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Highlights

Appellate Cases—Takings

■ *MEASURE 39: THE OTHER BIG NEWS*

Quite rightly, the "big news" in Measure 39 was its limitation on public agencies' ability to condemn property when the property will later be transferred to a private party. Following in the wake of the U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 US 469 (2005), Measure 39 may have a major impact on the shape of many urban renewal and other public-private development projects.

At the same time, Measure 39 contained another piece of "big news" that got less notice in the run-up to November's election. Measure 39 radically changes litigation fee recovery in *every* Oregon condemnation case.

A property owner's entitlement to attorney, appraisal, and other litigation fees in condemnation has long been measured against the yardstick of the condemning agency's "30-day offer." Under the pre-Measure 39 version of ORS 35.346(7)(a), a property owner was entitled to recover litigation fees as decided by the trial court using the procedural mechanisms and standards in ORCP 68 (see *Dept. of Trans. v. Gonzales*, 74 Or App 514, 703 P2d 271 (1985)) if the jury's verdict at trial exceeded the highest written offer made by the agency at least 30 days before trial. See *generally Dept. of Trans. v. Glenn*, 288 Or 17, 602 P2d 253 (1979) (discussing attorney fee recovery in condemnation). The practical effect of the "30-day" offer mechanism was that a public agency's "last dollar" typically went on the settlement table 30 days before trial. That date was also significant because other provisions in ORS 35.346 generally require both sides to exchange their appraisal reports by that point as well. With "all cards on the table," the "30-day" offer mechanism provided a powerful incentive to settle for both sides—the public agency wanted to avoid paying the property owner's litigation fees, which would accrue from the beginning of the case, and the property owner could compare the agency's offer against both sides' appraisal reports.

Section 4 of Measure 39, which is available on the Oregon Secretary of State's web site at www.sos.state.or.us/elections/nov72006/guide/meas/m39, retains the idea that the property owner must "beat" the agency's offer, but radically moves the temporal goalposts to the beginning of the case. Under Measure 39, ORS 35.346.7(a) was amended to make the gauge for litigation fee recovery the public agency's *initial written offer*, which under companion provisions in ORS 35.346 must generally be served at least 40 days before the case is filed. Initial offers have typically been less than "30-day" offers for a variety of reasons, including the fact that they are made without the benefit of seeing the property owner's appraisal and are not influenced by the dynamics of a looming trial date.

Like its predecessor, the new litigation recovery mechanism is not reciprocal. In other words, if the property owner "loses" at trial in the sense of not recovering as much as the agency's offer, the property owner does not pay the agency's attorney and expert fees; rather, the property owner simply absorbs its own and pays relatively nominal court costs to the agency (see ORS 35.346(8)).

Measure 39's change in the gauge for litigation fee recovery will likely alter the dynamics of Oregon condemnation cases in many ways that cannot be predicted or perhaps even anticipated by Measure 39's sponsors. Although the precise practical shape of those changes will play out over time, assuming no further changes by the Legislature, Measure 39 leaves little doubt that the dynamics of condemnation litigation will change in important ways for both agencies and property owners.

While lawyers for both agencies and property owners attempt to predict the shape of those future changes, it is important to note an interesting piece of history. Although most of the present generation of Oregon condemnation lawyers have known only the "30-day offer" mechanism, the system for litigation fee recovery that was in place before 1971 was remarkably similar to Measure 39. Former ORS 366.380(9), which governed fee recovery for the state's principal

condemner, the State Highway Commission (the predecessor to today's Department of Transportation), provided that a property owner could recover costs and disbursements, "'including a reasonable attorney's fee,'" unless "'it appears that the commission tendered the defendants before commencing the action an amount equal to or greater than that assessed by the jury . . . .'" ***Dept. of Trans. v. Glenn***, 288 Or at 25 (quoting former ORS 366.380(9); ***accord Highway Comm. v. Helliwell***, 225 Or 588, 590, 358 P2d 719 (1961) (interpreting former ORS 366.380(9)); ***Highway Comm***. v. Lytle, 234 Or 188, 190, 380 P2d 811 (1963) (describing cost recovery under former ORS 366.380(9)).

Ironically, therefore, the answer to how the current change will affect us in the future may instead lie in the past.

Mark J. Fucile

Appellate Cases – Land Use

■ *MANNER OF SERVICE FOR APPEAL FROM LUBA IS JURISDICTIONAL*

Only service by registered or certified mail of a petition for judicial review from a LUBA order establishes the court of appeals' jurisdiction. In ***Wal-Mart Stores, Inc. v. City of Central Point,*** 341 Or 393, 144 P3d 914 (2006), the Oregon Supreme Court looked to the text and context of ORS 197.850 to construe the jurisdictional requirements for appeal to the Oregon Court of Appeals. In doing so, the court found that the term "service" has a well-established legal meaning of legal notice in a formal manner and that manner is impliedly jurisdictional when it is framed in mandatory terms.

The relevant facts are short. LUBA issued its Final Opinion and Order, and petitioner Wal-Mart Stores, Inc., timely filed by certified mail a petition for judicial review on the 21st day. Petitioner also served by first class regular mail copies of the petition on respondents who were all other parties of record in the board proceeding. Respondents received the petition on the 22nd day. The court of appeals dismissed the petition for a lack of jurisdiction.

ORS 197.850(3)(b) provides that filing a timely petition in the court of appeals "and service of a petition on all persons identified in the petition as adverse parties of record in the board proceeding is jurisdictional and may not be waived or extended." The next subsection, ORS 197.850(4), provides that "[c]opies of the petition shall be served by registered or certified mail upon the board, and all other parties of record in the board proceeding." On appeal, petitioner argued that service by registered or certified mail under ORS 197.850(4) was not a jurisdictional requirement because the manner of service was not explicitly stated in the jurisdictional provision of ORS 197.850(3)(b).

The Oregon Supreme Court applied the familiar ***PGE v. BOLI*** analytic paradigm to discern whether the Oregon Legislature intended to provide a mandatory manner for achieving service of appeals for judicial review of a LUBA order. The court found that "[t]he word 'service' is a term of art with a specific, legal meaning." 341 Or. at 398. According to Black's Law Dictionary, "service" denotes delivery of a legal notice in some formal manner and, thereby, use of the word "service" further implies accompanying legal requirements of how that service is to be made. In footnote 8, the court emphasized this understanding of the word "service" as it is used in state statutory law—the court noted for the legislature's edification the substantive legal difference between requiring "service" or "the fact of service." 341 Or at 399.

The court then turned to case law for guidance in how those legal requirements are discerned. Previously, in addressing a similar jurisdictional question affecting civil appeals, the court concluded that when service is mandated by statute it becomes jurisdictional, regardless of any explicit statutory reference to service as a jurisdictional requirement. The court concluded that "[w]hen read together, paragraph (3)(b) and subsection (4) of ORS 197.850 mandate that a party wanting to obtain judicial review of a LUBA order serve a petition for review, by certified or registered mail, on all adverse parties identified in the petition." 341 Or at 399–400. The court further noted that the legislative history of ORS 197.850 supports this conclusion.

Having disposed of the case jurisdictionally, the court did not reach petitioner's additional claim that ORS 197.850 imposes a jurisdictional deadline only for filing and not service. The court upheld the court of appeal's dismissal of petitioner's appeal for lack of jurisdiction.

Matthew J. Michel

Wal-Mart Stores, Inc. v. City of Central Point, 341 Or 393, 144 P3d 914 (2006).

■ *STUNTED GRAPE VINES: PINOT NOIR OR RAISINS?*

In ***Wetherell v. Douglas County and Umpqua Pacific Resources Company, Inc.,*** 209 Or App 1, 146 P3d 343 (2006), the Oregon Court of Appeals affirmed LUBA's decision to reverse and remand a Douglas County land use decision, ruling that the decision was based upon findings that were "not supported by substantial evidence in the whole record." ***See Younger v. City of Portland***, 305 Or 346, 360, 752 P2d 262 (1988) (setting the standard of review).

Umpqua owned a three-acre parcel in Douglas County that had been a vineyard for more than 30 years. Umpqua sought and received approval from Douglas County for a non-farm dwelling on the vineyard, using a soil scientist's report stating that a .3 acre parcel within the larger parcel consisted of inferior quality soil. Respondent Wetherell had submitted to the Douglas County Planning Commission photographs showing healthy vines, and two horticultural experts had submitted letters stating that the entire vineyard was healthy. However, the planning commission found that

the .3 acre lot was unsuitable for agricultural/forestry use. Although Douglas County accepted the soil scientist's report, LUBA and the court of appeals did not.

The court of appeals agreed with LUBA that there was no substantial evidence to support the county's finding that the .3 acre parcel was unsuitable, even though the soil scientist had stated that vines in the .3 acre lot were stunted and less vigorous than vines in the rest of the vineyard. The court of appeals and LUBA found that stunted vines did not make that portion of the vineyard generally unsuitable for the production of farm crops and livestock or merchantable tree species as required by ORS 215.284(2)(b). The record upon which the county made its decision did not meet the "substantial evidence" test. There was no substantial evidence that the small .3 acre parcel was incapable of supporting farm crops, livestock or timber, nor was there any evidence that the land was not and had not been put to those uses prior.

Therefore, the court of appeals concluded that LUBA had applied the correct "substantial evidence" standard and had applied it correctly. Hopefully less vigorous vines do not produce less vigorous wines.

Jack D. Hoffman

Wetherell v. Douglas County and Umpqua Pacific Resources Company, Inc., 209 Or App 1, 146 P3d 343 (2006).

■ *LUBA'S ISSUANCE OF CORRECTED ORDER DID NOT EXTEND DEADLINE FOR FILING APPEAL*

In Friends of ***Bull Mountain v. City of Tigard,*** 208 Or App 189, 144 P3d 965 (2006), the Friends of Bull Mountain appealed the city of Tigard's annexation ordinance to LUBA. LUBA issued a final order affirming the city. LUBA's final order was both issued and mailed to the parties on May 25, 2006. However, that order mistakenly indicated that the matter was "REMANDED 05/25/*05*" (emphasis added). On May 30, 2006, LUBA issued a new final order stating that the matter was "REMANDED 05/25/*06*" (emphasis added). LUBA did not withdraw its original final order. Friends of Bull Mountain attempted to appeal the matter by filing a petition for judicial review with the Oregon Court of Appeals on June 15, 2006. A copy of the petition was sent to LUBA by certified mail, but was sent to the other parties by first class mail.

ORS 197.850(3)(a) requires that "proceedings for judicial review [of a LUBA decision] shall be instituted by filing a petition in the Court of Appeals . . . within 21 days following the date the board delivered or mailed the order upon which the petition is based." The statute provides in subsection (3)(b) that "filing the petition . . . and service of a petition on all persons identified in the petition as adverse parties of record in the board proceeding is jurisdictional and may not be waived or extended." In subsection (4), the statute requires that "[c]opies of the petition shall be served by registered or certified mail upon the board, and all other parties

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of record in the proceeding."

Despite the language in ORS 197.830(4) requiring service by registered or certified mail, the court allows a party to provide service by regular mail if the petition is actually received within the 21-day period. The petitioners in this case used first class mail to send a copy of the petition to the parties of record in the LUBA proceeding. One of the respondents received the petition on June 16, 2006 (22 days after May 25th). Whether the petition was properly served depended upon which of LUBA's mailings constituted its final order (the May 25th or May 30th mailing) for purposes of calculating the 21-day period in ORS 197.850.

The court held that, although the second order mailed by LUBA contained a date correction, that change was not material. According to the court, "LUBA sent the same order twice." 208 Or App at 193. Because one of the parties of the LUBA proceeding received its copy of the petition a day late, the appeal was dismissed.

Emily Jerome

Friends of Bull Mountain v. City of Tigard, 208 Or App 189, 144 P3d 965 (2006).

■ HOW TO APPEAR IN A LAND USE PROCEEDING WITHOUT PARTICIPATING IN IT

Century Properties, LLC v. City of Corvallis, 207 Or App. 8, 139 P3d 990 (2006), involved the requirements of "participation" and "appearance" needed to have statutory standing at LUBA.

As part of its comprehensive plan periodic review process, the city of Corvallis held numerous workshops and hearings over several years, ultimately leading to the adoption of 14 separate ordinances collectively referred to as the "Natural Features Project." Century Properties, LLC, which owned 9.5 acres of commercial land in the city, did not involve itself in the Natural Features Project except to have its attorney send the city a letter stating that he was "appearing" in the hearings on the proposed ordinances and he would like to be placed on the notice list of any final decisions or related proceedings. Neither Century Properties nor its attorney submitted any other documents in the proceedings, nor did they testify at any hearing or take any position on the merits of any of the ordinances.

After adoption, Century Properties appealed the ordinances to LUBA under ORS 197.620(1), which governs appeals of post-acknowledgment plan amendments. The statute gives standing to appeal to "persons who participated either orally or in writing" in the proceedings leading to adoption of the amendments. LUBA dismissed the appeal, concluding that the letter from Century Properties' attorney did not constitute "participation" in the proceedings.

The Oregon Court of Appeals agreed with LUBA. The court examined the legislative history of ORS 197.620(1) and compared it with other statutes governing standing to appeal to LUBA. The court concluded that the original version of ORS 197.620(1) adopted in 1981 was clear that 'participation" meant something more than merely appearing; it required the petitioner to have taken an active role in the decision-making process. Subsequent revisions to the statute did not eliminate this requirement. Further, comparison to other LUBA standing statutes, such as ORS 197.830(2) regarding appeal of land use decisions, demonstrated that when the Oregon Legislature wished to adopt a less stringent standard, such as merely "appearing" in the local government proceedings, it did so by using different language in the statute.

The end result was that Century Properties had appeared in the local government proceedings on the Natural Features Project, but had not participated in it. Its failure to participate prevented Century Properties from having standing to appeal the resulting ordinances to LUBA under ORS 197.620(1).

David J. Petersen

Century Properties, LLC v. City of Corvallis, 207 Or App. 8, 139 P3d 990 (2006).

■ OREGON SUPREME COURT OVERTURNS UTSEY'S "PRACTICAL EFFECTS" REQUIREMENT

More than five years after the Oregon Court of Appeals' holding in *Utsey v. Coos County,* 176 Or App 524, 32 P3d 933 (2001), *rev dismissed,* 335 Or 217 (2003), that all persons challenging a governmental action must demonstrate that the action has a "practical effect" on their interests, the Oregon Supreme Court has determined that *Utsey* was wrongly decided. In *Kellas v. Department of Corrections,* 341 Or 471, 145 P3d 139 (2006), the supreme court expressly overturned *Utsey* and held that the legislature may grant all citizens the right to judicially challenge governmental actions without having to demonstrate "practical effects."

In *Utsey,* the court of appeals concluded that the League of Women Voters of Coos County did not have "constitutional standing" to challenge a LUBA decision. According to the court, it was not enough that the league had participated in the proceedings below in the manner authorized by statute; the league failed to also show that the outcome would affect it in more than an abstract manner, and thus did not have standing. The court conceded that nowhere does the Oregon constitution refer to "standing," but, as the court pointed out, neither does it refer to "justiciability," "mootness," or "ripeness," all of which are well-settled "judicial constructs" that the Oregon courts have adopted "in reference to the 'judicial power' conferred under Article VII (Amended) of the state constitution." 176 Or App at 529.

Utsey was an unusually fractured, 5 to 4 decision that

drew one concurring and three lengthy dissenting opinions. The primary debate involved how to interpret past Oregon Supreme Court cases that refer to a "practical effects" element of justiciability. The majority felt that "practical effects" is a stand-alone constitutional requirement that must always be satisfied, while the dissenters felt that "practical effects" arises only in the context of the mootness doctrine. Both sides agreed that litigants in federal court must demonstrate that they have suffered an "injury in fact" pursuant to Article III of the federal Constitution (*see generally Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130 (1992)), but they disagreed over whether the Oregon constitution imposes a similar requirement in state courts.

The league sought review of the court of appeals' *Utsey* decision, but ironically, the case became moot when the applicants withdrew their land use application and Coos County declared the application "null and void." Thus, the Oregon Supreme Court dismissed review of *Utsey* and denied the league's motion to vacate the court of appeals' decision. 335 Or 217 (2003).

Subsequently, the Oregon Supreme Court granted review in another land use case specifically to take up the issue of whether *Utsey* was wrongly decided. However, that case also became *moot* based on subsequent government actions, and the supreme court again dismissed review. *Just v. City of Lebanon,* 193 Or App 132, 88 P3d 312 (2004), rev dismissed, 342 Or 117, 149 P3d 139 (2006).

In *Kellas*, the Oregon Supreme Court was finally able to address the merits of *Utsey. Kellas* was not a land use case. Rather, it involved a challenge to two administrative rules of the Criminal Justice Commission that the Department of Corrections had used to determine a prison term for the petitioner's adult son. The petitioner, Kellas, challenged the rules pursuant to ORS 183.400, which provides, in part, that "[t]he validity of any rule may be determined upon a petition by *any person* to the Court of Appeals" (emphasis added).

The court of appeals *sua sponte* raised the issue of whether Kellas had constitutional standing to challenge the rules, determined that he had failed to demonstrate that invalidation of the challenged rules would have a "practical effect" on his interests, and dismissed the petition. 190 Or App 331, 78 P3d 1250 (2003). The state, which had taken no position before the court of appeals as to whether Kellas had standing, sought review by the supreme court, arguing that the legislature may authorize any person to seek judicial review of a governmental action without having to show a "practical effect."

In a unanimous opinion, the supreme court agreed with the state that the legislature has lawful authority to allow any person to challenge a governmental action. The court noted that the legislature has plenary lawmaking authority and held that statutory standing alone is sufficient to give a court jurisdiction over a case:

> A party who seeks judicial review of a governmental action must establish that the party has standing to invoke judicial review. The source of law that determines the question is the statute that confers standing in the particular proceeding that the party has initiated, "because standing is not a matter of common law but is, instead, conferred by the legislature." *Local No. 290 v. Dept. of Environ.* Quality, 323 Or 559, 566, 919 P2d 1168 (1996).
>
> 341 Or at 477.

Here, ORS 183.400(1) confers standing to "any person," with no limitations whatsoever. The court found nothing in the Oregon constitution restricting the legislature's ability to confer standing in such a manner. The court acknowledged that federal courts have interpreted the "cases" and "controversies" language of Article III, section 2 of the United States Constitution to require litigants in federal court to demonstrate standing. However, "the constraints of Article III do not apply to state courts," *Asarco Inc. v. Kadish*, 490 U.S. 605, 617, 109 S Ct 2037 (1989), and the Oregon constitution contains no "cases" or "controversies" provision. 341 Or at 478.

The court cited abundant precedent showing that, where authorized, individual citizens may act as private attorneys general to enforce public rights. For example, in *State v. Ware,* 13 Or 380, 10 P 885 (1886), the court held that a person seeking a writ of mandamus directing a county clerk to correct an election notice was not required to "show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such is interested in the execution of the law." *Id.* at 383 (internal citation omitted). In *Marbet v. Portland General Electric*, 277 Or 447, 453–57, 561 P2d 154 (1977), the court allowed the petitioner to seek judicial review of a site certificate for the construction of two nuclear power plants because the Administrative Procedures Act expressly entitled "any party to an agency proceeding" to judicial review, ORS 183.480(1) (1975), and the petitioner had been a party below. In *Deras v. Kiesling*, 320 Or 1, 879 P2d 850 (1994), the court allowed the petitioner to challenge a ballot measure explanatory statement pursuant to ORS 251.235 (1993), and did not require the petitioner to demonstrate a special interest different from that of the general public. Thus, the *Kellas* court determined that in the instant case,

> [t]he correct question is not whether [the Oregon constitution] requires a personal stake in the proceeding. Rather, the question is whether the legislature has empowered citizens to initiate a judicial proceeding to vindicate the public's interest in requiring the government to respect the limits of its authority under law.
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> 341 Or at 484.

The court acknowledged that several of its 1990s cases had sown confusion regarding "practical effects." In *People for the Ethical Treatment of Animals v. Institutional Animal*

Care and Use Committee of the University of Oregon (PETA), 312 Or 95, 817 P2d 1299 (1991), the court made a vague reference to constitutional aspects of standing: "*[A]side from certain constitutional considerations not presented by this case*, a reviewing court's inquiry into the standing of an entity seeking judicial review is confined to an interpretation of legislative intent." *Id.* at 99 (emphasis added); see also *Brian v. Oregon Gov't Ethics Comm'n*, 319 Or 151, 156, 874 P2d 1294 (1994) (citing PETA). The court noted that it had decided PETA and Brian on statutory, rather than constitutional, grounds, and clarified that its statements in those cases were not intended to establish any constitutional standing requirement.

The court also addressed *McIntire v. Forbes,* 322 Or 426, 909 P2d 846 (1996), which was the most compelling authority provided by the *Utsey* majority for its holding that "practical effects" is an independent element of justiciability. In *McIntire*, taxpayers challenged the constitutionality of a light-rail funding statute. The statute allowed "[a]ny interested person" to bring such a challenge. Or Laws 1995, ch 3, § 18(2) (Spec Sess). The following passage from McIntire led to a great deal of debate in *Utsey* regarding standing:

> There are two aspects to the analysis of justiciability in this case. The first relates to the standing inquiry: will a decision have a *practical effect* on the rights of the parties? The second relates to ripeness: is this case brought prematurely?
>
> . . . .
>
> This court recently has reiterated the standard for a justiciable controversy under Oregon law: "Under Oregon law, a justiciable controversy exists when 'the interests of the parties to the action are adverse' and 'the court's decision in the matter will have some practical effect on the rights of the parties to the controversy.' *Brumnett v. PSRB,* 315 Or 402, 405–06, 848 P2d 1194 (1993)." *Barcik v. Kubiaczyk,* 321 Or 174, 182 895 P2d 765 (1995).
>
> 322 Or at 433–34 (emphasis added).

The *Kellas* court interpreted this passage in a manner similar to that of the *Utsey* dissenters. First, *Brumnett* and *Barcik* were both mootness cases, and despite any ambiguous language in these opinions to the contrary, "practical effects" is part of the mootness inquiry rather than a stand-alone element of justiciability. (The *Utsey* dissenters further argued that *McIntire* was also a mootness case; the supreme court was silent on whether it felt the same way.) In addition, in *McIntire*, "practical effects" was relevant to the statutory standing determination of whether the taxpayers were "interested persons" within the meaning of the authorizing statute.

Although the court included limiting language in *Kellas* that its holding applies "at least within the context of the present controversy" and not necessarily to future facts, 341 Or at 476, the principles espoused in *Kellas* are broad enough to apply to most, if not all, situations where a statute authorizes judicial review of governmental actions. Under *Kellas*, the sole authority for determining standing in such cases is the authorizing statute. If the statute permits "any person" to bring a challenge, then the petitioner will undoubtedly have standing. In the land use context, if a statute authorizes any "adversely affected" or "aggrieved" person to bring a challenge, then the petitioner will likely have standing if she participated in the land use proceedings below and the decision made is contrary to the position she asserted. *Jefferson Landfill Comm'n v. Marion Co.,* 297 Or 280, 284, 686 P2d 310 (1984) (cited in *Kellas*, 341 Or at 482 n 4); see also PETA, 312 Or at 105 ("[S]tanding as an 'aggrieved' person in land use proceedings is broader than that under the Oregon APA."). Finally, traditional constitutional principles, such as ripeness and mootness, may apply to specific cases; indeed, the fact that both *Utsey* and Just were dismissed as moot reminds us of this possibility.

Kellas reaffirms the Oregon system of allowing meaningful citizen participation in the courts to shape matters of public interest, as distinguished from the federal system with its additional constitutional hurdles. The court expressly declined to rely on federal law "to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government." 341 Or at 478. The court also quoted a recent law review article by former Justice Linde that cautions state courts against unnecessarily importing federal justiciability standards into state common law: "It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions of legal disputes that affect people's public, rather than self-seeking, interests." Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*," 46 Wm & Mary L Rev 1273, 1288 (2005).

Nathan Baker

Kellas v. Department of Corrections, 341 Or 479, 145 P3d 139 (2006).

[Note: Mr. Baker is the staff attorney for Friends of the Columbia Gorge. Along with several other conservation groups, Friends filed an amicus brief with the Oregon Supreme Court in the Utsey case.]

Appellate Cases – Real Estate

■ WHEN A LETTER OF INTENT IS AN ENFORCEABLE CONTRACT, BE CAREFUL WHAT YOU SIGN

In *Logan v. D.W. Sivers Company*, 207 Or App 231, 141 P3d 589 (2006), the Oregon Court of Appeals considered whether a letter of intent containing a non-solicitation provision and a provision to supply and review due diligence materials constituted an enforceable contract to negotiate on those terms and, if so, what was the appropriate measure of damages for breach of the contract. In the end, the court held that an enforceable agreement to negotiate was formed and upheld the jury's award to the original plaintiff of consequential damages in the amount of $919,605.

The facts of the case were as follows. Logan sold a piece of real estate for a profit and was looking for replacement property to effect a section 1031 like-kind exchange to defer recognition of her gain on the sale. After negotiations during which Sivers learned of Logan's intention to consummate a like-kind exchange, Logan and Sivers entered into a letter of intent for a shopping center owned by Sivers. The letter of intent contained the material terms of the proposed transaction and a non-solicitation provision that prohibited Sivers and his representatives from seeking or entering into a letter of intent or purchase agreement for the sale of the property for a period of sixty (60) days after execution of the letter of intent.

The letter of intent, however, also contained a disclaimer indicating that the parties did not intend to be bound by the terms of the letter of intent, with the exception of the non-solicitation provision and a provision requiring Sivers to provide certain due diligence documents and Logan to review these documents, which the parties agreed were binding. By the time Logan delivered the draft purchase agreement to Sivers, Sivers had already contracted to sell the shopping center to another party. Logan attempted to find another replacement property in time to complete a like-kind exchange, but was unsuccessful and ended up paying $919,605 in taxes on the gain that she realized from the property she sold. Logan subsequently filed suit against Sivers.

At the trial level, a jury returned a verdict for Logan and awarded her $919,652 in damages, an amount almost equal to her tax liability. However, the trial court entered a judgment notwithstanding the verdict in favor of Sivers, ruling that the letter of intent was not enforceable because it was merely an "agreement to agree" and not a binding contract and alternatively that the damages sought by Logan were not recoverable.

Logan appealed the trial court's decision, arguing that if an enforceable agreement to negotiate was formed, it could give rise to a claim for consequential damages, and there was evidence to support the jury's award of damages.

The Oregon Court of Appeals began its discussion with the question of whether there was an enforceable agreement. The court concluded that the subject letter of intent fell within the category of preliminary agreements and, more specifically, within the type of preliminary agreement known as an "agreement to negotiate." The court went on to state that Oregon had not yet addressed the enforceability of agreements to negotiate, but that enforceability of this type of agreement would be determined on a case-by-case basis and would turn on the intention of the parties to be bound by the agreement and whether the terms of the agreement were sufficiently definite to provide a basis for determining whether a breach had occurred.

The court concluded that the parties manifested an intention to be bound by certain terms of the letter of intent—specifically Sivers agreed to provide due diligence documents and abide by the non-solicitation provision, while Logan agreed to review the due diligence materials. As a result, a binding agreement to negotiate arose, which obligated the parties to act and negotiate the remaining terms of the purchase agreement in good faith. Sivers breached this obligation by entering into a purchase agreement with a third party in contravention of the non-solicitation provision.

The court next addressed the issue of whether consequential damages were recoverable by Logan. Sivers argued that the jury's verdict should be set aside because the damages that it awarded were not caused by the breach and were not foreseeable and that the appropriate measure of damages for breach of the agreement to negotiate was the out-of-pocket expenses incurred by Logan in the negotiation. Sivers contended that the jury improperly presumed that the parties would have entered into a purchase agreement but for Sivers breach of the agreement to negotiate and that this conclusion was too speculative. Sivers had the right to back out of negotiations for any good faith reason and, as a result, the parties may not have entered into a purchase agreement.

The court of appeals disagreed, citing its standard of review requiring the court to uphold a jury's verdict if there is any evidence to support the award. The court held that there was sufficient evidence submitted at trial for the jury to conclude that (1) but for Sivers breach of the agreement to negotiate, the parties would have entered into a purchase agreement and eventually closed on the transaction allowing Logan to effect a like-kind exchange and avoid $919,605 in tax liability and (2) Logan's damages were a natural and foreseeable result of the breach.

Sivers has petitioned the Oregon Supreme Court to review the decision and the Portland chapter of the Commercial Association of Realtors is preparing an amicus brief in support as it believes this decision will have a negative effect on letter of intent practice in Oregon. So there is a decent chance that we will hear about this case again in the future.

Richard S. Bailey

Logan v. D.W. Sivers Co., 207 Or App 231, 141 P3d 589 (2006).

■ AT FORECLOSURE SALES, BUYERS MUST ALWAYS REMEMBER TO BEWARE

The case of ***Staffordshire Investments v. Cal-Western Reconveyance Corporation***, 209 Or App 528, 149 P3d 150 (2006), examines an all too common situation involving a statutory non-judicial trust deed foreclosure sale. Bickell mortgaged a property to Headlands Mortgage Company (Headlands) on July 9, 1999, and the loan was secured by a trust deed on certain property. Headlands assigned its interest to Bankers Trust Company of California, N.A. (Bankers Trust) on March 27, 2000. In January 2001, Bickell defaulted on the loan. Cal-Western Reconveyance Corporation (Cal-Western) as the substituted trustee filed a notice of default on June 26, 2001. Publication was made July 23, 2001, setting a sale date of November 8, 2001.

Notice was received by a co-grantor, Rainey, on August 17, 2001. In that notice, the auction was postponed to December 17, 2001. On November 8th the defendant entered into a loan forbearance agreement with the co-grantor. However, the co-grantor did not make the required payment by December 1, 2001 as agreed. On December 14, 2001, the defendant sent an e-mail to Cal-Western instructing them to proceed with the foreclosure sale on December 17, 2001. On December 15, 2001, the defendant and the co-grantor entered into a new forbearance agreement.

On December 17, 2001, the co-grantor mailed a payment under the new forbearance agreement. He then went to the scheduled sale and informed the bidders and the trustee about the agreement. The trustee attempted to reach the defendant, but was unsuccessful and, therefore, conducted the sale. After the sale, the defendant contacted Cal-Western and instructed them not to issue the Trustee's Deed. Cal-Western returned the plaintiff's purchase funds.

The plaintiff filed this action for breach of contract and breach of warranty seeking to recover lost profits it would have realized upon resale of the property. The trial court entered a judgment against the defendant for the plaintiff's damage (difference between fair market price and amount bid at sale) and dismissed the claim against the trustee, Cal-Western.

The Oregon Court of Appeals reversed and reinstated the claim against Cal-Western. The court ultimately held that the trustee had no authority to sell pursuant to ORS 86.740–86.755 because there was no default. There was no default because the parties had entered into a forbearance agreement on December 15, 2001, two days before the sale date. Although the forbearance agreement contained language that continued the default until the forbearance agreement was completed, the court determined that the purpose for the agreement was to forestall any sale unless the terms of the forbearance agreement were not met.

The court stated:

> The Act represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor . . . [I]t confers upon a trustee the power to sell property securing an obligation under a trust deed in the event of default, without the necessity for judicial action. However, the trustee's power of sale is subject to strict statutory rules designed to protect the grantor, including provisions relating to notice and reinstatement.
>
> 209 Or App at 542.

The court went on to state, "The ability of the grantor to postpone the sale by entering into, and complying with, a forbearance agreement with the beneficiary furthers that legislative intent. Enforcing a sale of the property at auction despite the existence of such an agreement would undermine that purpose of the Act. *Id*.

The court held that the plaintiff's remedy was limited to return of the purchase price plus interest, if applicable. The court also reinstated the claim for breach of warranty against Cal-Western, stating "Although our decision in the plaintiff's claim against the defendant may foreclose any recovery by the plaintiff on its breach of warranty of authority claim against Cal-Western, the parties have not had an opportunity to address the issue." 209 Or App at 544 (internal citations omitted).

This case exemplifies the risk of buying property at foreclosure auctions. After years of litigations, the final conclusion was that buyers should always beware.

Alan Brickley

Staffordshire Investments v. Cal-Western Reconveyance Corporation, 209 Or App 528, 149 P3d 150 (2006).

■ A CORRECT SURVEY MAY NOT MATTER IF IT IS OLD ENOUGH AND THERE IS RELIANCE

The case of ***Dykes v. Arnold***, 204 Or App 154, 129 P3d 257 (2006), contains an extensive and thoughtful review of the rectangular survey system and the law of surveying in the state of Oregon—none of which is repeated here; however, it is commended for anyone interested in the topic. The specific facts of this case involved a dispute over the boundary of various parcels in Lincoln County. The issue stems from a disagreement over the location of the center of Section 12 which was, essentially, the beginning point for the various parcels at issue.

Defendant's surveyor, aware that the center of the section had been previously established by Derrick, utilized that information and his location of that center corresponded with the accepted boundary lines in the area as reflected in the deeds, county road location, fence lines, and lines of occupation for the last 100 years. Plaintiff's surveyor, Denison, did not retrace the original survey locating the center of the section because he believed it was flawed. He located the center anew utilizing legally prescribed methods and modern survey techniques and disregarded other evidence of the

boundaries. Plaintiff's survey was different in that it located the center of the section some 71 feet northwest of where the defendant's surveyor placed it.

The court then entered into the discussion referenced above including a review of the deeds in the chain of title and the neighbors understanding of the boundaries. The court's determination rests on which of the surveys is to be controlling. The court held as follows:

> No evidence suggests that Derrick's survey was called into question for nearly 100 years. To the contrary, the record amply persuades us that the local reliance on Derrick's center has been extensive and long-standing. As Nyhus put it, "chaos" could ensue throughout this area of section 12 if Derrick's center were disregarded and the center of section 12 were located based on the correct methodology and modern survey techniques. Beginning in 1926, deed after deed has made calls to the center of the section. Property has been subdivided, homes have been built, the county road has been established, and lots have been conveyed and reconveyed in reliance on a section center that was monumented by Derrick and that has remained a known and identifiable point on the ground for local residents. Among other problems, if the center of the section were moved based on Denison's survey, the county road would be in the wrong place, a house would sit where the county road should be, and the lines of occupation in the area would not match the boundaries dictated by such a displacement of center.
>
> The flaw that infected Derrick's work, or other flaws like it, may infect many, if not most, of the first interior surveys of what were originally public lands all over the state. As Justice Cooley cautioned, few of the early surveys of public lands can stand the test of "a careful and accurate survey without disclosing errors." For the same reasons that a federal government survey of a section's exterior boundaries is given legal effect despite its errors, an original county survey of a section's interior boundaries should be as well. We, therefore, agree with ***Clark*** and the court in ***Adams*** that an original county survey marking the center of a section, despite a flawed methodology, should be decreed an original survey, one that is "left in repose" and given legal effect. Derrick's center, as physically marked on the ground, is therefore controlling in this case, even if incorrectly placed.
>
> 204 Or App at 186–187 (internal citations omitted).

If this ruling had been different, then every boundary line based on the original survey would have been compromised. This case shows the value of leaving an understood point of reference left in place.

Alan Brickley

Dykes v. Arnold, 204 Or App 154, 129 P3d 257 (2006).

Appellate Cases – Outside Jurisdiction

■ *ACCESS OF RIGHT OVER FEDERAL LANDS IS DIFFICULT TO PROVE*

The Fitzgerald Living Trust v. United States, 460 F.3d 1259 (9th Cir. 2006), involves a dispute regarding the right of access over a national forest road to the O'Haco Cabins Ranch, which is a 28-acre cattle ranch in northern Arizona owned by the trust. At the time of suit the ranch was accessible via a single forest service road through the surrounding Sitgreaves National Forest. Ultimately, the Ninth Circuit Court of Appeals affirmed the district court's opinion in favor of the United States on all counts.

In 1920 President Wilson granted the ranch "with the appurtenances thereof" to the original landowner pursuant to the 1862 Homestead Act. Act of May 20, 1862, ch. 75, 12 Stat. 392–93 (1862) (codified as 43 U.S.C. §§161–284) (repealed 1976). At the time of the grant, the property was surrounded by both the Sitgreaves National Forest and by land owned by private third parties. Roads crossing both the national forest and the privately-owned lands provided access to the ranch.

In 1983 Raymond and Nancy Fitzgerald purchased the property, which had become completely enveloped by the Sitgreaves National Forest and was only accessible via several routes through the forest. The United States Forest Service (Forest Service) closed all motorized access to the ranch except for a single road in 1986. The Forest Service then asked the Fitzgeralds to obtain a special use permit under the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §§1701-1785, if they wanted to use the road. The Fitzgeralds applied for the permit, but refused to accept it in the belief that they had a legal right to use the road without the proposed special use permit.

After a policy change in 1988, the Forest Service offered the Fitzgeralds a statutory private road easement under the FLPMA in lieu of the earlier proposed special use permit. The Fitzgeralds refused the private road easement, after which the Forest Service closed the road to motor vehicles. The Chief of the Forest Service ultimately upheld this decision in 1993, prompting the couple to file a lawsuit challenging the closure, which was eventually dismissed as moot. ***Fitzgeralds v. United States***, 932 F. Supp. 1195 (D. Ariz. 1996), ***vacated as moot*** No. CIV-94-0518-PCT-PRG (D. Ariz. July 19, 1999).

Subsequently, the Fitzgeralds filed a new use application with the Forest Service in 2000. In response the Forest Service drew up a thirty-year private easement, which the Fitzgeralds refused to accept due to the proposed easement's conditions. The appellants especially objected to the easement's use fee and termination provisions.

In response, the Fitzgeralds filed suit under the Administrative Procedures Act ("APA"), 5 U.S.C. §§701–706, and the Quiet Title Act, 28 U.S.C. §§2409a, alleging that:

(1) they had an easement by necessity, an implied easement under the Homestead Act, and an express easement over the road, (2) the issuance of the FLPMA thirty-year private easement was arbitrary and capricious because it restricted the couple's common law rights of access, and, (3) the easement further violated their statutory right of access under the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §3210(a), and their right to a permanent easement under the National Forest Roads and Trails Act ("NFRTA"), 16 U.S.C. §§532–538.

The district court granted summary judgment to the Forest Service. It decided that the service had the statutory authority under the FLPMA and the ANILCA to restrict a private landowner's ingress and egress over national forest land. Further, prior unrestricted use of the road did not trump this authority, and the private easement's conditions were found to be reasonable. Finally, the court held that the service did not abuse its discretion by offering the Fitzgeralds an easement pursuant to the FLPMA and not pursuant to the NFRTA. The landowners appealed.

Initially, the circuit court found jurisdiction over this case and declared a ***de novo*** standard of review. Using ***Adams II*** as authority, it then decided that the Fitzgerald's access to the Forest Service land was subject to the FLPMA and the ANILCA's permitting processes. ***Adams v. United States*** (***Adams II***), 255 F.3d 787 (9th Cir. 2001). However, quoting ***Skranak***, the court ruled that any regulations imposed through these processes must be reasonable, particularly regarding the claimant's common law easement claim. ***Skranak v. Castenada***, 425 F.3d 1213 (9th Cir. 2005). It further noted that a preexisting easement was relevant to the Forest Service's issuance of a FLPMA statutory easement. The court then addressed each of the landowners' easement arguments in turn.

First, the appellant's claimed that they had an implied easement to use the road due to the Homestead Act's language allowing people "to enter . . . unappropriated public lands" to establish homesteads. They compared this language to statutory railroad land grants, which earlier decisions required to be construed liberally. The appellants urged the court to adopt a similar posture to homestead grants.

In response the court quoted ***Jenks*** in holding that a Homestead Act grant may create an implied license to use public land to access a property, but it cannot create an implied easement. ***United States v. Jenks***, 129 F.3d 1348 (10th Cir. 1997). The act does not create a newly-vested property right. It merely codifies and authorizes the then-customary use of public land to access a homestead. The court further rejected the Fitzgerald's apparently unsupported contention that such an implied license was transformed into an implied easement by the 1920 grant.

Second, the court avoided the issue of whether an easement by necessity may be taken against the United States by finding that the Fitzgeralds did not meet the easement's common law necessity element. It wrote that the FLPMA and the ANILCA's statutory rights of access destroyed the necessity essential to the creation of such an easement.

Third, the Fitzgeralds argued that the 1920 grant created an express easement through its "with the appurtenances thereof" language and that the ranch would have been worthless without this express easement. Again citing ***Jenks***, the court ruled that in this context the word "appurtenances" would convey any existing easements, but it would not create a new easement. 129 F.3d at 1355. Additionally, the court found that the intent and specificity required to create an express easement were absent in this instance.

After dismissing the appellant's easement claims, the court then proceeded to make short shrift of the Fitzgerald's contentions regarding the unreasonableness of the use fee and termination provisions contained in the proposed thirty-year private easement. The court further held that the NFRTA did not help the Fitzgerald's claims because they were not using the road to maintain the forest and, thus, did not meet that statute's requirement for the granting of easements.

Finally, the court found that the offered thirty-year private easement was a reasonable use of the government's authority over the Sitgreaves National Forest.

Ben Martin

The Fitzgerald Living Trust v. United States, 460 F.3d 1259 (9th Cir. 2006).

■ *NINTH CIRCUIT INVALIDATES REDMOND, WASHINGTON'S SIGN ORDINANCE*

Ballen v. City of Redmond, 463 F.3d 1020 (9th Cir. 2006), involved the defendant's portable sign regulations, which prohibited all portable signs with ten exceptions. The plaintiff contended the ordinance did not directly advance a substantial governmental interest and reached further than necessary to accomplish any legitimate public interest. The trial court granted the plaintiff summary judgment and the Ninth Circuit affirmed.

Among the portable signs exempt from the city's ordinance were real estate signs, community celebration displays, temporary window signs, land use notices, and political signs. The plaintiff employed a person wearing a "Fresh Bagels—Now Open" sign to stand on the sidewalk in front of his business, Blazing Bagels. He was later served with a letter alleging violations and threatening a future citation. The plaintiff then brought a state court action contending the ordinance was unconstitutional. The defendant removed the case to federal court, which heard cross motions for summary judgment. The federal district court granted the plaintiff's motion and eventually awarded him $165,508 in attorneys' fees.

The Ninth Circuit reviewed the grant of summary judg-

ment de novo. The city replaced the ordinance under which the plaintiff had brought the complaint, but because the plaintiff had sought nominal damages under the previous ordinance, the parties and the court agreed the case involved a live controversy. The court also noted that the city threatened to reenact the replaced ordinance if it were successful on appeal.

The court found the plaintiff's portable sign was commercial speech, and all parties agreed that the speech at issue concerned a lawful activity and was not misleading. They also agreed that the ordinance advanced two legitimate city goals—traffic safety and aesthetics, which are substantial governmental interests. The plaintiff contended the ordinance failed to advance the substantial governmental interests directly and reached further than necessary to do so. Because the Ninth Circuit found the scope of the ordinance excessive, it did not reach the "direct advancement" issue.

The court noted the "more extensive than necessary" test came from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561–62 (1980), and required a "reasonable fit" between the restriction on speech and the government's legitimate goals. The restriction must include a means narrowly tailored to achieve the desired objective, though that fit need not be the most minimal means of achieving that goal. The *Central Hudson* court said that the degree of severity of the regulation was a relevant consideration in evaluating this test. In any event, the defendant has the burden of proving that the regulation is narrowly tailored. A categorical ban on all, or certain, commercial speech may not be upheld in most cases. In this case, all the exceptions to the categorical ban were content-based, and the city could not show how those exempt signs reduced traffic safety problems or promoted aesthetics more than the ban on any other signs or show that the city had carefully calculated the cost and benefits associated with the burden on speech imposed by the discriminatory content-based prohibition.

Some exemptions were found reasonable—political signs were subject to strict scrutiny, construction signs promoted pedestrian and traffic safety, and celebration banners promoted community and aesthetics. But others like "ubiquitous" real estate signs were an even greater danger to the vehicle and pedestrian safety and aesthetics than the single bagel sign at issue here. Permitting real estate signs was more a product of the power of that industry than aesthetics and traffic safety. The same may be said of temporary window signs and signs on kiosks, which were also exempted.

Moreover, the court found the availability of various alternatives to be a relevant consideration in evaluating whether the ordinance swept too broadly. The exempt signs had the same effect as those banned, thus it appeared that the ordinance discriminated and swept too broadly. The defendant could have imposed time, place, and manner restrictions on all signs or, if it found certain signs more distracting or unattractive regardless of their content, it could have banned them altogether. The court refused to apply the categorical prohibition on billboards containing offsite advertising to this case, which was upheld in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1991). The court noted that the Supreme Court in Metromedia found that each method of communicating was a law unto itself and that that case dealt with a ban of billboards. This was different from the law of sandwich signs and portable signs. Moreover, Metromedia banned all off-site commercial advertising without exception. That content neutral ban was upheld. Here the content-based exceptions were fatal to the ordinance.

The court also upheld the trial court's exclusion of the testimony of the City Code of Enforcement Officer that the ordinance served a public interest and reduced traffic safety and aesthetic problems so that the restrictions were beneficial for all, as there were no objective facts to support these legal conclusions. In addition, the statements did not deal with the "greater than necessary" objection.

The court also rejected the city's suggestion that the exemptions be severed. Finally, the court found the award of attorney fees subject only to an abuse of discretion standard. Attorney fees are available in civil rights cases like these unless the award is found to be unjust, which was not the case here. Nor did the court find the award excessive as it was calculated by a reasonable number of hours and a reasonable rate in accordance with factors recognized by case law. The order was upheld and the trial court judgment affirmed.

This case again emphasizes that sign regulations involve protective constitutional rights and must be drafted with the greatest care.

Ed Sullivan

Ballen v. City of Redmond, 463 F3d 1020 (9th Cir. 2006)

NOTICES:

The Real Estate and Land Use Section of the Oregon State Bar seeks an **Assistant Editor** and a **LUBA Case Summary Author** for the *Oregon Real Estate and Land Use Digest*. For consideration, e-mail Kathryn Beaumont at kbeaumont@ci.portland.or.us by April 30 with "Assistant Editor" or "LUBA Case Summary Author" in the subject line of your-email.

The *Oregon Real Estate and Land Use Digest* would also like to extend its best wishes to Ben Martin, who has been one of the digest's most diligent and reliable contributors. We are sad to see him go.

■ *PROPERTY LINE ADJUSTMENTS*

LUBA's decision in ***South v. City of Portland***, LUBA No. 2006-184 (2/13/2007) brings needed clarity to the process of reviewing and approving property line adjustments. In ***South***, the city approved a property line adjustment between two platted lots, each of which is larger than the minimum required lot size in the R10 zone. The city reviewed and approved the property line adjustment using a Type I procedure, in which surrounding property owners received notice and had an opportunity to comment. The intervenors, adjoining property owners, received notice of the proposed property line adjustment and submitted comments. The property line adjustment was modified in response to intervenors' comments before the city approved it.

Intervenors appealed the city's decision to LUBA on the ground, among others, that the property line adjustment is a discretionary "permit" within the meaning of ORS 227.160(2) and the city erred by failing to provide either a public hearing or an opportunity for public hearing. The cited statute defines a "permit" as "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." Assuming, without deciding, that approval of a property line adjustment involves the exercise of discretion, LUBA nevertheless rejected the intervenors' argument. A property line adjustment is not a discretionary permit under ORS 227.160(2) because it does not involve a "proposed development of land." The statute defines "development" as "dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285" and the ORS 92.010 excludes property line adjustments from the definition of partitions and subdivisions. As a result, LUBA observed "there is a strong inference that the legislature did not intend 'development' to include property line adjustments." (Slip Op. at 8)

In concluding that property line adjustments are not discretionary permits, LUBA distinguished two decisions cited by the intervenors, ***Smith v. City of St. Paul***, 45 Or LUBA 281 (2003) and ***Warf v. Coos County***, 43 Or LUBA 460 (2003). Acknowledging that the ***Smith*** case suggested a contrary conclusion, LUBA noted that the purported property line adjustment decision at issue in ***Smith*** in fact appeared to be a partition dividing two lots into four lots. As a result, the city in ***Smith*** properly used its quasi-judicial procedure for discretionary permits to review the ***de facto*** partition. Similarly, in ***Warf***, LUBA ruled that the two property line adjustments the county approved were in essence a partition and the county erred by failing to follow the necessary procedures for a discretionary quasi-judicial land use review. In ***South***, there was no dispute that the city approved a property line adjustment, and not a ***de facto*** partition. Accordingly, LUBA rejected the intervenors' claim that they were entitled to the notice and opportunity for hearing required for a discretionary permit and affirmed the city's decision.

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