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Highlights

1 **Statute Prohibiting Live Sex Shows and City Ordinance Regulating Nude Dancers' Proximity to Patrons Held to be Unconstitutional Restrictions on Freedom of Expression**

3 **Oregon Court of Appeals Mostly Upholds Metro's 2002 Urban Growth Boundary Expansion**

6 **Dolan Revisited: Oregon Court of Appeals Decides Timing of Rough Proportionality Analysis**

9 **Oregon Court of Appeals Rejects the Concept of "Mutual Adverse Possession" by Competing Landowners**

Appellate Cases—Land Use

■ *STATUTE PROHIBITING LIVE SEX SHOWS AND CITY ORDINANCE REGULATING NUDE DANCERS' PROXIMITY TO PATRONS HELD TO BE UNCONSTITUTIONAL RESTRICTIONS ON FREEDOM OF EXPRESSION*

In two cases decided September 29, 2005, the Oregon Supreme Court struck down as unconstitutional a state statute prohibiting the promotion of live public sex shows and a city ordinance requiring nude dancers to stay at least four feet away from adult entertainment patrons. *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005); *City of Nyssa v. Dufloth*, 339 Or 330, 121 P3d 639 (2005).

The first case, *Ciancanelli*, concerned a Roseburg business that offered a variety of performances for individual customers or small groups for a fee. On two occasions undercover police officers observed shows in which the performers engaged in "sexual conduct" prohibited by ORS 167.062. The owner of the business and the performers were arrested, and the owner was convicted of promoting a live sex show in violation of ORS 167.062 and of promoting prostitution in violation of ORS 167.012, among other things. The owner appealed, and the Oregon Court of Appeals affirmed the convictions.

The owner appealed to the Oregon Supreme Court, asserting that ORS 167.062 failed the test for constitutionality articulated in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), because it is directed, by its terms, at a form of expression and does not fall within a well established historical exception to the prohibition of such laws in Article I, section 8, of the Oregon Constitution. The state argued that: (1) ORS 167.062 is not directed at expression and is, therefore, constitutionally sound, and (2) that the court should abandon the *Robertson* framework in favor of a balancing test.

The court agreed to re-examine the *Robertson* framework using the paradigm set out in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992). First, the court looked to the wording of Article I, section 8, of the Oregon Constitution, which states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The court deemed the words of the first phrase "so clear and sweeping" it was "beyond reasonable dispute that the protection extends to the kinds of expression that a majority of citizens in many communities would dislike-profanity, blasphemy, pornography-and even physical acts such as nude dancing or other explicit sexual conduct, that have an expressive component." *Ciancanelli*, 339 Or at 311.

The second phrase was more problematic. The court interpreted "responsible" to mean legal accountability, and "abuse" to mean use of the right "in a way or for a purpose that, under some unidentified standard, is improper or wrongful." *Id.* at 294. However, the court acknowledged that the provision "offered no further hint as to how abuse of the right . . . may be distinguished from a proper use of that right." *Id.*

Applying the second step of the *Priest* analysis, the court then looked to existing case law. Under *Robertson*, Article I, section 8, prohibits lawmakers from enacting restrictions that are directed by their terms at expression, but an exception to that rule exists for laws that are directed at restraining expression if they fall within a historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 were not intended to abolish.

The court next examined the history of the adoption of Article I, section 8, to better understand what the framers meant by "abuse of this right." The court found that two theories regarding freedom of expression were popular at the time of adoption of the provision. The court termed these the

"Blackstonian" view and the "Natural Rights" view. Under the Blackstonian view, named for William Blackstone, prior restraint is forbidden, but the legislature has full authority to punish, after the fact, any speech that it deems to be abusive. Under the Natural Rights philosophy, advanced by John Locke, the legislature would only have the power to punish or interfere with expression to the extent that it caused injury to the fundamental "natural rights" of other individuals. Ultimately, it was impossible to determine which theory prevailed because there was no sound basis for placing the drafters as a whole into either camp, and therefore, the state had to show that the *Robertson* framework was contrary to both theories before it would be overturned. The court acknowledged that *Robertson* was incompatible with a Blackstonian approach, but because *Robertson* was consistent with a Natural Rights approach, the court retained the *Robertson* framework.

In reaching this conclusion, the court noted that the historical exception prong of *Robertson* did not have an obvious connection to the Natural Rights theory, but it did not contradict the Natural Rights theory either. It merely recognized that the drafters did not intend to abolish certain traditional crimes. However, the court thought it necessary to clarify how the historical exception prong should be applied. The *Robertson* court drew a distinction between longstanding verbal crimes like solicitation, which the *Robertson* court concluded the drafters did not intend to eliminate, and crimes like seditious and criminal libel, which the drafters did intend to abolish. All of the crimes meant to be retained have at their core some underlying actual harm to an individual or group beyond any harm the message itself might cause. *Id.* at 318. Therefore, the court explained, historical crimes that ultimately focus on some non-speech harm are immunized from the prohibition in Article I, section 8, whereas historical crimes that are directed at expression both "in terms" and in their real focus require "a more direct expression of the framers' intent" to retain the laws. *Id.* at 319.

Applying *Robertson* to the situation at hand, the court stated that because it was the overall constitutionality of the statute that was at issue, not the particular conduct of the defendant, it did not matter whether the conduct in this specific instance was protected expression. *Id.* at 320. Because the statute was directed primarily, if not solely, toward the expressive aspect of the conduct described in the statute, i.e., a "live public show," the statute restrained free expression.

As to whether it fell under a historical exception, the court assumed for the sake of argument that a criminal prohibition on live sex shows was well-established at the time Article I, section 8, was adopted. However, because the statute did not focus on underlying non-speech harm, but instead was directed at protecting the viewer from the message itself, the court required a more direct expression of intent to retain the prohibition in light of Article I, section 8. Because such evidence was nowhere in the record, the court ruled ORS 167.062 unconstitutional on its face. *Id.* at 322.

As to the statute criminalizing the promotion of prostitution, the court found that the statute was directed not at expression, but at conduct. Therefore, there was no issue of facial constitutionality. Moreover, just because the defendant's conduct, promoting prostitution, occurred in association with a live public show, it was not transformed into protected expression. Thus, the defendant's conviction under ORS 167.012 was affirmed.

The second case, *City of Nyssa*, involved a local ordinance that required entertainers at nude dancing clubs to remain at least four feet away from patrons. The defendants in *City of Nyssa* were charged with violation of the ordinance after a police officer observed a nude dancer kneeling against a barrier surrounding the stage and shaking her hair in a patron's face while standing less than one foot from the patron. The defendants were convicted and fined. The convictions were upheld on appeal on the grounds that even if the ordinance was directed at expression, the ordinance was constitutional because nude dancing is not protected expression. *City of Nyssa*, 339 Or at 335.

The Oregon Supreme Court disagreed. The court first noted its decision to retain the *Robertson* framework in *Ciancanelli*. Noting that the Nyssa ordinance required nude dancers to keep a four-foot distance from patrons, but specifically excluded plays, operas, musicals, classes, seminars, exhibitions, and performances that are not "obscene," the court concluded that the ordinance applied only to one disfavored type of communication, making it indistinguishable from the ordinances held unconstitutional under prior case law, including *Ciancanelli*. Therefore the ordinance restrained free expression. 339 Or at 339-40.

Next, the court looked to whether the ordinance was nonetheless permissible because it fell within a well-established historical exception. It noted that it had just rejected the Oregon Court of Appeals' *Ciancanelli* decision that ORS 167.062 fell within a well-established historical exception to laws regulating live public shows involving nudity and sexuality. Since the City of Nyssa's argument for a historical exception did not differ from *Ciancanelli*, the court came to the same conclusion as in *Ciancanelli* that the ordinance was unconstitutional on its face.

Ciancanelli and *City of Nyssa* illustrate the breadth of Oregon's constitutional protection of freedom of expression. However, while a state law prohibiting live sex shows and a city ordinance requiring nude dancers to keep a four-foot distance from patrons were struck down as unconstitutional, other laws might constitutionally be used to regulate similar conduct. For example, although ORS 167.062 was held unconstitutional, the *Ciancanelli* defendant's conviction for promoting prostitution was affirmed because the court held that statute constitutional both facially and as applied.

Kimberlee A. Stafford

State v. Ciancanelli, 339 Or 282, 121 P3d 613 (2005); *City of Nyssa v. Dufloth*, 339 Or 330, 121 P3d 639 (2005).

■ *OREGON COURT OF APPEALS MOSTLY UPHOLDS METRO'S 2002 URBAN GROWTH BOUNDARY EXPANSION*

In *City of West Linn v. Land Conservation and Development Commission*, 201 Or App 419, 119 P3d 285, *rev. denied* 339 Or 610, ___ P3d ___ (2005), the Oregon Court of Appeals addressed the challenges to the 2002 Metro Urban Growth Boundary (UGB) expansion. As part of its 2002 periodic review of its comprehensive plan and land use regulations pursuant to ORS 197.628, Metro approved the expansion of the Metro UGB by 18,638 acres. As required by ORS 197.644(2), LCDC reviewed the results of the periodic review, including the proposed UGB expansion, and found the results in compliance with the statewide land use planning laws and goals.

Several petitioners challenged LCDC's final order on basically two grounds. First, the petitioners questioned the adequacy of Metro's analysis of the need to expand the UGB and second, disputed the adequacy of Metro's findings as to specific areas added to the UGB. With two exceptions, the court of appeals upheld LCDC's order.

As a preliminary matter, the court addressed the proper standard of review. LCDC final orders on periodic reviews are subject to review as contested cases under the Administrative Procedure Act, ORS 183.482. That statute establishes the same substantial evidence standard that usually applies to quasi-judicial decision-making. LCDC argued that because periodic review is more in the nature of legislative action, the proper standard of review is to determine if the action is supported by evidence "of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." The court rejected LCDC's contention both because the plain language of the statute prohibited it and because it found the substantial evidence standard to be a workable standard in this case.

Turning then to the petitioners' contentions, the court first rejected all of the claims that Metro was unjustified in concluding that the UGB required expansion. Substantial evidence in the record supported the economic forecasting tools relied upon by Metro to predict future growth, and the petitioners' claim that different forecasts should have been adopted was rejected.

The remainder of the decision addressed the petitioners' challenges to the inclusion of specific areas in the UGB expansion. The first challenge concerned land on the eastern edge of Oregon City. The petitioners challenged LCDC's conclusion that Metro had complied with Goals 1, 6, 7, 12, and 14 in adding that area to the UGB. The court rejected each challenge, finding that LCDC had properly determined that substantial evidence supported Metro's conclusions as to each of these goals.

The second challenge concerned application of the priority of land types for inclusion in the UGB as set forth in ORS 197.298(1). The land in question was 373 acres of second-priority "exception" land near the City of West Linn. The City argued that its disinterest in providing

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services to the area meant that Metro could not validly conclude that the land could be provided with public services in an "orderly" fashion, as Goal 14 requires. The court rejected this argument, finding that the City's disinterest in providing services did not mean that services could not be provided in an orderly fashion, and moreover that orderly provision of services was only one of several factors to be weighed in balance with other factors in determining Goal 14 compliance. Therefore, neither Metro nor LCDC erred in concluding that the evidence warranted inclusion of the land in the UGB.

Metro and LCDC fared less well on West Linn's second argument that Metro failed to provide a sufficient analysis of the site in comparison to alternative sites, as required by Section 3.01.020 of the Metro Code. That section required findings as to why the chosen site "was better than alternative sites." Metro's findings merely stated the reasons for including the site, but did not explain why it was better than alternative sites. Thus, the decision to include the West Linn site in the UGB was reversed and remanded for reconsideration of the alternatives analysis.

The third challenge, regarding agricultural lands in the Bethany area, also required analysis of the priority list of ORS 197.298(1). These lands were EFU lands, the fourth and lowest priority on the list, and the petitioner challenged the sufficiency of the evidence underlying Metro's conclusion that land of higher priority was inadequate to meet the projected need. LCDC upheld Metro's decision, and the court upheld LCDC, reasoning that the adequacy determination required by ORS 197.298(1) was not merely a matter of quantity of land, but rather one of suitability. Thus, the mere availability of higher-priority land adjacent to the existing UGB did not require inclusion of that land rather than lower-priority EFU land. Instead, because Metro found that the EFU land was more suitable in light of all the Goal 14 factors based on substantial evidence, its inclusion in the UGB expansion, rather than other higher-priority land, was justified.

The final challenge concerned 517 acres near Forest Park. The petitioners there challenged the inclusion of this land on the basis that its realistic development density was likely to be at 1 unit per 2 acres or less, which is a density more suited to rural development. The court found that while Goal 14 prohibits urban uses on rural land, the reverse is not true, and the mere fact that land can only support rural densities does not bar its inclusion in the UGB. However, as it had done with the West Linn site, Metro failed to conduct the analysis of the site in comparison to alternative sites as required by its own code, so the decision to include the Forest Park land was reversed and remanded as well.

On balance, the decision-making process of Metro and LCDC was upheld based on the substantial evidence standard. Metro's only failure was to provide sufficient analysis of alternative sites as required by its own code, an omission that likely can be rectified easily on remand. For the most part, the saga of the 2002 Metro UGB expansions has come to a close.

David J. Petersen

City of West Linn v. Land Conservation and Dev. Comm'n, 201 Or App 419, 119 P3d 285, *rev. denied* 339 Or 610, ___ P3d ___ (2005).

■ COURT ADDS SPECIFICITY REQUIREMENT TO ORS 197.195 (1)

In *Paterson v. City of Bend*, 201 Or App 344, 118 P3d 842 (2005), the Oregon Court of Appeals held that the following standard did not incorporate any specific comprehensive plan or zoning ordinances as approval criteria for this limited land use decision:

> The phased tentative plan shall include . . . the following elements . . . [a showing of] compliance with the Bend Area General Plan and implementing land use ordinances and policies. BSO 3.040 (2).

201 Or App at 348.

The applicant sought approval for the first phase of a 31-lot phased subdivision. While agreeing that the decision maker had to make a current finding that it was feasible to comply with all applicable approval criteria, the court refused to view any specific comprehensive plan provisions as approval standards.

ORS 197.195(1) requires that limited land use decisions be consistent with city or county comprehensive plans and land use regulations. The statute allows the local jurisdictions to incorporate "all, some or none of the applicable comprehensive plan standards into [their] land use regulations . . ." 201 Or App at 351. If the incorporation occurs after September 29, 1993, it has to be done through a post-acknowledgment amendment process, but the city or county is still allowed, by statute, to incorporate "all, some, or none" of the provisions.

Here, through the adoption of BSO 3.040(2), the City of Bend appeared to incorporate all of its applicable comprehensive plan provisions when it mandated a showing of "compliance with the Bend Area General Plan and implementing land use ordinances and policies" as an approval criterion for phased subdivision proposals. However, LUBA found that BSO 3.040(2) "falls far short of" a specific incorporation of any particular comprehensive plan provision and the applicant need not comply with the plan provisions. The court of appeals agreed.

Notwithstanding the unambiguous language requiring a showing of compliance with the Bend Area General Plan, the court found that the City was not required to apply any of the comprehensive plan provisions unless specific comprehensive plan standards were incorporated as specific approval criteria for limited land use decisions under the City's land use regulations. This holding appears to render the requirements of BSO 3.040(2) meaningless.

According to the court, to satisfy BSO 3.040(2), an applicant need merely allege "general" compliance with the Bend Area General Plan and implementing land use ordinances and policies. This decision now precludes parties from showing "noncompliance" with an approval criterion by demonstrating violation of specific comprehensive plan provisions unless those violated provisions have been specifically incorporated into the subdivision ordinance as approval standards.

Peggy Hennessy

Paterson v. City of Bend, 201 Or App 344, 118 P3d 842 (2005).

■ *PROOF OF A NONCONFORMING USE: CONTINUING USE UNDER TWENTY YEARS PRECEDING PLUS LAWFUL USE ON THE EFFECTIVE DATE OF THE ZONING REGULATIONS*

A petitioner's burden of proof to establish a nonconforming use can be more than what ORS 215.130(11) requires. The Oregon Court of Appeals held in *Aguilar v. Washington County*, 201 Or App 640, 120 P3d 514 (2005), that when the local development code requires it, a petitioner's burden of proof to establish a nonconforming use can be a two part task: (1) proof of continuous use for up to 20 years, and (2) proof that the use was lawful at the time zoning regulations were applied to the subject property.

For 16 years, from 1984 until 2000, an excavating business used two buildings on 34 acres along the Tualatin Valley Highway for storage. In 2000, petitioners bought the property and a year later connected the buildings and started using them as grocery storage for food and vending supplies on land zoned "Agriculture-Forestry." Washington County cited petitioners for building and zoning violations, which prompted petitioners to apply for a nonconforming use permit.

The county hearings officer found that petitioners proved the continuous use of the land for storage, but failed to prove that the use was lawful "at the time the first zoning ordinances went into effect" in 1974 as required by the Washington County Development Code. 201 Or App at 643. On appeal to LUBA, petitioners contested this second, "lawful use" criterion as beyond the requirement of ORS 215.130(11) to show a 20 year continuous use. Petitioners asserted that subsection (11) was the only requirement Washington County could impose under state planning law. LUBA upheld Washington County's code requirement and the court of appeals affirmed.

Writing for a unanimous panel, Judge Landau first found that the state statute contains an "overarching policy" in ORS 215.130(5) that requires lawful use as a condition precedent to continued use. 201 Or App at 645. The court then turned to ORS 215.130(11), which states "a county may not require an applicant for verification to prove the 'existence, continuity, nature and extent' of the use for a period exceeding 20 years" immediately preceding the date of application. *Id.* at 645.

The court found that the text of subsection (11) "suggests" two conclusions. First, subsection (11) is best read as a specific prohibition and not a general limitation because "it states what a county may *not* require." Id at 646 (emphasis in original). Second, the phrasing of the immediately prior subsection, subsection (10), connotes two rebuttable presumptions: both a continuous existence for a term of years and a lawful use. The fact that the legislature said nothing about the lawfulness of the use in subsection (11) "suggests that the legislature did not intend to prohibit a county from requiring proof of the lawfulness of the use. *Id.* at 646. Additionally, the court of appeals applied the analysis from their prior decision in *Lawrence v. Clackamas County*, 180 Or App 495, 43 P3d 1192, *rev den*, 334 Or 327 (2002) that interpreted ORS 215.130(11). Judge Landau characterized Lawrence to hold that an applicant "must establish two predicates" to verify a nonconforming use. 201 Or App at 648. Finally, the court found that the legislative history of subsection (11) "was not intended to alter the requirement that, to prove the existence of a nonconforming use, the applicant must establish its lawfulness before the zoning ordinance or regulation went into effect." *Id.* at 650.

Here, the petitioners did not establish that storage on their property was a lawful use back in 1974. Therefore, the court affirmed LUBA's decision to uphold Washington County's denial of petitioners' application.

The two Oregon counties discussed in this case—Washington and Clackamas—make the lawful use requirement an explicit predicate in their determinations. In other Oregon counties, the county code arguably makes lawful use a predicate requirement by simply defining a "nonconforming use" as a use that was lawful.

Matthew J. Michel

Aguilar v. Washington County, 201 Or App 640, 120 P3d 514 (2005).

■ *LAKE TAHOE PIER RAISES QUESTIONS ABOUT RECREATIONAL ACCESS EASEMENT*

As with so many cases arising out of the Tahoe Regional Planning Agency (TRPA), *Glenbrook Homeowners Ass'n v. Tahoe Regional Planning Agency*, 425 F.3d 611 (9th Cir. 2005), has a complex history involving multiple parties and multiple claims. In short, the Lawrence W. Ruvo Trust, Edward Fein, and others (which the court refers to as "Ruvo/Fein") sought approval from TRPA to build a pier on property owned by Fein. TRPA approved the project subject to conditions of approval that required a court to determine:

> (1) the pier "will not unreasonably interfere with any recreational/access rights [that the Glenbrook Homeowners Association (GHOA)] holds in the project area" ("Condition N"); and (2) "as of the date [of the TRPA's final approval of the project] the

> owners of the Fein parcels . . . do not have a legal right to use the GHOA community pier independent of actions by GHOA" ("Condition O").

425 F.3d at 614. Ruvo/Fein sought a declaratory judgment from Nevada state court as required by conditions N and O. The Glenbrook Homeowners Association and Glenbrook Preservation Association appealed TRPA's decision in the Eastern District of California. Others appealed TRPA's decision in the District of Nevada. The court refers to all of the opposition parties as "the Glenbrook parties." All three cases were consolidated in the District of Nevada.

The District of Nevada adopted a magistrate's report holding: (1) TRPA's approval was supported by substantial evidence; (2) Condition N was satisfied; and (3) Condition O was not satisfied because the Fein parcels had a right to use the GHOA pier.

The first issue primarily concerned whether TRPA should have applied NEPA. The Ninth Circuit found that NEPA does not apply. It reasoned that NEPA applies only to agencies of the federal government. TRPA was created through an interstate compact by Nevada and California. It also rejected the Glenbrook parties' argument to import NEPA requirements under the TRPA compact section regarding Environmental Impact Statements because the requirements that the Glenbrook parties sought to impose on TRPA came from judicial interpretations of the regulations that implement NEPA, not from NEPA or the TRPA Compact.

Concerning Condition N, the Ninth Circuit upheld the District Court's finding that the pier would not interfere with the GHOA access rights in the area. The court focused on one deed from 1977 in which GHOA and its members received an easement over the beach property at issue permitting use of the area for various uses allowed by TRPA. In that deed, the grantor also "'covenant[ed] and agree[d] that [the beach area] shall not be developed for other than recreational uses as defined by [TRPA]." 425 F.3d at 616. The Ninth Circuit noted that because GHOA's easement is limited by the express reservation of the property owner's right to develop the property for recreational uses, any such use cannot infringe on GHOA's easement. The Ninth Circuit also rejected a claim that the pier is prohibited by the Nevada Planned Unit Development Statute.

Concerning Condition O, the Court noted that TRPA's regulations would only allow the pier if the owners of the Fein parcel did not have access to the GHOA pier. The District of Nevada found that in a 1976 deed Glenbrook Company conveyed to Glenbrook Properties (which included the Fein parcels) the right to use the recreational areas in Glenbrook for recreational purposes. Ruvo/Fein argued that this holding was erroneous because under the doctrine of merger the 1976 deed was void and also that the Fein parcels were not conveyed in the deed.

The 1976 deed created an easement in favor of the dominant tenement described in Exhibit A upon the servient tenement described in Exhibit C (the recreational areas owned by Glenbrook Company). However, in a 1977 deed, Glenbrook Properties reconveyed Exhibit A to Glenbrook Company who still owned the property in Exhibit C. Thus, the court held that through the 1977 deed, Glenbrook Company acquired the present possessory fee simple title to both the servient and dominant tenements and the easement merged into the fee and was thus terminated.

The Ninth Circuit went further to discuss that even if the easement in the 1976 deed had not been extinguished, it still would not have created rights appurtenant to the Fein parcels to use the GHOA pier. The district court reviewed a 1987 deed in which Glenbrook Properties conveyed the community pier to GHOA. The district court noted that this conveyed only the pier and an easement over the land to maintain the pier. As such, the district court held that the pier was severed from the realty. Ruvo/Fein thus argued to the Ninth Circuit that Glenbrook Properties never assigned its purely contractual interest in access to the pier and that even if it did assign the right, it would benefit only Fein himself, not the Fein parcels (the relevant inquiry under the Condition O). The Ninth Circuit agreed, noting that it is well-settled that personal contracts do not run with the land.

Local governments may take note that despite TRPA's apparent intention to punt the difficult easement interference and access questions to the courts, it found itself defending its decision anyway.

Jeff Litwak

Glenbrook Homeowners Ass'n v. Tahoe Regional Planning Agency, 425 F.3d 611 (9th Cir. 2005)

Appellate Cases—Takings

■ DOLAN REVISITED: OREGON COURT OF APPEALS DECIDES TIMING OF ROUGH PROPORTIONALITY ANALYSIS

In October, the Oregon Court of Appeals addressed an important practical and procedural issue under the "rough proportionality" test set out by the U.S. Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L .Ed. 2d 304 (1994): *when* must a governmental entity make findings that exactions required of a permit applicant are "roughly proportional" to the burdens the development places on the public.

In *Hammer v. City of Eugene*, 202 Or App 189, 121 P3d 693 (2005), the City of Eugene had not issued "rough proportionality" findings when it imposed various exactions on applicants for minor partitions. One hundred seventy-three applicants, who had been certified as a class, sued for inverse condemnation. The trial court granted partial summary judgment to the plaintiff class on liability, holding that the city was required to make "rough proportionality" findings at the time it made the exactions. The city took an interlocutory appeal, contending that it could

reserve the issue of "rough proportionality" for trial. The court of appeals agreed and reversed.

The court of appeals found that at least where an exaction is first challenged in an inverse condemnation proceeding (rather than administratively) nothing in *Dolan* requires findings at the time an exaction is made. The court reasoned that the Fifth Amendment's Takings Clause protects substantive rights and not a particular procedure for vindicating those rights: "[T]he Takings Clause is concerned not with process, but rather with substantive restrictions on governmental authority." 202 Or App at 197. The court noted that the presence or absence of findings on "rough proportionality" at the time an exaction takes place does not control whether or not the exaction imposed is Constitutionally proper. Rather, it concluded that when an exaction is first challenged in an inverse condemnation proceeding "rough proportionality" goes to the merits of whether there was a taking and, as such, is normally a question of fact for trial.

Even under *Hammer*, however, partial summary judgment might still be possible for a plaintiff property owner in an inverse condemnation case if it put forward evidence of the lack of "rough proportionality" on summary judgment and the government agency did nothing to rebut that evidence. In that scenario, there would be no issue of fact for trial and partial summary judgment should still be warranted notwithstanding *Hammer*.

Mark J. Fucile

Hammer v. City of Eugene, 202 Or App 189, 121 P3d 693 (2005).

■ *NO TAKING FROM IRRIGATION WATER CUT-OFF SAYS COURT OF FEDERAL CLAIMS*

Klamath Irrigation District v. United States, 67 Fed. Cl. 504 (2005), involved the issue of whether water was "property" under the Fifth Amendment and the circumstances of this case. The plaintiffs, water districts and farmers in the Klamath Basin of Oregon and California, claimed a taking and breach of contract for loss of water in 2001 because of other governmental water priorities. The latter claim was also brought under plaintiffs' alleged water rights.

Much history is relevant to the case. Congress passed the Reclamation Act of 1902 to direct the Secretary of the Interior to provide water projects to reclaim arid lands, especially in the western United States and to acquire title to the water used. In 1911, the Warren Act allowed cooperation of the Secretary with irrigation districts for the delivery of water wherein users would receive a "water rights certificate" for the lands served and a certificate holder would be liable for a share of the debt in the project. This pattern continued in subsequent federal legislation so that the federal government ultimately contracted solely with irrigation districts in reclamation projects to finance the delivery of water. The Klamath Project was authorized in 1905 under the Reclamation Act to serve 240,000 acres of irrigable land and to supply water to certain national wildlife refuges as well. Because Klamath Lake is shallow and unable to store much water, the federal government was required to consider the Endangered Species Act ("ESA") in the allocation of water. This meant that it was obliged to undertake a biological assessment of impacts of project operations on threatened or endangered species and, as a practical matter, to rely on other federal agencies to do so.

The legal history of Oregon water law also played a role. In 1905 the Oregon legislature enabled the federal government to acquire land and water in connection with reclamation projects and gave the United States control over the waters acquired. Oregon law also shifted the entities who contract with the United States to administer water and water rights from the landowner to irrigation districts, as well as the repayment of obligations. From this the court inferred that individual water rights were extinguished or superseded by the certificate program in exchange for a share of project water. However, the water schemes were neither uniform nor clear, so that some farmers and districts claimed water rights notwithstanding the federal legislation. However, the federal and state legislation did not affect the rights of owners of various Native American tribes in the basin. To make matters more complicated, Oregon legislation distinguished between water rights claims before 1909 and those after that date, all of which were potentially subject to a state adjudication process.

In 2001, there was a drought and the federal government was required to ration water consistent with its Endangered Species Act ("ESA") obligations, which caused it to allocate some water to assure the survival of listed species. The plaintiffs brought this action after defendant announced termination of water delivery, which the plaintiffs alleged was due them under the Klamath Basin Compact. The Court of Claims had entered a previous order to the effect that plaintiffs had only a "beneficial interest" in water from the project, but no property right. The plaintiffs then filed a motion for summary judgment on the takings claim.

The court began its analysis by stating that property interests were defined by state law and noting that economic interest did not rise to the level of a property right. In Oregon and California, water belongs to the public and is held in trust by the state, which regulates its use. The court then looked to non-constitutional law (for the Constitution does not establish property rights), and the laws of the two states on the property issue. Beginning with the Reclamation Act of 1902, the right to use water was declared to be appurtenant to the land irrigated. The plaintiffs claimed that this act gave them a property interest in the water under federal law. However, the court noted that these same acts also required the federal government to proceed in conformance with state water law.

The court noted that affected states passed legislation to facilitate its implementation following the passage of the

Reclamation Act. For example, the Oregon legislature passed a law that appropriated previously unappropriated water to the United States once it announced the reclamation project, allowed use of Upper Klamath Lake for storage, and ceded to the United States any land not covered by a water project. The United States also acquired other water rights in the area by purchase and the State of Oregon did not appropriate further waters in the basin.

The court concluded that the United States had acquired all post-1905 water rights and turned to the pre-1905 appropriations, which also preceded a 1909 Oregon Water Rights Act that preserved previously vested water rights. Some of these rights had been exchanged for rights to receive water from the project. Post-1905 interests were found to be subject to the project. Contracts to sell water gave authority to the United States to determine the actual amount used and avoided liability for failure to deliver water promised. The court concluded that any declaratory relief on the contract with the United States was limited to rights under those agreements, nearly all of which contain "shortage clauses," absolving the United States from damages for failure to deliver water, so no taking liability accrues either on behalf of the districts or individual users.

The briefing schedule left for another day whether the United States had breached the various agreements; however, under the agreements, which were the sole source of any property rights, there were apparently no damages for a taking, and it appeared there were no damages under most of the agreements either, given the shortage clauses. In any event, the Sovereign Acts Doctrine shielded the United States from contract liability because its sovereignty applied (unless a court finds that the sovereign's exercise of the legislative power was meant to affect its contract obligations, rather than be a mere incident to the accomplishment of a broader governmental objective). After reviewing the case law, the court said that the plaintiffs faced an "uphill battle" to show that the Endangered Species Act was designed to abrogate existing water agreements.

The court noted its previous decision in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl 313 (2001), which found a physical taking by federal water limitations caused by application of the ESA. The court observed that this decision "appear[ed] to be wrong on some counts, incomplete in others, and, distinguishable, in all events." 67 Fed. Cl. at 537. In saying so, the court noted that the *Tulare* decision which found the contract rights were property, did not consider state water law and did not consider the breach of contract case.

Finally, the court noted that post-1905 interests (by patent deed from the United States or water rights under Oregon law) were subject to the "first in time, first in right" rule, so could not be infringed on by the laws and agreements to which they were bound. While the Klamath River Basin Compact has a provision that no irrigation or domestic use of water shall be taken without just compensation, the United States was not a party to the Compact and other provisions made water use subject to applicable law. The court concluded that disappointed expectations do not give rise to property rights if those rights were not present in the first place and found for the defendant.

This is a lengthy case which deals with the mysteries of federal and state water laws and a takings context. It makes sense to say that takings law only applies to property, which is defined by state law. By surrendering water rights for federal water project allocations, the farmers in this case were left with a reduced expectation of water delivery which, in most cases, was not compensable if the water could not, in fact, be delivered.

Ed Sullivan

Klamath Irrigation District v. United States, 67 Fed. Cl. 504 (2005).

Appellate Cases—Real Estate

■ OREGON COURT OF APPEALS DECLINES TO AWARD FEES UNDER ORS 105.180

A party is not entitled to receive a fee award under ORS 105.180 if the party seeks a declaratory judgment for sharing an easement's maintenance costs instead of seeking contribution for an already-incurred liability. In *Guild v. Baune*, 200 Or App 397, 115 P3d 249, *adhered to on recons.* 201 Or App 514, 119 P3d 281 (2005), the Oregon Court of Appeals reversed and remanded a judgment awarding attorney fees, costs, and prevailing party fees to the defendants who shared the use of an easement with the plaintiffs. The parties owned a total of seven lots, each benefited by an access easement. There was no agreement establishing the parties' rights of use or maintenance and repair obligations with respect to the easement.

In the absence of an agreement to share the cost of maintaining an easement in repair, ORS 105.175 provides that the easement holders shall share the repair and maintenance costs in proportion to each holder's use. ORS 105.180 allows a holder to bring a civil action for contribution against another holder who "fails, after demand in writing to pay the holder's proportion of [such] costs" and allows the prevailing party to recover all court costs, arbitration fees, and attorney fees.

At trial the plaintiffs alleged that the easement was in disrepair and the parties had been unable to agree how it should be maintained and how the costs of maintenance should be allocated. The plaintiffs asked that the court do so and award attorney fees under ORS 105.180. The plaintiffs did not claim they had paid for the easement's maintenance or seek reimbursement for past expenses. The trial court judgment established the level of maintenance the parties were obligated to contribute toward and their proportionate shares of that obligation. Each of the parties claimed attorney fees, and the court entered supplemental judgments in favor of the defendants, awarding fees under ORS 105.180.

The court of appeals cited the plain language of ORS 105.180(1) in reversing and remanding the trial court's decision, noting that that statute authorizes a civil action only for money damages, specific performance, or contribution. The court determined that, despite the parties' belief, the plaintiffs' claim was not one for contribution because no common liability was incurred by the plaintiffs and no written demand was made by them for payment. An action for contribution typically is premature until the party seeking contribution has incurred and satisfied the liability that the party obligated to contribute has not shared. The court reversed and remanded to the trial court for reconsideration of the fee award under the other causes of action brought by the plaintiffs.

Kathleen Sieler

Guild v. Baune, 200 Or App 397, 115 P3d 249, *adhered to on recons*. 201 Or App 514, 119 P3d 281 (2005).

■ *OREGON COURT OF APPEALS REJECTS THE CONCEPT OF "MUTUAL ADVERSE POSSESSION" BY COMPETING LANDOWNERS*

In *Harrell v. Tilley*, 201 Or App 464, 119 P3d 251 (2005), the Oregon Court of Appeals reversed a trial court's decision recognizing a cause of action for "mutual" or "joint" adverse possession. The court of appeals held that such a concept was untenable as neither party established the necessary exclusivity required under Oregon case law.

The plaintiffs and the defendants owned adjacent parcels containing a strip of land between the edges of their respective property lines known as "the Gap." The Gap served as an access road for both parcels from approximately 1938 through 1990 and contained an irrigation well powered by an electrical line running across the defendant's parcel. After the plaintiffs purchased their parcel in 2001, they elected to construct a fence along the gap which spurred both a matching fence by the defendants and the case at bar.

At trial, the plaintiffs alleged a number of claims against the defendants seeking (1) title to the Gap on the basis of adverse possession and (2) a prescriptive easement across the defendants' parcel for the power line to the well. The defendants answered with a counterclaim alleging adverse possession of the Gap and well by virtue of the mutual use of the gap and well by both parties. The trial court initially issued a letter opinion finding that neither party could make claim to this property because the state was the rightful owner as the previous owner died intestate with no heirs. The state soon thereafter demonstrated that conclusion was reached in error, as the previous owner had heirs to whom the estate had been distributed in probate.

The plaintiffs subsequently located the successors-in-interest and obtained from them quitclaim deeds to the Gap. As no judgment had yet been rendered, the plaintiffs requested that the trial court reconsider its rejection on the basis of the newly-obtained quitclaim deed. The trial court concluded both parties' predecessors-in-interest had acquired joint title to the gap through "joint adverse possession" long before the quitclaim deeds were signed, thus giving them no legal effect.

On appeal, the plaintiffs argued they should have sole ownership of the Gap as well as a prescriptive easement for the power line to the well. The court of appeals denied the claim for sole ownership on the basis that the plaintiffs did not demonstrate the element of hostility required to establish adverse possession by clear and convincing evidence. Citing *Hoffman v. Freeman Land and Timber, LLC*, 329 Or 554, 924 P2d 106 (1999), the court found there was no evidence that the plaintiffs' predecessor-in-interest believed he owned the Gap or that he intended to wrest control from its true owners. Without such evidence, the court deemed that the predecessor-in-interest use of the Gap was not hostile to the interests of the record holder. The prescriptive easement claim was also denied because the court found that the use of the defendants' property was permissive, thus barring a finding of easement by prescription, citing *Kondor v. Prose*, 50 Or App 55, 60, 622 P2d 741 (1981).

Turning to the concept of mutual adverse possession, the court cited *Hoffman* for its proposition that Oregon adverse possession law requires a degree of exclusive possession characteristic of that which an owner of the property would exercise. As the use of the Gap from 1956 onward was insufficiently exclusive by any one party, the court held that neither party adversely possessed ownership from the record title holders.

The court was unmoved by the defendants' appeal to the persuasiveness of the Texas Court of Civil Appeal decision in *Anzaldua v Richardson*, 287 SW2d 299 (Tex Civ App 1956), which held that two brothers acting in concert can acquire joint title by adverse possession. The court of appeals side-stepped the issue of whether the "joint adverse possession" recognized in *Anzaldua* should apply in Oregon by pointing out the materially different circumstances between the two fact patterns, such as the two parties in the instant case were neither related nor did they act in concert. The court instead considered this case indistinguishable from *Werner v. Brown*, 44 Or App 319, 323, 605 P2d 1352, *rev den* 289 Or 71 (1980), which held that, "The requirement of exclusive use is not met when two or more persons are in possession of the property." After concluding that reasoning was dispositive in the case at bar, the court of appeals held that the trial court erred in entering judgment for the defendants on their counterclaim for joint adverse possession through mutual use.

As the "mutual adverse possession" premise of the trial court's treatment of the quitclaim deeds was deemed erroneous, the court of appeals reversed the trial court's judgment against the plaintiffs' quiet title claim and remanded it back for reconsideration of the legal effect of the plaintiffs' belatedly acquired quitclaim deeds.

David Richarson

Harrell v. Tilley, 201 Or App 464, 119 P3d 251 (2005).

■ *LANDOWNER ENTITLED TO OPPORTUNITY TO PROVE EASEMENT OVER FEDERAL LAND*

In *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005), the 9th Circuit ruled that the district court had improperly granted summary judgment to the United States of America and the National Parks Service (Park Service). The plaintiff's predecessor-in-interest received title to property within the boundaries of Glacier National Park (Park) under the Homestead Act in 1916. The plaintiff's property had been accessible by Glacier Route 7 since 1901 and the plaintiff's predecessors had lived year-round on the property into the 1960s.

In 1975, the Park Service banned snowmobiling within the Park and in 1997 published a policy of closing Glacier Route 7 to winter public vehicular access, which policy was then announced to local media in 1998. Since 1976, the Park Service controlled access to Glacier Route 7 by means of a locked gate, although the Park Service allowed residents through the gate whenever asked until 1999. In 1999, the plaintiff informed the Park Service that he and his family intended to reside year-round in the Park. The Park Service responded that it would not allow access through the gate once Glacier Route 7 was closed to public access. The Park Service also denied the plaintiff's application for a special use permit for motorized access.

Plaintiff sued in 2000 under the Quiet Title Act, 28 USC § 2409a, which has a 12-year statute of limitation. The court noted that because plaintiff claimed title to an easement, rather than fee, his action accrued only after he "knew or should have known the government claimed the exclusive right to deny [plaintiff's] historic access to Glacier Route 7." 425 F.3d at 727. Adducing such proof was complicated by the government's power to regulate.

Given the government's power to regulate, neither the 1975 ban on snowmobiles nor the installation of locked gates constituted notice to plaintiff that the Park Service claimed exclusive ownership. The government did not introduce any evidence that it had denied any resident access to Glacier Route 7 at any time during the limitations period. Further, the court observed that even if the Park Service denied access to an impassable road, it may still not have constituted sufficient notice to start the limitations period since denying access would have been within the government's regulatory powers.

Consequently, the Court reversed the summary judgment and remanded plaintiff's claims to the district court.

Tod Northman

McFarland v. Norton, 425 F.3d 724 (9th Cir. 2005).

LUBA Cases

■ *GOALS 3 AND 4*

The issue before LUBA in *Wetherell v. Douglas County*, LUBA No. 2005-070 (Aug. 25, 2005), was whether the county erred in concluding that 55 acres of a 135-acre parcel was not "agricultural land" within the meaning of Goal 3 or "forest land" within the meaning of Goal 4. Based on this conclusion, the county approved comprehensive plan and zoning map changes from agricultural and forest designations to non-resource designations for the 55-acre portion to allow it to be subdivided for rural residential development. The county did not adopt exceptions to Goals 3 and 4 before approving the comprehensive plan and zoning changes.

The undisputed facts show that if the 135-acre Parent Parcel is viewed as a whole, it has soils that are predominantly Class I-V and fall within the Goal 3 definition of agricultural land. Similarly, 80 acres of the Parent Parcel are currently used for commercial forest purposes and, therefore, it is forest land within the meaning of Goal 4. Accordingly, the Parent Parcel could not be re-designated and rezoned for non-resource purposes unless the county first adopts exceptions from Goals 3 and 4. If, however, the 55-acre portion is analyzed separately, the soils on this portion do not qualify as either agricultural or forest lands as defined by the two goals.

On appeal to LUBA, the petitioner argued the required unit of land to be evaluated under Goal 3 is the Parent Parcel and the county erred by addressing only the 55-acre parcel and failing to first approve a goal exception. The starting point for LUBA's analysis was the 3-part definition of agricultural land in Goal 3 and its implementing administrative rule. The first prong defines agricultural land in terms of predominant soil class. Before applying this first prong, a unit of land must be selected so that the analysis of whether Class I-IV soils are predominant can proceed. Neither Goal 3 nor the administrative rule identify the unit of land that must be used for this analysis.

After a careful review of relevant LUBA and appellate decisions, as well as more recent legislative and administrative rule changes, LUBA concluded that the Parent Parcel is the appropriate unit of land to be evaluated under Goal 3. Most persuasive to LUBA were LCDC's adoption of administrative rule changes in 1992 in which LCDC clarified that the predominant soil capability classification applies to a "lot or parcel." LUBA acknowledged that this terminology neither expressly prohibits nor authorizes inventorying agricultural land on a sub-parcel or sub-lot basis. However, LUBA noted that "it appears to assume that such inventories will examine whole lots and parcels, rather than portions of lots and parcels." Accordingly, LUBA concluded that the Goal 3 rule does not permit "portions of existing parcels that are predominantly Class I-IV soils to be analyzed on a sub-parcel basis so that sub-

areas within that parcel can be eliminated from the county's inventory of agricultural land." Since the county applied the "predominant soil class" prong of the agricultural land definition to only the 55-acre portion, LUBA held the county violated the Goal 3 rule and reversed the county's decision.

■ *LOCAL PROCEDURE*

Local Record

In resolving record objections in *Fleming v. City of Albany*, LUBA No. 2005-051 (Order, Aug. 24, 2005), LUBA addressed the often ambiguous issue of when documents are "placed before" a local decision maker for purposes of inclusion in the local government record in a LUBA appeal. The disputed documents in *Fleming* consisted of an application for the challenged annexation, traffic, and geotechnical reports concerning the application, and correspondence between city staff and the applicants' experts concerning the proposed annexation. They were received by the city planning staff during its review of the annexation, placed in the planning file, discussed or referred to in the staff report, and explicitly referred to in the council's decision approving the annexation. Petitioners objected to the city's inclusion of these documents in the record based on an affidavit of a city council member who said that these items were never placed before the city council. LUBA denied the record objection, stating that documents may be "'placed before' the final decision maker in ways other than physically setting the item in front of the decision maker." Given the lack of explanation for the city councilor's statement and the fact that the council's decision expressly referred to the disputed documents, LUBA concluded the documents were properly included in the record.

Opportunity for Rebuttal

LUBA's decision in *Ploeg v. Tillamook County*, LUBA No. 2005-079 (Dec. 2, 2005), is a reminder of the procedural pitfalls that can accompany requests for staff analysis after the evidentiary record in a quasi-judicial proceeding is closed. This appeal involved the county's approval of a non-farm dwelling on remand from LUBA. The county conducted an additional evidentiary hearing on January 26, 2005 and held the record open for several weeks after the hearing. At the continued hearing on March 15, 2005, the county staff presented a written "independent analysis" of the evidence concerning two of the applicable standards and verbally summarized the analysis. The petitioners objected to the staff analysis and asked for an opportunity to rebut it, which the county board denied. The board voted to approve the non-farm dwelling and signed the final written decision on April 27, 2005.

On appeal to LUBA, petitioners argued the county board erred in considering the written and verbal staff analysis without providing petitioners an opportunity for rebuttal. The county responded that it was unclear whether the analysis was ever submitted to the county board and, even if it was, the county's findings only referred to staff's verbal analysis and not to the written document. Additionally, the county argued the staff's analysis was not new evidence and, in any event, the county's findings relied solely on the applicant's evidence in concluding one of the applicable standards was satisfied.

LUBA was not persuaded. The minutes of the March 15th hearing indicated the county board actually received the staff's written analysis and considered it in making their tentative decision to approve the application. Most important, the staff analysis relied on different information than other studies in the record and, as a result, constituted new evidence. LUBA described the line between permissible and impermissible staff assistance to a decision maker as follows:

> It is certainly permissible, even during a non-evidentiary phase of the proceedings, for staff to assist the decision maker by expressing the staff position with respect to whether evidence in the record demonstrates compliance with applicable criteria. However, the [written staff analysis] appears to go far beyond such assistance. (Slip Op. at 8)

Under these circumstances, the county board had two choices: (1) to reopen the record to allow petitioners and others to respond to the staff analysis, or (2) to reject the new evidence as untimely. Since the county board did neither, LUBA concluded the petitioners' substantial rights were prejudiced and remanded the county's decision.

■ *LUBA PROCEDURE*

Intervention

Potential intervenors beware! LUBA ruled that it lacked the authority to accept an untimely motion to intervene in *Grahn v. City of Newberg*. LUBA No. 2005-080 (July 15, 2005) and denied ODOT permission to intervene in the appeal. In this appeal the parties stipulated to extend the due date for the record by one week and ODOT filed a motion to intervene on behalf of the city shortly before the extended due date for the record. Petitioners objected to ODOT's motion on the ground that it was not filed within 21 days of the date the notice of intent to appeal was filed. ODOT argued that LUBA should accept its motion because by extending the due date for the record, the parties automatically extended all other deadlines in the appeal under LUBA's rules (OAR 6601-0100067(5)), including the deadline for filing a motion to intervene.

LUBA agreed that an extension of time under its rules automatically extends the time for all subsequent filings. It also agreed that "subsequent filings" "includes all deadlines that, as of the date of the extension, have not yet passed." (Order at 3) Thus, for purposes of LUBA's rules,

the deadline for filing a motion to intervene had not yet passed when ODOT filed its motion.

However, LUBA agreed with the petitioners that its enabling statute establishes an absolute deadline for filing a motion to intervene—a deadline that cannot be extended. Specifically, ORS 197.830(7)(c) uses "unequivocal language" and says that failure to file a motion to intervene within the 21-day period prescribed by ORS 197.830(7)(a) "shall result in denial of the motion to intervene." The fact that the legislature prescribed the consequences for failing to comply with this 21-day deadline "suggests that the legislature regards that deadline as a particularly important one." (Order at 5) LUBA contrasted the statutory language concerning motions to intervene with the language describing other deadlines in its enabling statute—which LUBA is given the express authority to extend. The absence of an equally specific grant of authority to extend the 21-day period for intervention "is strong evidence that the legislature wanted the deadline to be rigorously enforced and, by implication, that the legislature did not want that deadline to be extended." (Order at 4) LUBA denied ODOT's motion as untimely.

Attorney Fees

LUBA's award of attorney fees in *Gallagher v. City of Myrtle Point*, LUBA No. 2004-2223 (July 27, 2005), is one of the few instances in which LUBA has awarded attorney fees in favor of a local government and against a *pro se* petitioner. The petitioner appealed the city's approval of a variance, which allowed the applicant to improve a section of residential street with a reduced width of 24 feet rather than the required 36 feet. Instead of a brief, petitioner submitted a letter that LUBA described as "so noncompliant with the requirements for petitions for review that we did not even recognize it as a petition for review." (Order at 2) LUBA ultimately dismissed the appeal because the letter did not address standing, the facts, or LUBA's jurisdiction and contained no assignments of error. At best, petitioner's letter expressed concern about drainage problems in the area, but did not explain what relationship drainage issues had with a variance for street width. LUBA noted that the city filed a brief attempting to respond to petitioner's letter. The petitioner did not respond to the city's motion for attorney fees. Under the circumstances, LUBA concluded the city's request for an award of $1,722 in attorney fees was reasonable and granted the city's motion.

Kathryn S. Beaumont

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