment scheme, which is to broaden participation opportunities by DLCD and those who might not receive local notices and rely on secondary notice through DLCD. This broader notice ensures that proposed amendments receive appropriate scrutiny for compliance with the statewide planning goals. The *quid pro quo* for this expanded notice and participation is ORS 197.625, which treats adopted post-acknowledgment plan amendments as consistent with the goals if the amendments are not appealed or are affirmed on appeal. Viewed in this context, whether a local government's errors in giving the 45-day notice require a remand "depends upon whether the errors are of the kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function." 44 Or LUBA at ___ (slip op at 18).

The petitioner in this appeal alleged that it is located in Salem and relies on DLCD notice to appear throughout the state on behalf of its members. Although the petitioner had submitted a two-page letter to the city almost two weeks after the first evidentiary hearing and that letter was read into the record at the second hearing on November 20, 2002, LUBA was hesitant to conclude that this belated participation had successfully avoided prejudice to the petitioner's interests. Additionally, LUBA was uncertain whether others had attempted to appear on November 7, the day after the evidentiary hearing, in response to the city's DLCD notice. As a result, LUBA refused to conclude that the city's notice error was harmless. In remanding the ordinance to the city, LUBA noted, "It is obviously not possible to now give 45 days notice before the first evidentiary hearing on November 6, 2002. However, it is possible to hold another evidentiary hearing and provide another notice of hearing to DLCD 45 days before that hearing is held." 44 Or LUBA at ___ (slip op at 19 n 20).

In the *No Tram* case, where LUBA reviewed post-acknowledgment plan amendments adopted by the city of Portland, LUBA applied and further refined its *OCAPA v. City of Mosier* holding. The petitioners in *No Tram* appealed a city council ordinance adopting the Marquam Hill Plan. The majority of the plan and its implementing measures were in Volume I of the ordinance, and the design guidelines were in Volume II. On February 15, 2002, the city mailed to DLCD an original notice of the April 2, 2002 first evidentiary hearing on Volume I before the planning commission. The notice contained a general description of the proposed amendments, but did not contain the text of the amendments. On March 7, 2002, the city sent a revised notice of the April 2 hearing to DLCD and attached a copy of the proposed text. The petitioners argued that the decision should be remanded because DLCD had received the

notice less than 45 days before the first evidentiary hearing. The city acknowledged that its first notice fell several days short of the required 45 days, but argued that this amounted to a procedural error that did not warrant a remand.

LUBA determined that sufficient notice had been given. LUBA first noted that the post-acknowledgment statutes require that three copies of the "text" of the proposed amendment be provided as part of the 45-day notice. DLCD's implementing rule defines "text" as the "specific language proposed." OAR 660-018-0020(2). The city's failure to attach the text of the proposed amendments to the February 15 notice was error. Although the city had attached the text to the revised March 7 notice, that notice was not mailed to DLCD until 26 days before the April 2 planning commission hearing. Nevertheless, LUBA concluded that the March 7 notice was sufficient to fulfill the purpose of the statutory scheme because it accurately described the initial evidentiary hearing date, referred to the February 15 notice, summarized the proposed amendments, and attached a copy of the proposed amendments. LUBA ruled that under these circumstances, the city's failure to provide the full 45-day notice did not require reversal or remand.

LUBA reached a different conclusion with respect to the city's notice to DLCD of the design commission's hearings on Volume II, the design guidelines. The city mailed a first notice of the design commission's initial evidentiary hearing on the design guidelines to DLCD on April 8, 2002. The city mailed a revised notice of the hearing to DLCD on April 26, 2002. Even though both notices identified the hearing date as April 18, 2002, the design commission did not hold its first evidentiary hearing on the design guidelines until May 16, 2002. The city argued that because the design commission could not take action on the design guidelines until the planning commission acted on Volume I, the city satisfied the 45-day notice requirement when it mailed to DLCD the February 15, 2002 notice of the Planning Commission's April 2, 2002 hearing on Volume I.

LUBA found the city's argument unpersuasive for several reasons. First, none of the notices sent to DLCD concerning the planning commission's hearings mentioned or attached the design guidelines in Volume II. Second, the planning commission never considered the design guidelines at any of its hearings on Volume I. Third, the April 8 notice to DLCD regarding the design commission's hearing did not include the proposed design guidelines as an attachment. The first notice to include the guidelines was the April 26 notice, but that notice incorrectly stated that the original evidentiary hearing date was April 18. Not surprisingly, LUBA concluded that

> a person receiving notice of hearing of the proposed [design guidelines] pursuant to ORS 197.610(1) would have no idea whether comments on the proposal would be considered after April 18, 2002. To the extent a party would be interested in providing evidence, the notice states that the design commission would be considering the amendments at their "May 23, 2002 meeting." It does not provide notice of the initial evidentiary hearing on May 16, 2002 at all. These errors are of a kind and degree that we cannot say that persons relying on DLCD's notice were not prejudiced.

44 Or LUBA at ___ (slip op at 12–13) (citation omitted). Accordingly, LUBA remanded the city's decision so that the city could give a new 45-day notice to DLCD and hold a new evidentiary hearing on the design guidelines.

Editors' Note: The author represented the city of Portland in the No Tram case.

Kathryn S. Beaumont