OREGON STATE BAR 1935

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 28, No. 3 • June 2006

Also available online

Highlights

Appellate Cases – Land Use

■ ASSERTION OF A STATUTORY RIGHT AFFECTING ONE'S OWN PROPERTY IS A JUSTICIABLE CONTROVERSY

Orr v. East Valley Water District (Orr v. EVWD), 203 Or App 430, 125 P3d 834 (2005), *rev den*, 340 Or 308, 132 P3d 28 (2006), involved a water district that includes land in Marion and Clackamas counties. The district was formed without an election of the owners of the properties in the district, consistent with ORS 545.029(3), because the formation petition was signed by all property owners within the district who would be subject to charges and assessments.

Property owners inside the district who did not sign the petition and have not been assessed for its activities have unsuccessfully appealed the formation of the district and have unsuccessfully attempted to form an alternative district. *See Butte Creek Assn. v. Marion County*, 174 Or App 149, 23 P3d 997, *rev den*, 332 Or 430 (2001) and *Orr v. Clackamas County*, 177 Or App 329, 34 P3d 1217 (2001).

In *Orr v. EVWD* the unsuccessful litigants filed a petition under ORS 545.099 to exclude their land from the district. The water district denied the petition. Petitioners filed for a writ of review in circuit court and moved for summary judgment. The water district filed a cross-motion for summary judgment asserting that the claim was not justiciable because petitioners had not shown that the denial of their petition for exclusion had an existing practical effect on their rights.

Instead of granting either summary judgment motion, the trial court dismissed the action as not justiciable, relying on *Utsey v. Coos County*, 176 Or App 524, 539–40, 32 P3d 922 (2001), *rev dismissed as moot*, 335 Or 217 (2003).

On appeal petitioners renewed their argument that ORS 545.099(2) accords them an absolute right to have their land removed from the district because it provides that, faced with such a petition, the district "shall enter its order approving the petition" and it does not provide for denial of a petition.

After reviewing the holdings in *Utsey* (the legislature does not have authority to confer standing on persons who have no apparent legal interest in the outcome), *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004) (a controversy is not justiciable if the party bringing the claim has only an abstract interest in the outcome), and *League of Oregon Cities v. State of Oregon*, 334 Or 645, 56 P3d 892 (2002) (certain petitioners failed to show how Measure 7 would affect them), the court of appeals held that the circumstances in *Orr v. EVWD* were "materially different."

The court held that the legal interest in *Orr v. EVWD* was not abstract. It was the petitioners' own properties that were the subject of the action. And, if they were correct about the meaning of ORS 545.099(2), they had a positive statutory right to exclude their property from the district. Because a judgment on the merits of their petition would have a practical effect on the legal status of their property, their claim was justiciable. Because petitioners asserted an injury to a statutory right affecting their property, they had standing under ORS 34.040(1). The court of appeals reversed and remanded the matter to the trial court.

Larry Epstein

Orr v. East Valley Water District, 203 Or App 430, 125 P3d 834 (2005), *rev den*, 340 Or 308, 132 P3d 28 (2006).

■ THAT GAP OF 26 CHAPTERS MEANS AN AWFUL LOT

In *Home Builders Association of Lane County v. City of Springfield*, 204 Or App 270, 129 P3d 713 (2006), the Oregon Court of Appeals reviewed LUBA's decision to uphold the cloak of protection, for purposes of its jurisdiction, that ORS 223 offers to system development charge (SDC) project lists. Petitioners argued that failing to apply the comprehensive plan and goals provisions to an SDC facility plan "takes the 'plan-

ning' out of land use planning." Although Chapters 197 and 223 are not exactly east and west, the court agreed with LUBA that they did not necessarily need to meet.

The Metropolitan Wastewater Management Commission (MWMC), a creation of Springfield, Eugene, and Lane County, adopted a list of projects to be funded in part by SDCs. The home builders association opposed certain of these projects and how they were to be funded. LUBA dismissed for lack of jurisdiction.

The court acknowledged that Goal 11 (Public Facilities and Services) governs implementation of MWMC's plan. It went on to observe that it may have made more sense to combine the comprehensive planning and SDC program decisions. However, it held that, because ORS 223.314 specifically exempts adoption of an SDC project list, MWMC could make this choice. Similarly, ORS 197.712(3) exempts project timing and financing provisions of public facilities plans from LUBA's review.

Since ORS 223.314 and ORS 197.712(3) took the project list, project timing, and financing decisions off of LUBA's plate, the leftover question here was what, if any, aspect of the SDC program was open for LUBA review. Nonetheless, this decision certainly left open the possibility that adoption of an SDC program could incorporate planning decision.

In a broader context, the court relied on one of the many specific exceptions now stated to the venerable "land use decision" definition. Although exceptions do help guide the practitioner, nothing in the court's treatment of the subject dissuades the land use lawyer's saying—"when in doubt, file everywhere."

Ty Wyman

Home Builders Association of Lane County v. City of Springfield, 204 Or App 270, 129 P3d 713 (2006).

■ *WAL-MART'S LIMITED LAND USE PROCESS IN OREGON CITY: PERHAPS NOT AS LIMITED AS YOU THOUGHT*

In *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 129 P3d 756 (2006) the Oregon Court of Appeals considered Oregon City's denial of Wal-Mart's site plan and design review application. Wal-Mart prevailed on appeal to LUBA, and the city appealed to the court of appeals. The court of appeals reversed and remanded LUBA's decision. The decision is currently on appeal to the Oregon Supreme Court.

Wal-Mart had earlier applied for a retail store on the same site in Oregon City. The first application involved a site plan/design review component in addition to a comprehensive plan/zone change proposal. The city and applicant agreed to consider the plan/zone change component first and, presumably, would only review the site plan portion if plan/zone change was approved. Ultimately the plan/zone change was denied, and the site plan was never considered by the city on its merits.

Less than a year later, Wal-Mart redesigned its proposal and eliminated the need for the plan/zone change. It submitted a second site plan to Oregon City, which chose to process the application as a limited land use decision under ORS 197.195.

Among other things, the limited land use process requires local jurisdictions to provide notice to persons adjacent to the proposed development and "provide a 14-day period for the submission of written comments prior to the decision." ORS 197.195(3)(c)(A). The resulting decision is made at the staff level. If an appeal is filed, the local government may, but need not, provide for a hearing. ORS 197.195(5).

In this case, Oregon City's planning director denied the limited land use application. Wal-Mart appealed to the Oregon City Commission (the city's governing body), and it upheld the denial.

In denying the application, the city accepted comments during the 14-day period mandated by statute and closed the comment period. After it was closed, however, the city accepted comments from its public works department, the local fire district, and its consulting traffic engineers. At LUBA, Wal-Mart successfully challenged the city's acceptance and consideration of the comments submitted after the 14-day period. Relying on holdings in previous cases, LUBA noted that if new evidence is accepted after a record is closed in a quasi-judicial context, the local government must reopen the record to allow rebuttal and cure a procedural error that would otherwise violate the participants' substantial rights.

The court of appeals disagreed with LUBA and determined that the city's procedure did not violate Wal-Mart's substantial rights. The court of appeals noted that the city commission heard Wal-Mart's appeal of the planning director's decision and that Wal-Mart at that appeal hearing "had an opportunity to rebut" the comments submitted after the 14-day period. Moreover, the court of appeals noted that the city commission's findings relied on evidence unrelated to that submitted after the 14-day period. The court found it to be based on substantial evidence.

The court of appeals also reversed LUBA regarding the city's code interpretations. One involved a one year prohibition on submitting the same or a substantially similar "proposal." The city's denial relied on this standard even though it had never considered the site plan/design review portion of the proposal the first time Wal-Mart sought to build a store. While LUBA found that the city could only rely on this provision if the site plan/design review portion were actually previously considered by the city, the court of appeals found that the city commission's interpretation was within the discretion afforded it by ORS 197.829(1) and the cases interpreting that statute. The court also found no inconsistency between the statutory interpretation processes articulated in *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1993) and the deference given to a local legislative body's interpretation of its own code under *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).

It would seem that the key issues on appeal to the supreme court are to what extent a local government can accept testimony and evidence after the 14-day comment period is closed under ORS 197.195(3)(C)(A) and whether an appeal where that "extra-record" evidence can be rebutted sufficiently protects a participant's substantial rights. Perhaps under the specific facts of this case those rights were adequately protected. Nevertheless, practitioners who advise local governments should recommend confining all testimony and evidence in limited land use decisions to the record developed during the 14-day comment period. Not doing so invites suspicion at the very least and, if you are really lucky, interminable debates about whether such a violation is procedural or substantive in nature and, if the former, whether it prejudices a participant's substantial rights.

David Doughman

Wal-Mart Stores, Inc. v. City of Oregon City, 204 Or App 359, 129 P3d 756 (2006).

■ *FEDERAL LAW PREEMPTS LOCAL REGULATION OF TELECOMMUNICATIONS*

In *Qwest Communications v. City of Berkeley*, 433 F.3d 1253 (2006), the Ninth Circuit affirmed the power of the Federal Telecommunications Act (Act) to preempt local regulations of telecommunications providers. The Act expressly provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The Ninth Circuit found this language to be virtually absolute in restricting the means by which state and local governments can regulate telecommunications. Such governments may manage public rights-of-way and impose fair compensation for the maintenance of them, but no more. Here the court found that a city of Berkeley ordinance was preempted because it imposed an onerous burden on Qwest, and effectively regulated the company rather than the right-of-way.

The Berkeley ordinance at issue was apparently enacted to halt a specific Qwest project that would have entailed laying conduit through Berkeley streets. The ordinance required that telecommunications companies using the public right-of-way pay a "non-cost based compensation fee." How that fee would be calculated or how much it amounted to was not stated in the opinion. This was peculiar because the Act specifically allows local governments to require "fair and reasonable compensation" for use of public rights-of-way. Apparently, the city "made no attempt" to argue that its fees were fair and not preempted. Rather, the city argued that the fee escaped preemption because the ordinance provided an alternative fee exemption procedure. This tactic backfired, however, because it was the alternative procedure that the court found onerous and therefore preempted.

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 5200 SW Meadows Road, Lake Oswego, OR 97035-0889. Subscription Price: free to Real Estate and Land Use Section Members, $24.50 per year for others. To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

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The burden of showing that an ordinance is preempted by the Act is easy because one need not show actual impact. Rather, regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. The Ninth Circuit easily found that the fee exemption procedure and safe harbor provisions of the ordinance could have such effect. The exemption procedure and safe harbor provisions required Qwest to file numerous documents containing extensive data. Among other things, Qwest would need to (1) disclose the material terms of any and all agreements, tariffs, or other documents relating to telecommunications services provided; (2) provide an annual written report including copies of all information made available to the public concerning tariffing, detariffing, and related notice requirements of law, including all negotiated contracts related to the provision of telecommunications services; (3) provide the names and contact information of all persons denied service in the preceding year and reasons for denial; and (4) provide copies of contracts effecting telecommunications facilities. Moreover, Qwest would need to allow the city to audit its books and records to determine compliance with these reporting requirements. The court concluded that such requirements were not permissible management of the public rights-of-way, but rather impermissible regulation of telecommunications companies.

The court also determined that the city's authority to deny excavation permits and to impose civil and criminal penalties for noncompliance with the ordinance contributed to a regulatory scheme that impermissibly prohibited the telecommunication companies from providing services. Since the court's ruling stripped the ordinance of its key provisions, the court declined to sever these provisions and invalidated the ordinance in its entirety.

Isa Taylor

Qwest Communications v. City of Berkeley, 433 F.3d 1253 (2006).

Appellate Cases – Real Estate

■ OUT OF BOUNDS: NO PRESCRIPTIVE EASEMENT FOR GOLF BALLS

In *Beers v. Brown*, 204 Or App 395, 129 P3d 756 (2006), the Oregon Court of Appeals considered whether a golf range owner had obtained a prescriptive easement on his neighbor's adjacent property for stray golf balls. The golf range owner asserted that after his neighbor had allowed golf balls to go onto her property for much more than 10 years, she had no right to complain. The neighbor asserted that the problem from stray golf balls had dramatically increased after the golf range was expanded in 1999 and her property value was diminished because of it. In the end, the court found that the golf range owner's claim was ***out of bounds*** because he had failed to satisfy the "open or notorious" requirement for a prescriptive easement.

The subject golf range in this case was constructed in late 1960s and has been owned by defendant since 1986. The plaintiff's property is directly across the street from the golf range. She has owned and lived on the property since 1958. When defendant purchased the golf range, there was no fence or other barrier to stop stray golf balls. In 1999, defendant significantly expanded the golf range, increasing the number of users, and installed a 25-foot high fence. After plaintiff complained that the number of golf balls landing on her property had dramatically increased after the expansion, defendant raised the fence to 35 feet in 2000.

When defendant's preventative measures proved inadequate, plaintiff filed an action for nuisance, trespass, and negligence and sought an injunction to close the golf range until defendant took sufficient measures to contain the golf balls. Defendant contended that he had obtained a prescriptive easement because golf balls from the driving range had been landing on plaintiffs property for more than 10 years without permission.

When the trial court granted a preliminary injunction limiting the use of the golf range, defendant constructed a 70-foot fence and asserted a counterclaim for the cost of the fence. The trial court rejected defendant's prescriptive easement claim and his counterclaim for the cost of the fence. The trial court awarded plaintiff compensatory damages of $5,500 and limited the type of golf balls ("low-compression" only) that could be used on the golf range.

On appeal, the Oregon Court of Appeals recounted the requirements for a prescriptive easement. A prescriptive easement requires clear and convincing evidence of an open or notorious use of property adverse to the rights of the owner for a continuous and uninterrupted period of 10 years. *Martin v. G. B. Enterprises, LLC*, 195 Or App 592, 595–96 (2004). Once the "continuous" and "open or notorious" requirements are established, there is a rebuttable presumption that the use is adverse. *Feldman v. Knap*, 196 Or 453, 472–73, 250 P2d 92 (1952). Continuous use "refers only to the character of the user's state of mind and requires only that the alleged easement be used in a manner consistent with the needs of the user." *Kondor v. Prose*, 50 Or App 55, 59, 622 P2d 741 (1981). In this case, the court focused on the "open or notorious" requirement.

A use is open or notorious if it provides the servient owner with a reasonable opportunity to learn of its existence and nature. The purpose of this requirement is to give the owner of the servient estate "ample opportunity to protect against the establishment of prescriptive rights." Restatement (Third) of Property § 2.17 comment h (2000). The court noted that the requirement serves to "notify the owner that the use will continue – and eventually ripen into a prescriptive easement--unless he or she takes action to stop it." 204 Or App at 405.

Intermittent use can satisfy the open or notorious requirement, but only if it is apparent during the periods of non-use that the cessation is temporary and that actual use will resume in the future. For example, very infrequent use of a road may be

open or notorious if the road is clearly visible. *Montagne v. Elliot*, 193 Or App 639, 650–51 (2004) (existence of maintained road informed landowner of adverse use). On the other hand, infrequent use does not satisfy the open or notorious requirement if it is not apparent that the use is ongoing or that actual use will resume in the future. *See, e.g.*, *Thompson v. Schuh*, 286 Or 201 (1979) (infrequent inspection trips did not provide notice to landowner because there was no apparent sign that the use would resume). The court noted that the use must be open or notorious throughout the prescriptive period. "In short, in the absence of any indication that a use will resume, if actual use ceases, it is no longer open or notorious, and the prescriptive period therefore ends; any resumption in actual use that follows begins a new prescriptive period." 204 Or App at 406.

In the application of this standard, the court considered the evidence of stray golf balls provided by both sides. Plaintiff and her daughter provided testimony that prior to the expansion of the golf range not many golf balls landed on plaintiff's property and the frequency was only occasional. Plaintiff supported her contention that the number of balls landing on her property increased after the golf range expansion with testimony from people who had seen or picked up golf balls from her property. Plaintiff also brought several bags into court containing almost 3500 golf balls that were allegedly gathered on her property.

In contrast, defendant did not offer any direct evidence of the frequency or number of golf balls that landed on plaintiff's property either before or after the 1999 expansion. Instead defendant's evidence consisted of statistical analysis based on the number of balls sold for use on the range combined with estimates from golf experts of the number of balls that the 35-foot fence would have stopped. The court found this evidence purely speculative. It "shows, at most, that more balls had the ***potential*** to reach plaintiff's property before the renovation than after it, not that more balls ***actually*** did, much less that they did so consistently for at least 10 years." 204 Or App at 407 (emphasis original). Although defendant had established that plaintiff knew that golf balls had landed on her property, the court concluded that defendant did not carry his burden to establish that open or notorious use occurred throughout the 10-year prescriptive period. The court upheld the trial court decision.

Interestingly, the court noted that the measures taken by defendant to build fences and keep balls off plaintiff's property, adversely affected defendant's prescriptive easement claim. To the extent those measures caused extended periods during which no balls landed on plaintiff's property, defendant's use would not be apparent to plaintiff, and consequently, would not be sufficiently open or notorious. Unfortunately for this defendant, you don't get a mulligan in court.

Raymond W. Greycloud

Beers v. Brown, 204 Or App 395, 129 P3d 756 (2006).

Appellate Cases – Landlord/Tenant

■ *EVIDENCE MUST SUPPORT EXPIRATION OF FIXED-TERM TENANCY TO ESTABLISH TENANCY AT SUFFERANCE*

In *Reeves v. Rodgers*, 204 Or App 281, 129 P3d 721 (2006), the Oregon Court of Appeals considered two questions. First, the court asked, "Does the trial court have authority to render judgment on a theory neither presented nor pleaded by the parties?" Second, the court asked "Does a tenancy at sufferance under ORS 97.040 arise when there has been no fixed term tenancy?" 204 Or App at 283. In reversing the trial court, the appellate court held that the answer to both questions is no.

The case arose out of a Forcible Entry and Detainer (FED) action filed by plaintiff landlords. At trial, plaintiffs claimed that the parties had an oral month-to-month lease agreement. Defendant argued that she was not a tenant and there was not a landlord-tenant relationship between the parties. Further, she argued that she had an equitable interest in the property, which carried over from other properties the parties owned together. Plaintiffs denied that defendant had an ownership interest.

Defendant asserted the FED action should be dismissed because plaintiffs did not properly serve a 30-day eviction notice. The trial court heard testimony on the notice issue and sustained defendant's hearsay objection to plaintiffs' evidence on the issue. However, the trial court did not dismiss the action in accordance with ORS 90.427(2).

The trial court took a third approach. Although the tenancy at sufferance issue was not plead or argued by either party, the court found that defendant was a tenant at sufferance. Because ORS 105.115(2)(b) permits a landlord to terminate a tenancy at sufferance without notice, the court awarded possession of the property to plaintiffs.

On review, the Oregon Court of Appeals looked at the notice question first. The court found no evidence to support plaintiffs' argument at trial that defendant was properly served notice of eviction. Thus, the plaintiffs failed to meet their burden, and the court found that the trial court should have dismissed the action pursuant to ORS 90.427(2).

In addition, the court of appeals held that the trial court erred by finding defendant was a tenant at sufferance. The court underscored the language in ORS 105.115(2)(b), which provides that a tenancy at sufferance arises where a fixed-term rental agreement expires. The court explained that the evidence was insufficient to determine whether or not the rental agreement was for a fixed term. Accordingly, the court held that plaintiffs should not be awarded possession of the property and reversed.

Glenn Fullilove

Reeves v. Rodgers, 204 Or App 281, 129 P3d 721 (2006).

Appellate Cases – Outside Jurisdition

■ WASHINGTON SUPREME COURT SETTLES CALCULATION OF IMPACT FEES: NO INDIVIDUAL CALCULATION REQUIRED

At least for now, the proper calculation of Washington's Growth Management Act (GMA) impact fees has been decided. In *City of Olympia v. Drebick*, 156 Wn.2d 289, 126 P.3d 802 (2006), the Washington Supreme Court held that impact fees could be collected and spent on facilities that are neither directly nor specifically related and beneficial to the development seeking approval.

Drebick sought approval to construct a four story, 54,000 square foot office building within Olympia city limits. The city assessed a transportation impact fee of $132,328.98 based on the projected infrastructure costs of new development within the city in general, area-wide assessment of transportation inventory, and needs. Drebick sought an adjustment by submitting an independent, site-specific fee calculation and appealed to the city hearing examiner, who reversed the city. On appeal, the superior court reversed the hearing examiner's decision, which was then reversed by the Washington Court of Appeals with a remand to the city for a recalculation of the impact fee in *City of Olympia v. Drebick*, 119 Wn.App. 774, 83 P.3d 443 (2004). The Washington Supreme Court granted the city's petition for review and reversed the court of appeals.

GMA impact fees arise from the Washington Legislature's adoption of comprehensive planning legislation in 1990. Impact fee authority was intended to help local governments implement capital facilities planning to insure that the infrastructure costs of "new growth and development" were not outpaced by growth itself. RCW 82.02.050(1)(a). However, the statute limits impact fees to a "proportionate share" of the costs of "system improvements" (needed roads, parks, schools, or fire stations identified in the capital facilities plan) that are "reasonably related to" and "reasonably benefit" the particular development seeking approval.

The court applauded the hearing examiner's findings that the traffic impact fees were proportionate and reasonably related to the jurisdiction-wide transportation needs attributable to the development and that all land uses share in benefiting from a "smoothly functioning transportation system with adequate capacity." However, the court cautioned that the analysis should have ended with that determination. The hearings examiner went on to hold that the city erred by failing to demonstrate that Drebick's impact fee was reasonably related to the needs created by his development on each of the improvements listed in the city's capital improvement plan. The court concluded that the language of the GMA impact fee statutes did not support this interpretation. Of note, the majority expressly rejected the notion that the statutory requirement of proportionality, relation, and benefit were intentionally modeled after the *Nollan/Dolan* standards for regulatory exactions.

The court recognized that the Legislature allowed local governments to determine the appropriate service area for fee calculation and expenditure. The court approved the city's decision to adopt a service area coterminous with its Urban Growth Area on grounds that the city of Olympia is relatively compact, such that the average trip length correlated "to a good portion of the City boundaries." The court also found that "nothing in the plain language" of the statute demanded a calculation of the individual, direct, and specific impacts of the new development on each improvement funded by impact fees. Comparing the GMA impact fee to other types of impact fee authority, the court concluded that "the local government's calculation of a proposed development's GMA impact fee begins . . . with the anticipation of the area wide improvements needed to serve new growth and development in the aggregate."

Kieth Hirokowa

City of Olympia v. Drebick, 156 Wn.2d 289, 126 P.3d 802 (2006).

■ DON'T TELL ME. INSTEAD SHOW ME THAT YOU USED "BEST AVAILABLE SCIENCE"

In *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005), the Washington Supreme Court reviewed a decision by the Eastern Washington Growth Management Hearings Board (GMHB) finding Ferry County noncompliant with the Growth Management Act (GMA), chapter 36.70A RCW. The board had found that Ferry County failed to demonstrate best available science (BAS) in its listing of only two species as endangered, threatened, or sensitive (ETS) in its critical areas ordinances. The court upheld the GMHB decision and rejected a claim that it was not supported by substantial evidence.

Under the GMA, all Washington local governments are required to adopt regulations for the designation and protection of "critical areas," defined to include: (1) fish and wildlife habitat conservation areas, (2) wetlands, (3) frequently flooded areas, (4) critical aquifer recharge areas, and (5) geologically hazardous areas. The GMA was amended in 1995 to add the requirement that critical areas designation and protection be based on BAS. The court has recognized that the Department of Fish and Wildlife (DFW) bases its recommendations on maps identifying known locations of priority habitats and species.

Initially, the Ferry County comprehensive plan was challenged before the GMHB under the BAS mandate. In an order dated July 31, 1998, GMHB held that Ferry County failed to include BAS in its comprehensive plan and that it was, therefore, not in compliance with the GMA. Ferry County's 1998 amendments, also found noncompliant, listed only four ETS species in their comprehensive plan: the bald eagle, ferruginous hawk, peregrine falcon, and lynx. Ferry County's subsequent amendments in 2000 listed only two ETS species: the bald eagle and lynx.

Of particular importance was the fact that DFW recommended that Ferry County list twelve species: the bald eagle, ferruginous hawk, peregrine falcon, sandhill crane, upland sandpiper, American white pelican, lynx, pygmy rabbit, gray wolf, grizzly bear, woodland caribou, and bull trout. Ferry County relied on recommendations contained in two letters from a retired Alaska Department of Fish and Game wildlife planner. Based on a book on bird breeding locations published in 1997, conversations with DFW biologists, and "various other field guides and wildlife texts," the planner concluded that the caribou, grizzly bear, timber wolves, pygmy rabbit, ferruginous hawk, peregrine falcon, sandhill crane, upland sandpiper, and the American white pelican did not require consideration as ETS species in Ferry County. 123 P.3d at 104.

GMHB and the court recognized that Ferry County's biologist did not have any particular experience relevant to Ferry County, did not address DFW's scientific methodology or even reference his own methods, did not conduct site-specific research, and generally did not show his work in a manner that demonstrated a reasoned process. Accordingly, the court held:

> The information used to support the county's listing does not pass the smell test for BAS regardless of how it is defined. Far from rising to the level of BAS, the information obtained through Dr. McKnight's methods more greatly resembles nonscientific information, and his conclusions are more similar to speculation or surmise, which the requirement of BAS seeks to prevent.

123 P.3d at 108.

The problem for Ferry County was that its biologist would not confirm the presence of the species of concern. Accordingly, a dissenting opinion by Justice Johnson noted that, much like the reported, but unconfirmed sasquatch sightings, "it is notoriously difficult to prove a negative." 123 P.3d at 112. Indeed, based on the record of evidence, Justice Johnson argued that "the majority is unable to cite any available scientific information in the administrative record that demonstrates that all of the species on the DFW priority habitat species list exist in Ferry County." 123 P.3d at 118. The dissent further argued that shouldering such a burden on local governments will "frustrate GMA compliance for sparsely populated and financially distressed counties." 123 P.3d at 113.

Justice Chambers authored a separate concurring opinion to clarify the purpose of the court's employment of the "substantial evidence" test. Justice Chambers wrote that the "substantial evidence test" is not used to check the persuasiveness of the "best available science," but to determine whether relief is appropriate. "While the difference may seem subtle, it is a distinction that makes a difference; adopting the dissent's position would require us to consistently substitute our judgment for the county and the growth management hearings board. That is not appropriate within our system of divided government." 123 P.3d at 112.

Keith Hirokowa

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 123 P.3d 102 (2005).

■ *PENNSYLVANIA COURT DISTINGUISHES KELO AND VOIDS EMINENT DOMAIN FOR RELIGIOUS USE*

In re Redevelopment Authority of the City of Philadelphia, 891 A.2d 820 (Pa. Commw. Ct. 2006), involved the Authority's condemnation of property, which was to be transferred to the Hope Partnership for use by a private religious school. A homeowner objected to the ultimate use, but not the declaration of blight, alleging that the taking was arbitrary, capricious, and discriminatory, not for a public purpose, and in violation of her due process rights. In particular, the homeowner challenged the taking as a violation of the Establishment Clause of the federal constitution and similar provisions of the Pennsylvania constitution. She also suggested the taking was pretextual and in violation of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) because it benefited a private party. There was no overall development plan for ultimate use in this case, as occurred in *Kelo*. The Authority contended, however, that there was no bad faith, the area was blighted, the religious school was a nonsectarian use, and the disposition of the land to the Hope Partnership required the Philadelphia City Council to approve it. The trial court upheld the taking and the homeowner appealed.

The appellate court reversed the trial court, which had overruled the homeowner objections, and found that the homeowner's failure to object to the blight declaration did not waive her right to object to the ultimate use of the land taken. Moreover, the appellate court found an impermissible entanglement of church and state in the arrangement at issue.

The use of eminent domain is strictly construed and the ultimate use must be public, i.e., one in which the public is the primary and paramount beneficiary, rather than any individual party. The court found a declaration of blight to be a necessary, but not sufficient, condition for the use of eminent domain. Regardless of the declaration, the court found that eminent domain could not be used to benefit a religious association. Using a three-fold Third Circuit test for Establishment Clause cases, the court said that to be constitutional, the Authority's exercise of its condemnation power must be for a secular purpose, must neither advance nor inhibit religion, and must not excessively entangle government with religion. The court concluded:

> The application of the three-part test to the evidence here shows unequivocally that the Authority's taking contravened the Establishment Clause. First, the Authority's primary purpose was to acquire land for the Hope Partnership to make it available for construction and operation of a private school. Although the Authority argued that no contract is yet executed between the Authority and the Hope Partnership, such evidence is immaterial where the redevelopment proposal included the religious organization as the developer, the Planning Commission approved the proposal, City Council enacted the required ordinance and the Authority then proceeded with its taking. Second, the Authority's land acquisition for the Hope Partnership had a primary religious effect

> because it directly aided the religious organization's mission to provide faith-based educational services, among other things, to residents in the blighted area. . . . The land acquisition had the primary effect of advancing religion. Third, there is no dispute that the Authority jointly worked with the Hope Partnership in effectuating the taking. The evidence shows that the Hope Partnership designated the land that it wanted and requested the Authority to acquire it, and the Authority proceeded to do so. This joint effort demonstrates the entanglement between church and state.
>
> 891 A.2d at 830–31 (internal citations omitted).

The court contrasted this case unfavorably with the *Kelo* case. *Kelo* involved an overall redevelopment plan, whereas there was none present in this case. The appellate court held that Pennsylvania law does not allow the Authority to take private property and turn it over to a religious organization for private development purposes. Because the taking was not for a public use, the appellate court reversed trial court's decision.

Judge Pellegrini, writing for himself and two other judges, dissented and focused on the authority of the agency to condemn blighted properties. He noted that there was no agreement between the Authority and Hope Project for acquisition and use of the homeowner's property at the time of the acquisition. A number of nonprofit and private commercial and residential uses were also known as beneficiaries of the redevelopment project. The dissent would require the Authority to prove only that the property was in a blighted neighborhood before it could acquire the same. Further, redevelopment must be approved by the Philadelphia City Council, which had not occurred when the property was acquired. Even if turnover of the property to a religious organization would violate the Establishment Clause, the condemnation was not void altogether. Moreover, the dissent suggested a categorical rule prohibiting transfer to religious institutions would constitute viewpoint discrimination, and that the conduct of a nonsecretarian school by religious persons did not violate the Establishment Clause.

This case resonates with most people according to their reactions to *Kelo*. Those taking the view that public use for redevelopment should be broadly construed would likely side with the dissent. In addition, the dissent's view that there are two actions at issue—the eminent domain and the subsequent redevelopment of the property—appears to be rather compelling.

Edward Sullivan

In re Redevelopment Authority of the City of Philadelphia, 891 A.2d 820 (Pa. Commw. Ct. 2006).

■ *REDELINEATION AND MITIGATION REQUIREMENTS FOR WETLANDS NOT A TAKINGS SAID FEDERAL CIRCUIT*

Norman v. United States, 429 F.3d 1081 (F. Cir. 2005) involved actions for a taking and alleged illegal exactions regarding the development of a 2,425 acre ranch near Reno, Nevada for commercial, residential, and agricultural uses. The city approved a development, but conditioned it on compliance with the United States Army Corps of Engineers (USACE) wetlands requirements. Plaintiffs sought to purchase a 470 acre portion of the approved development, which was designated for industrial uses. The wetland delineation originally found 17 acres of wetlands on this parcel, and plaintiffs completed the purchase on that basis. The original delineation later became controversial and was rescinded and replaced by a new delineation showing 87 acres of wetlands on plaintiffs' property, which required reconfiguration of an approved master plan. After the original developer declared bankruptcy, plaintiffs bought additional portions of the larger parcel. In doing further development, plaintiffs were required to undertake additional mitigation. In return for a permit to fill 60 acres of wetlands, plaintiffs were required to create or restore 195 acres of wetlands and create a funding mechanism for their continued upkeep. As of the date of the first claim in 1995, plaintiffs had sold off much of the property and had only 716 acres under their control. The Court of Federal Claims dismissed plaintiffs' exactions claims in 2003 for lack of jurisdiction and, following a trial, dismissed plaintiffs' takings claims.

The Federal Circuit Court reviewed factual matters under a "clear error" standard and issues of law on a de novo basis. The court rejected the notion that the redelineation following reliance on the initial delineation caused the taking, noting that over the years many transactions had occurred after the delineation and the relationship between the additional lands required for wetlands and mitigation was "too attenuated" to support a takings claim based on that redelineation and subsequent mitigation.

As to plaintiffs' physical appropriation claims for the transfer of property for mitigation, the court noted that plaintiffs did not transfer the land to the government, but to a nonprofit association as a part of its funding mechanism to assure maintenance for the mitigated areas. The 404 permit condition requiring the funding mechanism did not require transfer of title. The court found no exaction of property because there was no evidence that plaintiffs lost exclusive possession of the land and the transaction was voluntary in nature. In any event, there was no physical invasion of the plaintiffs' property. Even if *Dolan* applied (which it did not, according to the court), there would be the appropriate nexus between the mitigation requirement and the purposes of wetland regulation.

Moreover, the court rejected plaintiffs' categorical takings claims because the 220 acres was a relatively small part of the 2280 acre development. Using the "parcel as a whole" rule, the trial court found the development to be a single economic unit; a finding that was largely unchallenged on appeal. In addition, the plaintiffs themselves treated this larger parcel as a single economic unit.

The court also analyzed a potential regulatory taking challenge using the Penn Central factors, i.e., the economic impact of the regulation on the plaintiffs, the extent to which it interfered with distinct investment-backed expectations, and the character of the regulation. The trial court found no investment-backed expectation claim except for a four acre parcel, which was designated for wetlands only after it was purchased; however, that court also found the value of this tract increased because it allowed for filling of other property, which was set aside for mitigation. Little discussion was made of the other *Penn Central* factors and indeed, the bulk of the property alleged to be "taken" was not owned by the plaintiffs at the time. And while notice of future regulations is not a bar to recovery, it is a factor in evaluating whether investment-backed expectations apply—here plaintiffs had both actual and constructive notice that portions of the sites that they later purchased were not developable.

The trial court also found that the plaintiffs relied on a 1988 wetland designation, which showed only 17 acres of wetland, and were surprised by the 1991 delineations, which showed 70 acres of wetlands. However, the subsequent Wetland and Fill Permit not only transferred 220 acres to a nonprofit corporation, but also allowed development of the commercial portions of the whole parcel. Plaintiffs did not challenge the trial court findings on investment-backed expectations with regard to the 220 acres or all but four acres of the 470 acres that plaintiffs had purchased. The appellate court found plaintiffs' appellate position to be unpersuasive, especially its insistence that the redelineation should be dispositive and should also exclude consideration of the other two *Penn Central* factors.

The court also rejected plaintiffs' claim for an unlawful exaction, which had been dismissed for lack of jurisdiction. This claim was based on the expenses of the USACE costs for delineation and mitigation. To prevail on their claim, plaintiffs had to show that the statute or provision causing the exaction provided a remedy involving a return of funds unlawfully exacted by the government. The Corps was prohibited by Public Law 102-104 from expending funds for delineation of wetlands under its 1989 manual—so plaintiffs had to do so if the job were to be done. Plaintiffs alleged that the loss of land and mitigation costs followed from this requirement. The trial court found no loss arising from the misapplication of a statute as the prohibition of USACE expenditures under 102-104 necessarily requires another to undertake this role. Further, the connection between the delineation of the land exacted and mitigation required was far too attenuated to justify a takings claim. The actions of the federal government did not have the necessary connection to support a takings claim. Thus all claims were properly dismissed, and the trial court decision was affirmed.

The court's decision in this case regarding a categorical takings claim, the use of the Penn Central factors, and their balancing in this case has produced a thoughtful analysis of federal constitutional law on the limits of regulation.

Edward Sullivan

Norman v. United States, 429 F.3d 1081 (F. Cir. 2005).
Editor's Note: On May 22, 2006, the United States Supreme Court denied the plaintiffs' petition for writ of certiorari. *Norman v. United States*, 2006 U.S. Lexis 3972.

Appellate Cases – LUBA Jurisdiction

■ *LOCAL ENFORCEMENT DECISIONS*

In *Johnston v. Marion County*, LUBA No. 2005-083 (Feb. 9, 2006), LUBA analyzed the circumstances under which a local enforcement decision is an appealable land use decision. In this case, LUBA concluded the county's written refusal to revoke previously issued building permits was a land use decision, but dismissed the appeal because the decision was not final.

The owner of the underlying property applied to partition the property for the purpose of building three duplexes, and the planning director initially approved the partition. After the director's approval, the owner applied for and received building permits to build the duplexes. Petitioners objected to the building permits because construction of the duplexes would use an easement across petitioners' property. Petitioners also appealed the director's partition approval to the hearings officer who denied the partition application. On appeal, the county board affirmed the hearings officer's decision. The county denied the partition because the owner could not satisfy the zoning code's 25-foot minimum width for an access easement. Following the denial of the partition application, petitioners' attorney sent several letters asking the county to revoke the building permits. On May 16, 2005, the county counsel responded by letter that the county would not revoke the building permits because the easement was sufficient to allow development that did not require a partition. Petitioners appealed the county counsel's letter to LUBA.

The county moved to dismiss the appeal on the ground that the county counsel's letter was an enforcement decision over which the circuit court had jurisdiction under ORS 197.825(3)(a) and was not an appealable land use decision. LUBA rejected the county's assertion that the statute divests LUBA of jurisdiction over all enforcement decisions. In LUBA's view, the statute provides local governments a choice of venues for local code enforcement and gives either LUBA or the circuit court jurisdiction over enforcement decisions depending on the

venue the local government selects. If a local government applies its own procedure and regulations to make an enforcement decision, that decision may be a land use decision subject to LUBA's jurisdiction. If a local government enforces its regulations in circuit court, however, the decision to do so is not a land use decision, and the court has jurisdiction over the matter.

Here, the county made a decision at the local level that no violation of its regulations existed and no enforcement action was warranted. Because the county counsel's letter explained why the building permits were consistent with the county's regulations, LUBA concluded the letter could be a land use decision. Petitioners argued LUBA had jurisdiction because the county issued its decision under a section of the zoning code that provided for "Requests for a Determination." The county argued that the code expressly excluded requests for determinations associated with building permits and, therefore, the zoning code did not apply. LUBA agreed with the county that the appealed letter was not a land use decision based on the "Requests for a Determination" provisions of the zoning code. LUBA also agreed with the county's alternative argument that the county counsel's letter was not a final decision. If the building permits were not land use decisions, a letter refusing to revoke the permits could not be a land use decision. If the building permits were land use decisions, the letter simply confirmed or repeated the earlier decisions. Either way, the appealed letter was not a final decision and LUBA dismissed the appeal.

LUBA applied similar principles to reach a different result in ***Wells v. Yamhill County***, LUBA No. 2005-176 (Apr. 27, 2006), which involved an appeal of a county counsel's letter denying petitioner's local appeal of a code enforcement complaint. The key events in this case were: (1) a November 3, 2005 letter from the county planning director to the Yamhill County Communications agency (YCOM) in which the director concluded YCOM did not need any land use approvals or permits to modify antenna on property YCOM leased from petitioner; (2) a letter from petitioner to the planning director indicating his intent to appeal the director's decision to the county board; (3) a November 9, 2005 letter from an assistant county counsel to petitioner stating no local appeal was available and the "matter is closed," (4) a November 17, 2005 appeal of the director's November 3rd letter to the county board; and (5) a November 21, 2005 letter from the assistant county counsel to petitioner again stating there was no local appeal available and the matter was closed. Petitioner appealed the November 21st letter from the assistant county counsel to LUBA.

The county moved to dismiss petitioner's appeal on the grounds that the letter was not a final decision because the assistant county counsel did not sign it and because he was not a decision maker under the county code. LUBA rejected both arguments, noting that the county counsel was the person who denied petitioner's appeal and the county did not identify any other potential decision maker under the county's code. Additionally, the county counsel's letter was a decision that was reduced to writing and prepared for signature; the fact that it contained a signature stamp rather than an actual signature was not compelling. LUBA treated a signature stamp as the equivalent of a signature.

LUBA also rejected the county's argument that the November 21st letter simply repeated the planning director's November 3rd decision and the LUBA appeal was not timely since it was appealed more than 21 days after November 3rd. LUBA pointed out that the appealed letter was a rejection of petitioner's attempt to appeal to the county board. The letter necessarily could not repeat either the November 3rd planning director's decision or the earlier letter from the county counsel, because both letters were written before petitioner filed his local appeal. In other words, "[t]he assistant county counsel could not reject an appeal that had not yet been filed." (Slip Op at 4). Accordingly, LUBA held that petitioner's appeal was timely and summarily concluded that the county counsel's letter was an appealable land use decision.

The county fared better, however, in defending its decision on substantive grounds. The county argued that the zoning code provision that addresses "Appeals from Decisions of the Commission or the Planning Director" only grants a right to appeal from land use decisions. The county asserted that the planning director's decision that the YCOM antenna did not require any land use approvals was an enforcement decision and was not adopted as a land use decision. The county's zoning code contains no formal procedure for issuing enforcement decisions and appears to suggest that any zoning code violations must be addressed by initiating an action in circuit court. Additionally, the county's "citation ordinance" describes a process for enforcing all of the county's ordinances, including its zoning code. With this context in mind, LUBA agreed that the planning director's decision was not a land use decision that could be appealed to the county board and affirmed the assistant county counsel's rejection of petitioner's local appeal.

Final Plat Approval

In ***Severson v. Josephine County***, LUBA No. 2006-019 (Apr. 6, 2006), LUBA dismissed an appeal of a final subdivision plat approval and held that under recently adopted legislation it lacked jurisdiction to review final plat decisions. In seeking dismissal of the appeal, the county relied on 2005 amendments to ORS 92.100(7), which now states:

> Granting approval or withholding approval of a final subdivision or partition plat under this section by the county surveyor, the county assessor or the governing body of a city or county, or a designee of the governing body, is not a land use decision or a limited land use decision, as defined in ORS 197.015.

The legislative assembly also adopted conforming amendments to the definition of "limited land use decision." The amendments became effective on June 16, 2005 and apply to all plats submitted after that date, including the plat at issue in this appeal. Petitioners agreed with the county's position and asked LUBA to dismiss the appeal so petitioners could pursue the matter in circuit court. LUBA concurred that the legislative amendments meant that the appealed plat was not a decision over which LUBA has jurisdiction. Since petitioners did not file a motion to transfer the appeal to circuit court, LUBA dismissed the appeal.

Standing

The issue of first impression presented in ***Century Properties, LLC v. City of Corvallis***, LUBA Nos. 2005-004 to 2005-17 (Apr. 7, 2006) concerned the difference between an "appearance" and "participation" in local proceedings for purposes of standing to appeal to LUBA. Petitioner in this appeal challenged 14 ordinances the city adopted to implement periodic review work tasks. During the city proceedings leading to adoption of the ordinances, petitioner's attorney submitted a one-page letter asking the city to "please accept this letter as an appearance by my client" and requesting that the attorney be "put on the notice list for any notice of adoption of any ordinance, resolution or order that results from these proceedings." The letter contained no substantive comments on the ordinances, and petitioner did not provide any other written or oral testimony during the local proceedings.

The city moved to dismiss the appeal on the ground that under the post-acknowledgement statutes, petitioner must do more than make an appearance during the local proceedings to have standing to appeal the ordinances to LUBA. The city pointed to ORS 197.620(1), which states the standing requirement as follows:

> Notwithstanding the requirements of ORS 197.830(2), persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation may appeal the decision to [LUBA] under ORS 197.830 to 197.845.***

The city argued that this statute established a higher threshold for standing to appeal to LUBA than ORS 197.830(2), which grants standing to appeal a land use decision to a person who "***appeared*** before the local government***orally or in writing." The city conceded that the letter from petitioner's attorney constituted an appearance in the local proceedings, but contended it was insufficient to meet the higher threshold for participation required to give petitioner standing to appeal the ordinances to LUBA.

LUBA acknowledged that its prior decisions have not described any difference between participation and an appearance for purposes of standing and have often used the words interchangeably. Treating this as an issue of first impression, LUBA proceeded to examine the text, context, and legislative history of the two statutes to ascertain their meaning. LUBA construed the use of two different words, "participated" and "appeared," to indicate the legislature intended to establish two different standing requirements. The dictionary definitions of both words were not particularly helpful, however, in determining whether they described different levels of activity necessary to have standing. After reviewing the legislative history of both statutes, LUBA concluded that "the ORS 197.620(1) requirement that a petitioner at LUBA must have 'participated' requires more than a mere neutral appearance. Specifically, that appearance must include an assertion of a position on the merits." (Slip Op. at 14). The letter petitioner's attorney submitted to the city did not state any position on the merits of the proposed ordinances. Accordingly, LUBA concluded petitioner lacked standing to appeal the ordinances under ORS 197.620(1) and dismissed petitioner's appeals.

■ *FIREARMS TRAINING FACILITY*

In *Citizens for Responsibility v. Lane County*, LUBA No. 2005-082 (Apr. 7, 2006), LUBA analyzed the statutory requirements for grandfathering a firearms training facility under ORS 197.770 and concluded the county erroneously applied the statute in approving modifications to an existing shooting range. ORS 197.770 states:

> (1) Any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility.
>
> (2) For purposes of this section, a "firearms training facility" is an indoor or outdoor facility that provides training courses and issues certifications required"
>
> (a) For law enforcement personnel;
>
> (b) By the State Department of Fish and Wildlife; or
>
> (c) By nationally recognized programs that promote shooting matches, target shooting and safety.

The shooting range at issue in this appeal was established in the mid-1950s. The county zoned the property for agriculture, timber, and grazing (AGT) in 1966. The AGT zone did not expressly permit recreational shooting ranges, but allowed uses not authorized in other zoning districts through a conditional use process. In 1975, the county approved a conditional use permit to allow the existing rifle shooting range to expand to include a skeet shooting range, subject to a condition that limited development and improvements to those shown on an approved site plan. The property was later rezoned to F-2. That zone explicitly allows a firearm training facility "that shall not significantly conflict with the existing uses on adjacent and nearby lands." The owner also discontinued the skeet range and added a pistol range.

In 2003, the owner applied for a permit to approve the modifications made to the facility after the 1975 conditional use approval. The county planning director approved the permit and agreed with the owner that the facility qualified as a "firearms training facility" under ORS 197.770 because prior to September 9, 1995 it provided training courses and issued certifications required by nationally recognized programs. The planning director focused on only the modifications made after September 9, 1995 and concluded they did not significantly conflict with existing adjacent uses. On appeal by petitioners, the hearings officer affirmed the planning director's decision. Although the hearings officer found no evidence in the record that the owner had actually provided training courses or certifications, he concluded that the use had not lapsed because the owner intended to use the facility for these purposes and had the ability to do so. Like the planning director, the hearings officer evaluated only the modifications made after September 9, 1995. The county board declined to hear petitioners' appeal from the hearings officer decision.

On appeal, LUBA agreed with petitioners that the county's decision erroneously construed and applied the statute in a number of ways. First, LUBA rejected the county's conclusion that the owner's intent and ability to provide firearms training programs and certifications was sufficient to grandfather a training facility under ORS 197.770. Analogizing the statute's provisions to those governing nonconforming uses, LUBA concluded that evidence of actual use is necessary for a qualifying training facility to be protected under ORS 197.770. Second, LUBA disagreed with the hearings officer that ***indefinite*** discontinuation of a firearms training facility creates no lapse in use under the statute as long as the owner has the intent and capability to use the facility for this purpose. Although the statute does not identify what period of disuse is sufficient to disqualify a facility, LUBA applied the one-year lapse period for nonconforming uses in the county's code. Third, LUBA agreed with petitioners that there was insufficient evidence that the owners had provided training and certifications to any of the three kinds of organizations listed in the statute. Finally, LUBA agreed that the hearings officer erred by failing to explicitly evaluate evidence of actual use since 1995 and by focusing instead on evidence of the owner's intent and capability.

LUBA also rejected the county's position that ORS 197.770 provides absolute protection for all uses and structures that are part of a firearms training facility in existence on September 9, 1995. Again, analogizing the statute to nonconforming use provisions, LUBA interpreted ORS 197.770 to protect only lawful uses or facilities in existence on that date. The county's alternative position—that the current uses and structures were authorized by the 1975 conditional use permit—was equally unpersuasive. LUBA noted that the facility currently included a pistol range that was never approved by the 1975 permit. Not surprisingly, LUBA remanded the county's decision.

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