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Appellate Cases – Land Use

■ *THE OREGON COURT OF APPEALS REJECTS AN INTERVENOR'S ATTEMPT TO OBJECT TO ACKNOWLEGED LAND USE REGULATIONS THROUGH THE COURTS*

State ex rel Butler v. City of Bandon, 204 Or App 690, 123 P3d 331 (2006) involved an intervenor's challenge to a writ of mandamus. The trial court below granted a peremptory writ of mandamus compelling the city of Bandon (City) to grant a land use permit for construction of a building on land belonging to the Port of Bandon (Port) known as "the High Dock" (Dock). The Port and developer Butler petitioned for the writ on the grounds that the City failed to timely act on their development request. The trial court granted the peremptory writ concluding that "the approval of [the development request] would not 'violate a substantive provision of the [City's] comprehensive plan or land use regulations,'" quoting ORS 227.179(5).

Intervenor-Appellant Gary Chang appealed the trial court's decision. On appeal the Oregon Court of Appeals analyzed whether it was correct to say that "approval of the permit application would not 'violate a substantive provision of the local comprehensive plan or land use regulation'" within the meaning of ORS 227.179(5). The court of appeals affirmed the trial court's decision.

The intervenor intervened in the matter at the trial court on the basis that approval of the proposed building would violate Statewide Land Use Planning Goals 16 and 17. The trial court disagreed, finding that the proposed development was permitted by the applicable regulations, which are discussed in depth in the case. The court found the intervenor's arguments amounted to "a collateral attack" on the existing regulations. The court of appeals agreed with the trial court and noted that the challenged regulations, as later amended, had been acknowledged by LCDC.

Before the court of appeals, the intervenor argued: 1) that the applicable land use regulation was, in effect, void because it was not timely submitted to DLCD for review when it was first adopted; 2) that the city's petition for acknowledgement review before DLCD failed to address affected Statewide Land Use Planning Goals; and 3) that the ordinance adopting the regulation failed to have supportive findings. The court of appeals found that the facts did not support these allegations. The court found that the materials submitted to DLCD by the City were deemed sufficient to alert DLCD of the extent of the City's proposal and to enable DLCD to mail notice to anyone who had requested it. No appeal of the regulation was taken before DLCD acknowledged it. Under these facts the court of appeals ruled it was too late for the intervenor to object that the regulation violated the statewide planning goals.

The court noted that nothing in ORS 197.615 "or any other related statute suggests that every procedural deviation from its requirements is fatal to the validity of an acknowledgement." 204 Or App at 699. What was submitted to DLCD was, in effect, good enough to enable DLCD to perform its Statewide Goal compliance review function, and the intervenor failed to show how any alleged deviation, such as the time of filing, caused him any injury. The court rejected the intervenor's insistence that statewide land use regulations had to be considered before approval of every specific land use application.

The court found that the proposed use did not violate Goals 16 and 17 and, since the regulations under which the land use approval was granted were part

of an acknowledged comprehensive plan, the land use decision must be consistent with the plan, not the goals. ORS 197.175(2)(c) and (d).

Quoting *Opus Development Corp. v. City of Eugene*, 141 Or App 249, 255–256, 918 P2d 116 (1996), the court noted:

> [I]n the review of a local land use decision to which an acknowledged comprehensive plan or regulatory provision is applicable, ORS 197.829(1)(d) does not enable LUBA ***or us*** to consider a ***goal*** consistency challenge to a local interpretation of the provision if: (1) the local government's interpretation is a correct statement of the meaning of the provision; (2) the challenge depends in substance on a showing that the acknowledged provision itself, as distinct from the interpretation of it, is contrary to a goal; and (3) a direct assertion that the acknowledged provision is inconsistent with the goal would not be cognizable under ORS 197.835

204 Or App at 702 (Emphasis original).

The court concluded that the intervenor's challenge really "depended upon the premise" that the underlying, acknowledged regulation was contrary to the goals and should not have been ***acknowledged***. The court said it could not entertain such an appeal, in effect, where the regulation being challenged was properly submitted for review and acknowledged.

Ruth Spetter

State ex rel Butler v. City of Bandon, 204 Or App 690, 123 P3d 331 (2006).

■ *IF YOU FILE A WRIT OF MANDAMUS, WITHDRAW THE WRIT BEFORE VIOLATING THE COURT ORDER AND FINDING YOURSELF HELD IN CONTEMPT*

In *Crown Investment Group, LLC v. City of Bend,* 206 Or App 453, 136 P3d 1149 (2006), Crown Investment Group, LLC (Crown) sought approval of a demolition permit from the city of Bend to demolish a historic building that it owned and was included on the city's Goal 5 inventory. The city failed to act on the permit application in a timely manner, and Crown filed a writ of mandamus for violation of the 120-day rule of ORS 227.179(1) with the court. The court issued an alternative writ of mandamus ordering the city to issue the permit or show cause at a hearing scheduled for August 30, 2004.

On August 19, 2004, Crown decided to demolish the building to prevent anyone from filing a legal action and delaying the permit. This prompted the city to file a motion for a remedial contempt sanction in the mandamus action. The court found Crown in contempt and imposed a $100,000 remedial contempt sanction against Crown under the authority of ORS 33.015. A writ of mandamus compelling the city to issue the demolition permit was entered by stipulation of the parties.

Crown appealed the court ruling to the Oregon Court of Appeals. Crown claimed that under ORS 33.015(4) no remedial sanction was authorized because the city's laws unambiguously compelled the city to issue an unconditional demolition permit and, therefore, the city suffered no injury, damage, or costs as a result of the demolition because. The court of appeals rejected this argument because the lower court had the authority under ORS 227.179(5) and the city's historic preservation law to deny the writ or to issue it with conditions. In effect, Crown deprived the city of the opportunity to contest the demolition in the court system.

Crown further claimed that the $100,000 sanction was inappropriate because it was excessive. The court of appeals disagreed, finding that the $100,000 was appropriate to compensate the city for losing its opportunity to seek a number of conditions from the court that could have helped it preserve the historical character of the building. Evidence presented at trial estimated the cost of a scale model of the building at $132,000.

Finally Crown argued that it had committed no contempt at all. The court of appeals disagreed and noted that Crown committed "flagrant contempt" that obstructed the court's authority and process and injured the city. The court of appeals affirmed the lower court's decision.

Liz Fancher

Crown Investment Group, LLC v. City of Bend, 206 Or App 453, 136 P3d 1149 (2006).

■ *FIREARM TRAINING FACILITIES SUCCESSFULLY GRANDFATHERED*

In *Citizens for Responsibility v. Lane County,* 207 Or App 500, 142 P3d 486 (2006), the Oregon Court of Appeals considered whether Lane County accurately applied ORS 197.770 to its approval of a special use permit for a firearms training facility. Citizens for Responsibility (Citizens) challenged the county's decision and prevailed on appeal to LUBA. The county appealed to the court of appeals and that court reversed and remanded LUBA's decision.

Since the mid-1950s, the Izaak Walton League (the League) had operated a gun club on its property. In 1966, the county zoned the property for agriculture, timber, and

grazing (AGT), which allowed authorization of a gun club by means of a conditional use permit. In 1975, the county granted the League a conditional use permit to expand the facility to include a skeet shooting range. The county later rezoned the property as F-2, which allowed a firearms training facility so long as it did not "significantly conflict with the existing uses on adjacent and nearby lands." Since the F-2 rezoning, the League has made other changes, constructing a pistol range and discontinuing the skeet range.

In 2003, the League sought a permit from the county for modifications the League had made to their gun club since 1975. The county approved that permit, agreeing with the League that the gun club qualified as a "firearms training facility" under ORS 197.770(1), which provides that "any firearms 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." The county's planning director concluded that the League's facility had provided "training courses" and issued "certifications," as required of a "firearms training facility" under ORS 197.770(2). Consequently, the planning director considered only those modifications made after September 9, 1995 and concluded they did not "significantly conflict with the existing uses on adjacent and nearby lands." Citizens appealed to the county's hearing officer who affirmed the planning director's decision. The county board declined to hear Citizens' appeal, so Citizens appealed to LUBA.

LUBA agreed with Citizens' assertion that the fact the facility existed on September 9, 1995 was not enough to afford it the protections of ORS 197.770. Rather, the facility and its uses and improvements must have been "authorized" and "lawful" for the facility to qualify under the statute. Further, LUBA rejected the county's claims that the status of the firearm training facility could be based on the owner's ***intent and ability*** to operate the facility. Instead, LUBA analogized ORS 197.770 to ORS 215.130, which governs non-conforming uses. LUBA determined that there must be evidence of actual use to be considered a firearm training facility. LUBA applied the county code's one year lapse period for nonconforming uses. By that standard, LUBA concluded that there was insufficient evidence that the owners had provided training and issued certifications as required by ORS 197.770.

The county appealed LUBA's decision to the court of appeals. Initially, the court analyzed the issue of whether the county had standing to seek review of LUBA's decision. The court determined that whether a county has standing to seek judicial review of its judicial or quasi-judicial decision depends on the particular functions that the government entity is exercising. Here, the court found that the county was exercising both legislative and executive functions in addition to its adjudicative function. Thus, the county was able to

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show a sufficient impact on its interests to establish standing for review of its judicial decision.

Regarding the merits, the court first addressed whether ORS 197.770 protects only lawful or authorized uses by a firearms training facility in existence on September 9, 1995. The county had argued that the statute protects ***any*** firearm training facility in existence on September 9, 1995, regardless of whether the particular use was authorized or lawful. The court agreed with the county's understanding of the text of the statute, which states only that "*[a]ny* firearms facility in existence on September 9, 1995" shall be allowed to continue operation. The court found that the legislature provided no limiting language that would require that the facility be "lawfully" in existence.

The court then reviewed LUBA's conclusion that the property was no longer used as a firearms training facility. The county argued that so long as the operator ***intended*** to provide training and issue certification and retained the ability to do so, the statute was satisfied. The court agreed. Further, the court disagreed with LUBA's importation of the one-year lapse provision for non-conforming uses. Rather, the court concurred with the hearing officer's use of the reasonable person standard to determine when activities would be discontinued under ORS 197.770. While ORS 197.770 does have some similarities to a nonconforming use provision, it does not import the specific lapse provisions found in other statutory nonconforming use provisions like ORS 215.130. Thus, the court concluded that ORS 197.770 leaves to local planning jurisdictions a broad delegation to determine when a qualifying facility is no longer used as a firearms training facility.

Paul Blechmann

Citizens for Responsibility v. Lane County, 207 Or App 500, 142 P3d 486 (2006).

Appellate Cases – Real Estate

■ *WHEN IT COMES TO ESTABLISHING A PRESCRIPTIVE EASEMENT OVER A ROAD, ADVERSITY IS HARD TO PROVE*

In ***Skidmore v. Clark,*** 205 Or App 592, 135 P3d 367 (2006), the Oregon Court of Appeals reversed the Jefferson County Circuit Court, again illustrating the difficulty of establishing a prescriptive easement for use of a shared road.

For more than 50 years the Skidmores and their predecessors had used a road on property owned by the Clarks and their predecessors. The Skidmores' predecessors testified they never asked or received permission. In 1999, the immediate predecessor to the Clarks purchased the Clark property, removed a chain on one of the access gates (with several unknown locks), and replaced it with a new chain and his own lock. Other property owners were then allowed to install their own locks on the chain. Although not mentioned in the opinion, it is common practice for multiple users to chain together their own padlocks so that each user can open the chain with a separate key. The Clarks' immediate predecessor never denied permission to anyone seeking use of the roads.

The Skidmores acquired their land in 1993 and became friends with the Clarks. However, the relationship deteriorated, and the Skidmores filed this action to establish a prescriptive easement. The trial court found the use was adverse and awarded an easement to the plaintiffs.

The court of appeals, reviewing ***de novo***, reversed. A claimant has the burden to show by clear and convincing evidence that the use has been open, continuous, and adverse for a period of ten years. Use that has been open and continuous for the ten year period is presumed to be adverse, but the presumption of adversity can be rebutted by showing that the use was of an existing way and that the use did not interfere with use by the owner. Since the origin of the road was unknown, the only question is whether the Skidmores' use of the road interfered with the Clarks' use. In the end, the court of appeals simply disagreed with the trial court's conclusions about the evidence.

Maintenance of the roads by the claimant did not show adversity but, to the contrary, was more indicative of a friendly agreement. The Clarks claimed damage to the roads as a result of use by the Skidmores, which weighed in favor of adverse use. However, the Skidmores in their own testimony denied doing any damage, thus negating the very evidence that might have helped them. The court considered the friendly relationship between the parties to be significant, further suggesting the use of the road was "pursuant to a neighborly arrangement rather than an act of adverse use."

205 Or App at 599. The evidence did not show interference other than the cutting of a chain by the Skidmores in 2001, but any change in the character of the use and any claim of right based on that act could not ripen until 2011.

This case illustrates the need for a careful fact analysis in any claim for prescriptive right to use a road. The origin of the road, the relationship of the parties, the nature of the use, the identity of other users, contributions to maintenance, damage to the road, and similar factors will determine the outcome. It is difficult to establish adversity in the use of a road

A careful review of the case law is equally important. Practitioners will find a variety of holdings, and care must be taken to sort out the wheat from the chaff. ***Skidmore*** is consistent with prior cases over the last several decades. ***Feldman v. Knapp***, 196 Or 453, 250 P2d 92 (1952), was once regarded as a leading case in the law of prescriptive easements, strongly emphasizing that the owner defending a claim of prescriptive easement had the burden of rebutting the presumption of adversity by introducing evidence that the use was permissive. Proof of mere acquiescence, as distinguished from permission, was not sufficient. However, in the 1970s and 1980s, this began to change, as noted by Judge Newman in ***Chambers v. Disney***, 65 Or App 684, 687, 672 P2d 711 (1983), "More recently, however, the court has been reluctant to find adverse use to support prescriptive easements."

The change does not appear to have followed an even and steady course, as can be seen from a review of some of the road cases. ***Feldman v. Knapp***, 196 Or 453, 250 P2d 92 (1952), has been cited frequently over the years, but seems at odds with current cases. Here the court found that the owner's request that the claimant contribute to the cost of driveway repairs constituted recognition of the claimant's easement. Contrast that with later cases, where the courts have disparaged such contributions or even interpreted them in an opposite manner. ***Feldman*** cites a very old case, ***Coventon v. Seufert***, 23 Or 548, 550, 32 P 508 (1893), to the effect that continuous use affords a ***conclusive*** presumption of right, unless the owner can show an agreement. It also states that proof of acquiescence does not establish permissiveness, while later cases give weight to factors more akin to acquiescence than actual permission.

Woods v. Hart, 254 Or 434, 458 P2d 945 (1969), was the beginning of this shift. The court denied a claim for prescriptive easement, noting that the presumption of adversity arising from 10 years of open and continuous use was rebutted when the claimant did not construct the road, even though he shared in the work and expense of maintaining the road, finding it "reasonable to assume that the use was pursuant to a friendly arrangement between neighbors." The court also pointed out that the result would have been the same whether this was an existing way, thus rebutting the ***Feldman*** presumption of adversity, or whether it was a presumption of permissiveness. The court mentioned ***Feldman*** as stating the basic rule, but considered the presumption to have been rebutted, even though the facts sound more like acquiescence than true permission.

This issue of adversity arises often in court opinions. Most recently the Oregon Court of Appeals denied a prescriptive easement over a road for lack of adversity in ***Webb v. Clodfelter,*** 205 Or App 20, 132 P.3d 50 (2006). [NOTE: see RELU Digest, Vol. 28, No. 5, Oct. 2006.] ***Skidmore*** mentioned ***Webb v. Clodfelter*** and the question of whether the presumption of adversity was rebutted or whether a presumption of permissiveness failed to arise at all in circumstances where the road was not constructed by the claimant and there was no interference. However, until the Oregon courts are able to definitely state when a prescriptive easement over a road may be granted, claimants will spend more time and money in the courts trying to fit their fact pattern into a continually narrowing standard.

Chris Minor

Skidmore v. Clark, 205 Or App 592, 135 P3d 367 (2006).

■ *BE SURE OF WHAT YOU TACK WHEN TRYING TO ESTABLISH A PRESCRIPTIVE EASEMENT*

Shortly after deciding ***Skidmore***, the Oregon Court of Appeals reversed a Jackson County decision in ***Bridston v. Panther Crushing Co.,*** Inc., 206 Or App 178, 136 P3d 84 (2006).

The plaintiffs sought a prescriptive easement to access their property by means of the Haul Road located on the property of the defendant. The plaintiffs had another access by means of a deeded easement, the use of which was impeded by the presence of a creek. At some time in the past, the plaintiffs' predecessor asked the defendant's predecessor for permission to use the road to transport building materials for construction of a home. The plaintiffs' predecessor continued to use the Haul Road (as did others) and even helped maintain the road. All of the predecessor owners maintained a friendly relationship. Later, the plaintiffs' immediate predecessor asked the defendant's immediate predecessor for an easement, which was refused, but permission was given to continue the use.

The plaintiffs acquired their property in 1991 with intent to build a bridge that would allow use of the deeded easement. A representative of the defendant testified that the plaintiffs asked for permission to use the road until the bridge was completed. The plaintiffs denied asking for permission and testified that it was clear the defendants did not approve of the use of the road.

In 1997 the defendant sent the plaintiffs a letter stating that their use amounted to a trespass and asked them to stop using the road. The plaintiffs responded by asserting, mistakenly, that they had a deeded easement. The defendant responded with a letter denying any easement right, but now stating that the plaintiffs were using the road by permission and, a few months later, sent a third letter stating that permission for use was revoked. Then these proceedings were commenced.

The trial court recognized that the presumption of adversity can be rebutted by proof that this was an existing road and the use did not interfere with the owner's use. The trial court acknowledged testimony to that effect on behalf of the defendant, but found the evidence troubling. The trial court found contradictions and inconsistencies, such as the letter asserting that the plaintiffs' use was a trespass.

The court of appeals, however, found it unnecessary to evaluate the testimony, since the plaintiffs themselves had not used the Haul Road for a full 10 years. Although the plaintiffs could tack the use of their predecessors in order to satisfy the ten-year requirement, the trial court failed to consider the ***character*** of the predecessors' use. The testimony of the predecessors showed their use was permissive. The earliest use was based on permission to use the road to haul building material, and there was no evidence of any change in the character of that use prior to the plaintiffs' acquisition. The court also considered that in the past the owners of the two properties had been on friendly terms and that the owner of the Haul Road had allowed use by anyone who had business up there. One of the predecessors had also helped maintain the road. The court pointed out that it has "consistently held that such an action by the dominant estate holder is indicative of a permissive use. Moreover, Stover and other witnesses all testified that the road was used in common with other people, another factor that weighs in favor of permissive use." 206 Or App at 185 (internal citations omitted).

Therefore, the plaintiffs' request for a prescriptive easement over a road failed to meet the proper criteria. This case is a good reminder that a claim requiring tacking the use of ones predecessor requires a careful analysis of the character of the predecessor's use.

Chris Minor

Bridston v. Panther Crushing Co., Inc., 206 Or App 178, 136 P3d 84 (2006).

Appellate Cases – Outside Jurisdiction

■ *WASHINGTON COURT UPHOLDS A FINDING THAT PERMITTED OUTRIGHT AQUACULTURE ACTIVITIES ARE SUBJECT TO THE SMA AND GMA*

In *Washington Shell Fish, Inc. v. Pierce County,* 132 Wash.App. 239, 131 P.3d 326 (2006), Washington Shell Fish (WSF) appealed Pierce County's code enforcement orders issued under Washington's Shoreline Management Act (SMA) and Growth Management Act (GMA), to prohibit WSF's planting and harvesting geoducks without permits. The appellate court affirmed the trial court, which had affirmed the hearing examiner's decision upholding the county's issuance of cease and desist orders to WSF.

To plant geoducks, WSF pushes three-inch diameter, polyvinylchloride (PVC) pipes into the shoreline using rope to guide tube placement. Geoduck seeds are placed into the PVC pipes. The pipes are covered with netting, and pins and wire-ties set the netting cover in place. The netting and pipes are later removed to allow the geoduck seeds to grow naturally. WSF has installed more than 21,000 such PVC pipes in the relevant shoreline. When a planted geoduck matures, harvesting involves using high-pressure water jets to excavate the substrate around the geoduck, loosening its grip, and then pulling the geoduck out of the sand. The process loosens and disrupts sand and silt and results in excavation pits one and a half to two feet in diameter.

This controversy stems from the legality of the geoduck activities. WSF neither sought nor obtained authorization from the county. In response to complaints, the county issued a series of cease and desist orders, requiring WSF to stop its geoduck operations and to stop working in eelgrass beds. At the hearing, WSF's expert testified that the evidence did not show WSF had planted in or harmed eelgrass, suggesting that eelgrass may have migrated into the areas after planting was completed. Neighbors and recreational users testified that WSF's equipment, rope, long metal stakes, and loose PVC pipes would occasionally entangle with other objects in the water or injure windsurfers. The hearing examiner upheld the county's cease and desist orders.

The SMA regulates both "uses" and "developments" of shoreline waters: (1) to protect and to manage the private and public shorelines of Washington state; (2) to protect against adverse effects to public health, public rights of navigation, land, vegetation, and wildlife; and (3) to plan for and to foster reasonable and appropriate shoreline uses. As is relevant to this case, a shoreline substantial development permit is

required if the proposed use will involve certain construction, removal of sand and gravel, placement of obstructions, or interference with the normal public use of the surface of waters. Although WSF raised a variety of arguments contesting potential environmental damage, the court relied on the notion that in general causing an interference with public use of the surface water is a sufficient basis for SMA jurisdiction and the issuance of a cease and desist order. The record contained sufficient testimony supporting the finding that the geoduck planting and harvesting operations interfered with public use of the water and posed a safety risk to the public.

WSF also argued that because geoduck harvesting was "permitted outright," it was exempt from the SMA. WSF's argument was premised on the Pierce County code, which states that geoduck harvesting is "permitted outright in all shoreline environments." WSF interpreted that status as an exemption from the SMA permitting scheme. The court rejected WSF's argument, holding that permitted outright status means only that the use may be permitted, but is not subject to conditional or special use standards.

The court also rejected WSF's argument that the county was not empowered to prohibit work in eelgrass beds under its GMA regulations. Under the GMA, counties are required to designate and protect critical areas, including fish and wildlife habitat. Pierce County's critical areas regulations require the county's approval for certain activities in critical areas, such as dredging and destroying vegetation. WSF argued that the critical areas regulations merely require that work be done in a manner sensitive to habitat function without harming the eelgrass.

Finding that eelgrass beds qualify as fish and wildlife habitat, the court upheld the finding that eelgrass beds are "critical areas" subject to county regulation and that an approval was required before conducting activities that could adversely affect habitat function. The court recognized that whether WSF's activities damaged eelgrass had no bearing on whether WSF was required to obtain county approval *before* undertaking operations in areas that contain fish or wildlife habitat, such as eelgrass beds.

Keith Hirokawa

Washington Shell Fish, Inc. v. Pierce County, 132 Wash. App. 239, 131 P.3d 326 (2006).

■ *FAILURE TO FILE LAND USE APPEAL PRECLUDES NUISANCE AND DUE PROCESS CLAIMS*

In *Asche v. Bloomquist*, 132 Wash.App. 784, 133 P.3d 475 (2006), the Washington Court of Appeals appears to have further tightened the hold of the Land Use Petition Act (LUPA) on all causes of action land use-related. This case concerns the issuance of a building permit on a property located in a view protection overlay zone in Kitsap County, Washington. The zoning overlay was adopted to protect views by "restricting the height of new residential construction" and was implemented by incorporating discretionary standards into the building permit review process. Application for a building between 28 and 35 feet in height triggers consideration of the view impacts on neighboring properties.

The building permit was issued without specific consideration of view impacts, presumably based on the city's interpretation and application of the overlay ordinance. The appellants, as neighbors to the building at issue, were not provided notice of the decision, the applicable procedures for which confused the parties and the court. After noticing construction of their neighbor's garage, the appellants contacted the builder and then sought information from the county. Months later, allegedly delayed because of county assurances, the appellants filed suit for a writ of mandamus, injunctive relief, and damages. Among other things, the appellants argued that the proposed building was approved without consideration of impacts to their view and that the proposed building exceeded 28 feet in height. The superior court dismissed the appellants' challenge to the building permit for failure to file a timely appeal of the building permit under LUPA.

On review, the court of appeals recognized and the county conceded that the overlay zone provided a valid basis for property interests protected by due process. Indeed, if the building were over 28 feet in height, a special process would apply and the appellants' view rights would be a central focal point for permit review. The problem for the appellants was that the height of the proposed structure was a land use decision; if the building did exceed 28 feet in height, a decision by the county otherwise should have been challenged as a land use appeal. Once the appeal timeline expired, that fact of the building's height became a verity and was immune from collateral attack, even if ***ultra vires*** or otherwise illegal, as recently decided by the Washington Supreme Court in *Habitat Watch v. Skagit County*, 120 P.3d 56 (Wash. 2005). Because the appellants were precluded from arguing about the actual building height, there were no valid nuisance or due process rights to pursue.

Several concerns arise from this decision, including the fear that the court's holding appears to conflict with recent precedent from the Washington Supreme Court. The

opinion begins with the court's holding, stated clearly and unambiguously: "We hold that their failure to file a land use petition within 21 days of the issuance of the building permit as required by RCW 36.70C.040 is determinative. Thus, their claims for nuisance, either private or public, fail, and their due process actions fail because they did not properly file under the Land Use Petition Act (LUPA)." 133 P.3d at 476–77.

One difficulty in the holding is that in *Grundy v. Thurston County*, 117 P.3d 1089 (Wash. 2005), the Washington Supreme Court recently reversed an appellate court decision on a closely related issue: the fact that a government tolerates a nuisance does not preclude third parties from seeking recovery or relief from a nuisance injury to another party. *Grundy* involved an action for water trespass under common law as well as regulatory compliance. This case was resolved with *Grundy* on grounds that Washington does not recognize a common law right to preservation of views. In contrast, a right to preservation of a view would necessarily arise in local land use ordinances and be resolved in the land use process. Although the court may have properly distinguished *Grundy*, we can expect the issue will continue to be litigated.

Equally controversial is the court's application of LUPA to preclude pursuit of an equitable remedy. The appellants argued that they could not have been bound to pursue a nuisance action under LUPA, as LUPA provides no effective relief. Under Washington law, local governmental decision makers typically lack equitable authority. LUPA only provides appellate authority to the courts and does not provide authority to award damages. Accordingly, it would seem that a court sitting in appellate capacity has no authority to establish an equitable remedy for nuisance where the initial decision maker lacked such authority. Nevertheless, the appellate court ruled that LUPA's provision for seeking a temporary stay of the governmental approval pending the litigation, as well as the court's statutory authority to "make such an order as it finds necessary to preserve the interests of the parties and the public," amounted to the authority to impose an equitable remedy equivalent to injunctive relief.

Finally, by imposing LUPA timelines on appellant's due process rights, the court appears to have imposed a 21-day statute of limitations on due process claims. Assuming that any adjudication of procedural irregularities in a land use process must be raised under LUPA, such a claim is certainly more efficiently brought under the LUPA procedures. Nevertheless, the circularity of the reasoning is problematic: the appellants were not provided any notice of the decision, which itself may have been the cause of the untimely filing.

Keith Hirokawa

Asche v. Bloomquist, 132 Wash. App. 784, 133 P.3d 475 (2006).

■ *THE NEVADA SUPREME COURT FINDS A TAKING BY HEIGHT RESTRICTIONS AROUND THE LAS VEGAS AIRPORT*

McCarran International Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006), involved affirmance of a trial court judgment against two public authorities (an airport and a county) for $6.5 million for a *per se* taking, along with attorneys fees, costs, and prejudgment interest.

The defendant county has restricted building heights and areas around airports since 1955 to avoid hazards. In the 1980s, plaintiff bought three parcels in the vicinity of the airport, noting that this land was zoned for hotels, casinos, and apartments. The subject site is 5,000 feet from the end of an airport runway. Under the city's regulations, the plaintiff could only develop the land to between 80 and 90 feet above ground level at that time—much less than the property similarly zoned in the area. A variance process also existed.

In 1990, following adoption of an airport master plan, the defendant county adopted additional restrictions limiting the height of structures on plaintiff's property to between 41 and 51 feet. The county then passed another ordinance, which dealt with height limitations on a slope from the runway and which resulted in permitted heights of only 3 to 10 feet. Again, only variances could be requested. The county had obtained an avigation easement over half of plaintiff's property from a predecessor in title in 1973, which protected it against noise complaints.

The plaintiff listed the site for sale for between $4.7 and $7 million, but completed no sales. A prospective developer sought to build a casino and hotel on the site, which required a variance to accommodate a 70-foot high structure. A staff member allegedly told that prospective buyer that no variance would be granted, a statement that the defendants dispute. Both the FAA and the county planning commission approved the variance; however, it lapsed after a year for non-use.

The plaintiff sued for inverse condemnation, claiming a *per se* taking under the federal and Nevada constitutions because the low and frequent overflights, noise, dust, and fumes lowered the property value. The plaintiff asserted that he had the right to use his property up to a 500-foot height and that the land below the allowed height of 500 feet was taken for public use. The county defended by saying that the case was not ripe because no variance was sought, that the overflights did not deprive plaintiff of the use of land, and that there was no required acquiescence to a physical invasion. The defendants admitted that flight patterns crossed the plaintiff's land, that aircraft flew below 500 feet on occasion, which the trial court also found, and that these invasions constituted a *per se* taking under *Loretto v. Teleprompter Manhattan CATV,* 458 U.S. 419 (1982).

The case proceeded to trial. The plaintiff dismissed the claims based on noise, dust, and fumes, electing to proceed solely under a physical invasion theory. The court assumed a 66-foot high building could be built with a variance and then awarded $6.5 million in damages plus costs, fees, and interest, resulting in a judgment of over $16 million. The public agency defendants then appealed.

The Nevada Supreme Court first considered whether the plaintiff had a valid property interest in the airspace over the site up to 500 feet as the trial court had determined, notwithstanding the avigation easement. Citing ***United States v. Causby***, 328 U.S. 256 (1946), the court concluded that a landowner owns as much of the airspace over the ground as can be occupied, whether or not that space is used. Following that case, Congress redefined "navigable airspace" to be 1,000 feet above ground level generally or 500 feet above congested areas except where necessary for safety. The Nevada court concluded there was a property right in that airspace and below. The court cited ***Griggs v. Allegheny County,*** 369 U.S. 84 (1962), for that proposition and added that even in the approach areas where the usable space was less than 500 feet, a takings claim could be made for the useable portions of the property.

Nevada law provides property owners with ownership up to the sky subject to a "right to flight." The court construed the statutes to allow construction of buildings up to 500 feet in height. Additionally, it found the avigation easement gave the county only those rights necessary to accomplish the public purpose stated and served. In this case there were no height restrictions in the easement, and it was only written to preclude liability for aircraft noise. The court concluded that to require an uncompensated easement in exchange for a permit would violate ***Nollan v. California Coastal Commission,*** 483 U.S. 825 (1987). The court added that the trial court correctly applied ***Loretto*** for a physical invasion under federal and state constitutional law. The plaintiff did not argue that he had been deprived of all economically beneficial use of his property. He argued only that his property was subject to a physical occupation. Nor did the plaintiff argue that the three factor ***Penn Central*** test applied, choosing to bring this case on a physical invasion theory because that theory involved a ***per se*** taking. For that reason, there was no ripeness hurdle.

The court found the plaintiff was not required to prove low and frequent overflights to seek damages as happened in ***Causby or Griggs*** because the evidence showed overflights occurred below 500 feet above ground level over plaintiff's property. By restricting height in the area to below 500 feet and allowing planes to fly there, the court said defendants allowed a physical invasion of plaintiff's property. The court rejected a ***Penn Central*** analysis of factors and pointed to the Nevada Constitution and Declaration of Rights for support in its decision to decide the case on independent state grounds.

The court found no abuse of discretion in inferring that a 66-foot high building could be built with the variance under the county's ordinance. The court also determined the trial court was correct in awarding attorneys fees and costs, plus prejudgment interest. Attorney fees and costs awards were provided for under the ***Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act,*** 42 U.S.C. § 4601–4655 (2000), in those cases where federal funds were used. The court noted that this act had been construed to include inverse condemnation acts, that Nevada law also required application of this act when federal funds were used, and that the airport had taken federal funds to acquire land and to make improvements in the area. The trial court decision was thus affirmed.

Judge Becker concurred in part and dissented in part, suggesting that ***Causby and Griggs*** were misapplied, since neither case found overflights to be the source of an obligation to compromise. Rather it was the nuisance activities of those overflights that generated that right. Moreover, Judge Becker said that the grant of an easement was not a taking, particularly if that grant had a direct connection to public health, safety, and welfare. Judge Becker did not apply ***Loretto***, but rather would have used the ***Penn Central*** factors to not give property owners in Nevada greater protections under the state constitution than the federal. Moreover, Justice Becker would have remanded the case for further analysis under the takings analysis contained in ***Lingle v. Chevron USA,*** Inc., 544 U.S. 528 (2005).

While he agreed with the majority that the easements might violate ***Nollan***, he found no damages to the plaintiff from their imposition. More importantly, Judge Becker found no physical invasion of the plaintiff's property. Since the landowner had the right to use the airspace, it was not a separate property interest. Only if overflights caused a nuisance would there be a right to a damage claim since aircraft may fly lower than 500 feet in an approach zone under both state and federal law. Justice Becker would also have found the claim to be ripe since the parameters of what could be built were clear, but wished to apply the ***Penn Central*** factors. Finally, Justice Becker concurred with the trial court determination as to attorney fees, costs, and prejudgment interest.

Justice Maupin dissented, finding no ***per se*** taking through a physical taking and no deprivation of all liable economic use. He found no violation of the ***Nollan*** restriction on the conditions. He went further saying that because flights come and go, there was no physical invasion either and thus, according to ***Lingle,*** only the ***Penn Central*** analysis could apply.

Moreover, Justice Maupin found the county had made no final decision because a variance had not been requested or disposed of. Because he determined there was no physical taking, a *Penn Central* analysis requires a ripe decision, which he felt was not present in this case. Finally, Justice Maupin would not have an independent state view of takings law separate from federal jurisprudence.

This is a troubling case since is seems to carve out a portion of property to find a taking only as to that portion, contrary to *Penn Central*. Moreover, the physical taking analysis used in this case appears to be inconsistent with *Causby and Griggs*.

Ed Sullivan

McCarran International Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006).

■ *PLANTING PALM TREES IN FRONT OF BILLBOARDS IS NOT A TAKING SAYS CALIFORNIA SUPREME COURT*

Regency Outdoor Advertising, Inc. v. City of Los Angeles, 139 P.3d 119 (Cal. 2006), involved an inverse condemnation claim against the defendant city for planting palm trees in front of billboards, thereby obscuring their visibility. The plaintiff claimed inverse condemnation, but that claim was rejected by both the trial court and the California District Court of Appeals, which found no "right to be seen" or compensation for this action. The city had planted the palms on median strips and other city property as part of a beautification project along Century Boulevard near the Los Angeles International Airport. The trial court awarded the city its attorney and expert fees and costs, amounting to just under $100,000. The court of appeals affirmed, finding a right for compensation for loss of visibility only where a separate and distinct property right was involved, such as a right to road access. That court also found that the city neither removed the billboards nor limited their maintenance and use and that the rejection of the city's offer to compromise before trial (consisting of $1,000 plus removal of one tree) entitled the city to its fees and costs.

As to the inverse condemnation claim, the court distinguished a decrease in value because of governmental actions from land being "taken or damaged" under the California constitution. The court found no authority for the plaintiff's claimed right to visibility. Tracing the rights of abutters to public roads, the court found recognition of a right to access and receipt of light and air from the street. However, those rights were not unqualified and did not include an interest in leaving a street in its original condition for all time. Considering various scenarios, the court found the billboard was not a public obstruction or nuisance, nor was the visibility taken by physical invasion or acquisition of property. Rather the city planted the palms without infringing on any property right for which compensation could be recognized.

The court noted a line of cases in which visibility was impaired during street improvements, but found that the blockage in those cases was foreseeable and not a source of compensation. There was also not a right by virtue of public improvements on a road, such as planting shade trees or other highway beautification measures. The improvement in this case comported with the general purpose of the road, so it could not be seen as a compensable injury, especially if it did not interfere with physical access to property. The trees in this case did not lower property values along Century Boulevard, and the city's actions were part of its traditional land use regulations for which there is normally no compensation since there is no division of land into discrete elements for purposes of regulatory takings analysis. Therefore, the court affirmed the lower court decision on the inverse condemnation claim.

The court then turned to the plaintiff's statutory claim that billboards could not be removed or limited under a local ordinance without compensation. It found that the planting of trees did not effectively remove the billboards as the plaintiff claimed. Moreover, the court interpreted the term "limit" to deal with limitations on the maintenance or use of billboards and not to municipal landscaping in a right of way. No California court has recognized a claim for loss of visibility. Any such claim on limitation grounds has always related to limitations on maintenance or use of the billboards by municipal restrictions. Anything else was not within the legislative intent which went no further. The court concluded:

> To summarize, we conclude that roadway beautification projects that may affect the visibility of nearby billboards, but are not undertaken for the purpose of limiting the "customary maintenance or use" of the displays, do not trigger the statutory compensation requirement. Here, Regency has offered no evidence establishing that the trees at issue were planted along Century Boulevard for the purpose of blocking its billboards from view—indeed, the evidence adduced at trial was to the contrary, with the manager of the landscaping project testifying that the trees had ***not*** been planted for this reason.

139 P.3d at ___ (emphasis original). (Slip Op. pg 23)

Finally, the court affirmed the award of attorney and expert fees as well as costs to the city in the light of the plaintiff's rejection of the compromise and settlement offer. The statute at issue precluded awards of fees and costs in eminent domain actions. The court distinguished the inverse condemnation proceedings in this case from an eminent

domain action and concluded the statutory exclusion for eminent domain did not apply. The plaintiff contended that the city's settlement offer was not made in good faith, but the court rejected that contention since the city's arguments were ultimately found meritorious and the offer was better than the trial court result for the plaintiff.

This case involved the consequences of a property owner overreaching and seeking takings damages for an unrecognized injury. If it would have prevailed, the plaintiff would have been entitled to attorneys' fees, expert fees, and costs. The plaintiff gambled and lost.

Ed Sullivan

Regency Outdoor Advertising, Inc. v. City of Los Angeles, 139 P.3d 119 (Cal. 2006).

■ *EIGHTH CIRCUIT REVERSES TRIAL COURT APPROVAL OF A WIRELESS FACILITY*

USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of Des Moines, 465 F.3d 817 (8th Cir. 2006), involved the plaintiff's proposal to build a wireless facility at the rear of a parking lot. The proposed tower would have exceeded the city's 85-foot height limit, which would ordinarily require that it be sited on a lot of 10 acres or more. Moreover, a tower may be granted, if at all, only through the special exception (conditional use permit) process and must either be screened or set back from the property line a distance equal to the tower's height. Alternatively, a variance must be granted for a smaller setback. The defendant board denied plaintiff's application for an exception and variance, and the plaintiff went to federal court, which ordered a grant of the permit.

The Eighth Circuit reviewed the matter *de novo* and said the policy underlying the Federal Telecommunications Act of 1996 (Telecom Act) encouraged the communications industry, but left local land use control processes in place, requiring only that the local land use bodies decide cases with written findings supported by substantial evidence in the record. The plaintiff alleged that the defendant had the burden of justifying the denial, but the Eighth Circuit found no such requirement—the normal standards for review of administrative decisions applied and, to the extent there was a burden, it was on the applicant to show that the burden was met. The term "substantial evidence" was used as it would be in other administrative agency reviews in federal court. So long as the local government did not discriminate among providers or effectively prohibit personal wireless services and the local decision was in writing and supported by substantial evidence, there was no displacement of land use authority.

Here the evidence justifying the denial of the exception and variance overlapped, but were consistent with local zoning regulations. There was a concern over whether the setback line should be smaller. The court noted that there was an adjacent development that might suffer from ice falling from the tower, leaving the defendant to conclude that the grant of a permit would not adequately safeguard the health, safety, and welfare of adjacent surrounding properties and would diminish their property value. The board found this evidence to be substantial, especially since the plaintiff did not submit any contrary evidence. The court agreed.

Similarly, the variance requirement was not met, and the court found that it could not use evidence not mentioned in the defendant's written justification for the denial. The variance required that the applicant show that it had been deprived of all beneficial or productive use of its land, that the need for the variance was due to a unique situation not of the applicant's own making, and that the grant would not alter the essential character of the property. Here there was no deprivation of all use of the land since it was a parking lot already. Nor was the situation unique—the site was simply not sufficiently large enough for the proposed use. The alteration standard may or may not have been met; however, all standards must be met, so the denial of the variance was upheld.

The plaintiff also argued that there was substantial evidence in the record to support its proposal because the plaintiff showed a need to improve its dropped-call ratio. Even assuming the plaintiff could make a case of the denial as an effective prohibition on service, the plaintiff would also have to show that alternatives were not feasible. The plaintiff failed to do so, and the court dismissed the plaintiff's complaint.

This case is a part of a now-familiar pattern of wireless facility permit denials. If a local government is not discriminating among service providers or effectively prohibiting wireless service, all it must do in the land use arena is to provide written findings supported by substantial evidence for any denial or conditioning. In Oregon, this is a familiar requirement in any event.

Ed Sullivan

USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of Des Moines, 465 F.3d 817 (8th Cir. 2006).

■ KELO COMES TO MUSKOGEE: THE OKLAHOMA SUPREME COURT FINDS CONDEMNATION FOR PRIVATE POWER GENERATION NOT A "PUBLIC USE"

Board of County Commissioners of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006), involves an eminent domain action by the plaintiff county to acquire easements for water pipelines for a private utility company to facilitate an energy plant not subject to public utility regulation. The defendants filed answers and counterclaims requesting a declaratory judgment and injunction, alleging the condemnation actions were not for a public use and were for solely economic development purposes, and thus void under Oklahoma statutory law and the state's constitution. The trial court found that the actions were for valid economic development purposes and thus constituted "public use." The trial court certified its order for immediate appeal, and the Oklahoma Court of Appeals reversed. The Oklahoma Supreme Court granted certiorari.

Oklahoma statutory law and the state constitution both require a public use and a public purpose for eminent domain. The supreme court said it would construe the constitutional provisions in favor of the landowner, relying heavily throughout its opinion on Justice O'Connor's dissent in *Kelo v. City of New London,* 125 S. Ct. 2655, 2671 (2005), rejecting economic development as a ground for eminent domain. While economic development for jobs were the stated purposes for the action, in the absence of blight, the court did not agree with the county, noting that *Kelo* allowed for different views on "public use" under state constitutional and statutory law. The court noted the absence of state statutory authorization for such an action, which was not the case in *Kelo*, and observed that it had previously rejected the broad view of eminent domain power advanced by the county. The court rejected the plaintiff's contention that a public energy plant constituted a public utility and was entitled to use eminent domain, noting that this right was limited to regulated public utility companies in the state.

With the principal issue disposed of, the court granted the defendants' motion for attorneys' fees and costs and remanded the case for a trial court determination as to the amount. As to appellate costs, those costs were recoverable under a statute upon reversal of the trial court judgment.

Ed Sullivan

Board of County Commissioners of Muskogee County v. Lowery, 136 P.3d 639 (Okla. 2006).

LUBA CASES

■ LOCAL PROCEDURE

LUBA's ruling on record objections in *Sommer v. City of Grants Pass*, LUBA No. 2006-130 (10/9/2006) is a reminder that a local appeal record consists of only those documents that are offered or specifically incorporated during the proceedings on the appeal. The petitioner in *Sommer* testified and offered written comments to the city council during an appeal hearing on a subdivision proposal. Later that evening, during the "Citizen Comment" portion of the council agenda, he expressed his disappointment about the outcome of the appeal hearing in oral comments to the council and submitted a document in support of his testimony. On appeal to LUBA, petitioner objected to the city's failure to include in the record the document he submitted with his "Citizen Comment" testimony. LUBA denied his record objection because the public comment portion of the council's agenda was not part of the appeal proceedings before the council on the subdivision request. Only those materials submitted to the council during the local appeal hearing are part of the record for purposes of the LUBA appeal. "That petitioner chose to comment on the appeal during the citizen comment portion of the city council meeting, after the public hearing on the appeal had ended, does not mean that the public hearing on the appeal was somehow re-opened." (Order at 3)

■ LUBA JURISDICTION

In *Neelund v. Josephine County*, LUBA No. 2006-080 (10/10/2006), LUBA addressed the often tricky question of whether an appeal is timely filed under the "actual notice" standard in ORS 197.830(3)(a) or the "knew or should have known" standard in ORS 197.830(3)(b). Petitioners in *Neelund* appealed the county's issuance of a development permit that approves construction of a dwelling and modification to the partition plat that created the affected parcel of property.

The parcel was created in 1992 when the county approved a partition with the condition that all homesites are to be located south of an identified irrigation canal. The owners later applied for a front yard setback variance and, when opposition arose, withdrew their application. In a letter dated January 21, 2005, the county notified interested parties, including petitioners, that the owners had withdrawn their variance application and planned to build a home on the north side of the irrigation canal with the garage located south of the canal. The notice included a site plan showing the location of the proposed home. On June 6, 2005, the county approved a development permit for a home and

garage on the north side of the canal and an accessory building south of the canal. The owners later applied for a height variance for the home. The county notified interested parties of the variance request and included in the notice a small site plan showing the location of the home. The homeowners withdrew their variance request on April 7, 2006. Petitioners filed an appeal of the June 6, 2005 development permit with LUBA on May 4, 2006.

The county moved to dismiss the appeal on jurisdictional grounds, arguing that the development permit was a ministerial decision that was not subject to LUBA review and, alternatively, that the LUBA appeal was untimely. LUBA quickly rejected the notion that the development permit was a ministerial decision, noting that the portion of the county code that allows the planning director to modify conditions of approval requires some interpretation and is not clear and objective.

Turning to the timeliness question, LUBA noted that whether the "actual notice" or the "knew or should have known" standard applies depends on whether the county was required to give notice of the development permit and whether petitioners were entitled to receive notice. LUBA rejected the petitioners' attempt to characterize the development permit as a discretionary permit under ORS 215.402(4). Citing the absence of any explanation to support this characterization or any showing that the county was required to give notice of the development permit, LUBA concluded the "actual notice" standard does not apply.

The remaining question before LUBA was whether the appeal was timely filed under the "knew or should have known" standards. This standard includes "subjective and imputed knowledge of a decision" or "inquiry notice." The county argued that the January 21, 2005 letter informing petitioners that the owners wanted to build a home north of the canal and the March 21, 2006 notice of the requested height variance were sufficient to put petitioners on inquiry notice that the county had approved construction of a home on the property. Petitioners argued they never received the January 21, 2005 letter until April 27, 2006 and that is the earliest date on which they could have known about the proposed dwelling north of the canal.

LUBA concluded that when petitioners knew about the precise location of the proposed home was less important than when they knew that the county had made a decision to approve construction of a home on the property. Under the facts of this case, LUBA ruled that the March 21, 2006 notice of the height variance was sufficient to place petitioners on inquiry notice that the county had approved a dwelling on the property. Petitioners took no further action to learn more about the proposed home after receiving the March 21st notice. LUBA concluded that the time for filing an appeal began on March 21st and, as a result, petitioners' appeal was untimely. LUBA also denied petitioners' motion to transfer the matter to circuit court, stating "[w]hen an appeal is dismissed as untimely, a transfer to circuit court is not appropriate." (Slip op. at 17)

■ *LUBA REVIEW*

Substantial Evidence

Issues concerning the substantial evidence standard of review are the focus of LUBA's decision in ***Wal-Mart Stores, Inc. v. City of Bend,*** LUBA No. 2006-040 (7/19/2006). In this appeal, Wal-Mart challenged the city's denial of its application for a commercial subdivision to be known as Juniper Crossing, site plan and design review, and conditional use approval for a proposed Wal-Mart Supercenter.

Traffic impacts were the key basis for the city's decision denying Wal-Mart's application. Evidence in the record included an initial Traffic Impact Analysis (TIA) and a Supplemental TIA submitted by Wal-Mart, as well as two memoranda from Wal-Mart's traffic engineers to ODOT and the city. Before the hearings officer, Wal-Mart argued that the Supplemental TIA and memoranda reflected agreement by the city, ODOT and Wal-Mart that proposed mitigation measures would allow affected intersections to operate at a level that is not worse than their existing performance. Opponents of the proposed Wal-Mart also submitted evidence from their traffic engineers that were critical of the traffic evidence submitted by Wal-Mart.

The hearings officer concluded that Wal-Mart failed to show the mitigation measures would be adequate and denied the requested land use approvals. The hearings officer described the applicable ODOT standard for the affected intersections with nearby Highways 20 and 97 as a "don't make it worse" standard. The hearings officer also identified five issues that the opponent's traffic engineers had raised and concluded they called into question the adequacy of Wal-Mart's traffic analysis and evidence.

On appeal to LUBA, Wal-Mart disputed the standard LUBA should apply in reviewing a substantial evidence challenge in the context of a denial. Citing the court of appeals' decision in ***Jurgenson v. Union County Court***, 42 Or App 505, 510, 600 P2d 1241 (1979), LUBA phrased its general standard of review as: "a denial is supported by substantial evidence***unless the reviewing court can say that the proponent of change sustained its burden of proof as a matter of law." Wal-Mart argued that the appropriate standard is derived from a line of workers' compensation cases and

requires LUBA to overturn a denial if "the credible evidence weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation," quoting ***Armstrong v. Asten-Hill Co.,*** 90 Or App 200, 752 P2d 312 (1988). LUBA expressed doubt about the applicability of the ***Armstrong*** standard to its review of the city's decision, but applied it nonetheless and determined the city's decision should be affirmed.

Noting that the record contained conflicting expert testimony, LUBA phrased the two questions posed by the ***Armstrong*** standard as: (1) Does Wal-Mart's evidence overwhelmingly favor a finding that the proposal satisfies ODOT's "don't make it worse" standard? and (2) Did the hearings officer fail to give a persuasive explanation for finding to the contrary? Wal-Mart argued LUBA should find for Wal-Mart on the first question because of the lengthy consultation process it undertook with the city and ODOT and the multiple expert reports it submitted. Wal-Mart also argued the testimony of the opponent's traffic engineer should be discounted because they simply critiqued Wal-Mart's experts and did not conduct any original studies to predict traffic impacts.

LUBA agreed with Wal-Mart that it "clearly put forth a much larger effort in this case to predict the traffic Juniper Crossing can be expected to generate," but noted that its "larger more technically sophisticated and documented effort" alone does not entitle it to prevail. With respect to the different approaches Wal-Mart's and the opponents' traffic engineers took, LUBA attributed that to the fact that Wal-Mart has the burden of proof and the opponents do not. Finally, LUBA disagreed with Wal-Mart's assertion that it should give the city's and ODOT's conclusions greater weight because they are neutral reviewers of traffic data. In LUBA's view, the weight to be given particular evidence is for the local decision maker to decide and LUBA will uphold the decision maker's assessments if they are reasonable, based on evidence in the whole record.

LUBA held that the issues raised by the opponents' traffic engineers successfully called into question whether Wal-Mart's traffic evidence satisfied ODOT's "don't make it worse standard." Acknowledging that there may be satisfactory answers to all of these issues, LUBA concluded that the record lacked specific responses from Wal-Mart. As a result, the hearings officer could reasonably determine that Wal-Mart failed to carry its burden of proof on traffic impacts and her explanation of her determination satisfied the "persuasive explanation" prong of the ***Armstrong*** standard. Accordingly, LUBA rejected Wal-Mart's substantial evidence challenge to city's decision.

Wal-Mart also challenged the hearings officer's interpretation of an "orderly development" criterion in the city's subdivision regulations. LUBA characterized the hearings officer's interpretation as "expansive," not adequately explained and incorrect. LUBA also agreed with Wal-Mart that the hearings officer erred in declining to impose a condition requiring Wal-Mart to obtain approvals from ODOT's rail division for certain improvements where the record identified no obstacle preventing Wal-Mart from obtaining these approvals.

Since LUBA sustained one basis for the city's denial of the proposed Supercenter, LUBA affirmed the city's decision.

Kathryn S. Beaumont

EDITOR'S NOTE:

In the Real Estate and Land Use Digest, Vol. 28, No. 3, June 2006, Keith Hirokowa wrote a summary of ***City of Olympia v. Drebick***, 156 Wn.2d 289, 126 P.3d 802 (2006). The ***City of Olympia v. Drebick*** concerned a developer who challenged the impact fees assessed by the city under Washington's Growth Management Act on the grounds that the fees were neither tailored to the actual impact of development on traffic flows nor would they be used in a manner beneficial to the development. The developer lost at the Washington Supreme Court and appealed to the United States Supreme Court.

In October 2006, the Supreme Court denied the writ of certiorari (Order 06-223). This leaves open the question of whether the federal Constitution would require that impact fees be based only on the development's actual impact on public services and be proportional in size to the impact. For now the answer under the Washington state constitution seems to be "no."

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