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Highlights

Appellate Cases – Real Estate

■ *SUBSEQUENT PURCHASER MAY SUE BUILDER FOR NEGLIGENCE*

In *Harris v. Suniga*, 344 Or 301, 180 P3d 12 (2008), the Oregon Supreme Court ruled in favor of plaintiffs, trustees of the Harris Family Trust, who sought to recover damages for negligent construction of a Salem apartment building they purchased from a California investment company. Defendants, general contractors, constructed the building for the California company. The company then sold the building to plaintiffs. Shortly thereafter, plaintiffs discovered construction defects, including defendants' failure to install flashing on parts of the building. Water damage ensued.

At trial, defendants moved for summary judgment arguing that Oregon's economic loss doctrine, which requires a special relationship between parties for recovery of purely pecuniary losses, precludes construction defect liability of a general contractor to all but the initial purchaser of the property. The trial court agreed and granted summary judgment, but the Court of Appeals reversed.

Affirming the Court of Appeals, the Oregon Supreme Court reviewed the development of Oregon's economic loss doctrine, noting that allowing recovery for all financial losses resulting from a person's negligent acts had been frowned upon by the Court as having "the potential of leading to 'limitless recoveries and . . . ruinous consequences.'" 344 Or at 307-08 (quoting *Ore-Ida Foods v. Indian Head*, 290 Or 909, 917, 627 P2d 469 (1980)). To prevent never-ending liability, the economic loss doctrine had been carved out as an exception to the general rule that all persons are liable in negligence if their conduct unreasonably creates a foreseeable risk of harm to others. The Court referred to a prior case where the exception to that rule had been clearly stated: "[O]ne ordinarily is not liable for negligently causing a stranger's purely economic loss without injuring his person or property." *Hale v. Groce*, 304 Or 281, 284 (1987). This analysis squarely framed the issue in this case as whether the costs incurred by plaintiffs to repair water damage caused by defendants' negligence were "economic loss" or, instead, "injury to property."

Defendants relied heavily on the Court's ruling in *Onita Pacific Corporation v. Trustees of Bronson*, 315 Or 149, 843 P2d 890 (1992), which applied the economic loss doctrine in the context of negligent misrepresentation. In *Onita Pacific Corp.*, the Court held that one may recover economic loss resulting from another's negligent misrepresentations only if the negligent person owed the injured party some duty beyond the common-law duty to exercise reasonable care to prevent foreseeable harm. 315 Or at 159-161.

The Court emphasized that it defined "economic loss" in *Onita Pacific Corp.* as "financial losses such as indebtedness incurred and return of monies paid, as distinguished from damages for injury to person or property," 315 Or at 159-161, but that the "definition did not purport to be comprehensive." 344 Or at 310. Moreover, according to the Court, the defendants' argument would eliminate the common-law distinction between purely economic losses and damages for physical injuries to person or property:

> [e]very physical injury to property can be characterized as a species of "economic loss" for the property owner, because every injury diminishes the financial value of the property owner's assets. Damage to a car reduces the value of the car – one of the owner's assets. A tree falling on a person's residence is damage to property, but also can be characterized as a financial loss because it reduces the value of the residence, which the owner may properly view as an asset or financial investment as well as a residence. Yet the law ordinarily allows the owner of the damaged car or residence to recover in negligence from the person who caused the damage.

Id.

Defendants' argued that a decision favorable to the plaintiffs opens the door to limitless liability in negligence to successive purchasers. The Court replied that "[d]efendants' concerns are exaggerated. In our view, doctrines such as claim preclusion, contribution, comparative fault, and mitigation of damages will be available in appropriate circumstances to avoid the obvious unfairness of subjecting a defendant to repeated lawsuits seeking recovery for the same negligent act and the same property damage." 344 Or at 312.

This case has significant impact in both commercial and residential construction defect cases by giving subsequent purchasers an alternative to proceeding on a breach of contract theory, an avenue closed to those without benefit of a contract to begin with. Now, subsequent purchasers who have no contractual relationship with a builder can sue the latter – and recover – in negligence.

Nicholas Merrill

Harris v. Suniga, 344 Or 301, 180 P3d 12 (2008).

Appellate Cases – Land Use

■ COURT OF APPEALS REVISITS SPOTTED OWL CONSTITUTIONAL TAKINGS CASE

More than fifteen years after a pair of spotted owls was discovered on a 65-acre parcel of timberland in Clatsop County, and ten years after the owls abandoned the property, litigation continues over logging restrictions temporarily imposed by the state to protect the owls. After several rounds of ping-ponging between the circuit and appellate courts, the Oregon Court of Appeals addressed the case for the fifth time in *Boise Cascade Corp. v. State ex rel. Board of Forestry*, 216 Or App 338, 174 P3d 587 (2007). This time, the court determined that Boise's takings claims failed to satisfy the "whole parcel" rule, that temporary *per se* regulatory takings claims are not available under the federal Constitution, and that the trial court did not abuse its discretion in forbidding Boise from amending its complaint to reassert takings claims under the state constitution.

In 1990, a pair of spotted owls was discovered on Boise's 65-acre parcel. Two years later, Boise proposed to log the entire parcel, but the state prohibited Boise from logging 56 of the 65 acres. Boise sought judicial review of the state's order and filed an inverse condemnation action under the Fifth Amendment to the United States Constitution and Article I, section 18 of the state constitution, claiming that the state had "taken" Boise's timber without just compensation.

In previous rulings, the state appellate courts rejected Boise's arguments about the validity of the administrative rule that the state relied upon to deny the logging, held that the trial court had jurisdiction over the case, and held that Boise had stated a claim for a regulatory taking. On remand, Boise voluntarily dismissed its state takings claim, choosing to pursue only its federal claim. Boise also transformed its federal claim into a claim for a temporary taking when the state lifted the logging restrictions following the death of one of the owls and the relocation of the other. A jury awarded nearly $2 million in compensation to Boise on its theory that the state had temporarily taken Boise's timber by "physical occupation."

The case again made its way up to the state court of appeals, which rejected Boise's "physical occupation" theory. The court of appeals also held that the trial court had erred in striking the state's defense that Boise's claim was not ripe, but that neither side was entitled to summary judgment on the ripeness question.

On remand, the trial court granted the state's motion for a "plenary re-trial of all jury questions, including liability and damages issues." The trial court denied Boise's attempts to reinstate its claim under Article I, section 18 of the state constitution. After a trial, the jury found that it would have been futile for Boise to seek an incidental take permit and awarded Boise $25 for the temporary taking of its property. Both sides appealed, bringing the case to the court of appeals yet again.

In the instant case, the court of appeals first summarized three categories of regulatory takings claims under the U.S. Constitution. The first category is a regulatory taking claim under *Penn Central Transportation Co. v. Mahon*, 438 U.S. 104, 98 S. Ct. 2646 (1978), which requires a reviewing court to make "essentially ad hoc, factual inquiries" into the character of the governmental action, the economic impact of the regulation on the claimant, and the extent to which application of the regulation has interfered with any distinct investment-backed expectations. *Id.* at 124–25. The second category is one where a regulation causes a physical invasion of the claimant's property. The final category is a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), where a regulation permanently "denies *all* economically beneficial or productive use of the land." *Id.* at 1015 (emphasis added).

Because Boise's physical occupation claim had been previously rejected, the court considered the only remaining claim, which Boise had expressly structured as a *Lucas* claim. Boise argued that it was due compensation for a temporary taking because the timber on its 56 acres had been rendered valueless during the roughly four years during which Boise was prevented from logging.

The court rejected Boise's *Lucas* claim on a number of grounds. First, the court applied the "whole parcel" rule, which precludes compensation unless the claimant was deprived of all the economic value of the *entire parcel*. *See, e.g.*, *Seiber v. State ex rel. Bd. of Forestry*, 210 Or App 215, 149 P3d 1243 (2006), *rev den*, 342 Or 633 (2007) (no taking where claimant was prevented from logging 20% of its parcel); *Coast Range Conifers, LLC v. State ex rel. Bd. of Forestry*, 339 Or 136, 117 P3d 990 (2005) (same; 23%). Here, Boise was prevented from logging approximately 56 of 65 acres (86% of the parcel), and Boise alleged that the regulation deprived Boise of 96.7% of the fair market value of the entire 65-acre parcel. Nevertheless, the court held that this could not be a taking under *Lucas*, stating that "neither the United States Supreme Court nor the Oregon Supreme Court has ever applied an 'almost' whole parcel rule under the Fifth Amendment." 216 Or App at 354. The court noted that the balancing approach of *Penn Central* might have been more favorable to Boise, but Boise had failed to pursue a *Penn Central* taking claim.

The court also cited *Coast Range Conifers* for the proposition that Boise's timber was only one of the sticks in its bundle of prop-

erty interests and could not be severed from the rest of the property for purposes of a takings analysis unless there was evidence that the timber was subject to a contract to be logged. *See Coast Range Conifers*, 339 Or at 150–51. Because Boise's complaint focused on the timber to the exclusion of the rest of its property interests, Boise had failed to make a valid *Lucas* claim. Boise argued that *Coast Range Conifers* contradicted a prior holding that growing crops are a separate property interest from the real property on which they grow. *See Hawkins v. City of La Grande*, 315 Or 57, 70–71, 843 P2d 400 (1992). The court of appeals held that it was nevertheless bound by *Coast Range Conifers*, which was directly on point, and advised Boise to take up its argument with the Oregon Supreme Court, which had issued both opinions.

The court of appeals also rejected Boise's *Lucas* claim on temporal grounds. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Protection Agency*, 535 U.S. 302, 122 S. Ct. 1465 (2002), the U.S. Supreme Court held that a categorical takings claim under *Lucas* must involve a *permanent* deprivation of property; temporary takings claims must be pursued under *Penn Central* rather than under *Lucas*. Thus, Boise had failed to allege a valid *Lucas* claim.

Finally, the court addressed whether Boise should have been allowed to amend its complaint to reassert its takings claims under the Oregon constitution, which Boise had voluntarily dropped in earlier stages of the litigation. The court of appeals ultimately determined that the trial court had not abused its discretion in denying leave to amend the complaint. Central to this conclusion was the fact that it had been more than six years since Boise had dismissed the claim. In addition, the appellate court noted the state's assertion that allowing Boise to reassert the claim would result in prejudice to the state. Finally, given that the Oregon Supreme Court had recently held in *Coast Range Conifers* that the whole parcel rule applies under Article I, section 18 of the state constitution, the court expressed doubt about Boise's chances of prevailing on such a claim.

Nathan Baker

Boise Cascade Corp. v. State ex rel. Bd. of Forestry, 216 Or App 338, 174 P3d 587 (2007).

Appellate Cases – Takings

■ *PORTLAND GETS TAGGED ON DOLAN ISSUE*

Skoro v. Portland, ___ F. Supp. 2d ___, 2008 WL 490642 (D. Or., Feb. 21, 2008) involved conditions imposed on two developments in defendant city, one at S.E. 52nd and Cooper and the other at S.E. 52nd and Woodstock. The development proposed for the first site, which was zoned neighborhood commercial, included demolition and replacement of structures. The city, through its Bureau of Development Services, demanded a 12-foot wide sidewalk in place of the existing 6-foot wide sidewalk, which happened to be the only sidewalk improvement on the block. The development proposed for the latter property involved a similar demolition and replacement of existing structures with new buildings, but the city requested a dedication of an additional two feet of right-of-way and intended to replace the existing ten-foot sidewalk with a six-foot sidewalk and a planting strip. Neither demand would preclude

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the proposed development, although they could require redesign of the structures.

Plaintiff asserted a taking because the conditions were not roughly proportional to the impacts of the new uses. The court, framing its proportionality analysis as a mixed question of fact and law, suggested that both *Nollan* and *Dolan* had their basis in physical transfers of land, rather than in the now-discredited "substantially advances a legitimate state interest" prong of *Agins v. Tiberon*, 447 U.S. 255 (1980), which was overruled in *Chevron U.S.A. v. Lingle*, 544 U.S. 528 (2005). The court added that the city under *Dolan* must make an "individualized determination" that the condition is roughly proportional in nature and extent to the impacts created by the new use.

Plaintiff moved for partial summary judgment on the takings issue, which would leave only the just compensation issue to the jury. The court used a three-part test, beginning with whether the action allowed a permanent physical occupation of plaintiff's property. Determining that this was the case, the court moved on to whether the use of the regulatory (or "police") power would shield defendant from the takings consequences of a physical occupation that would normally attach. This step required the need to show both an "essential nexus" between the impacts of the use and the physical occupation, as well as the roughly proportional relationship between the requested dedications and these impacts. The final step would be the just compensation analysis if a taking were found, a matter left to the jury if the first two steps militated towards the taking.

Regarding the record on summary judgment, the parties presented opposing affidavits. The city presented an affidavit of its city engineer and the defendant an affidavit of a private transportation engineer. The city engineer's affidavit asserted, regarding the first site, that the proposed use was the "highest and best" use of the site, that it would produce 260 new vehicle trips and that the traffic from the site would "directly conflict with pedestrians, bicycles and vehicles." He contended the 12-foot dedication was consistent with the city's adopted "pedestrian design guide" created to make improvements conducive to walking by: (1) increasing pedestrian/bicycle vehicle access to the site; (2) providing direct access for emergency vehicles, thereby reducing response time; (3) providing an area for efficient location of utilities and the right-of-way; (4) providing an area to reduce pedestrian congestion on the site; and (5) enhancing property values by allowing an increased area for outdoor seating, advertising and street trees.

Similarly, the city engineer's affidavit regarding the second site also said the proposed use was the highest and best use, that it would add 69 new vehicle trips, that the 2-foot dedication would allow for a 6-foot sidewalk and 2-foot planting strip for street trees and buffers, and that the improvement might achieve the same list of benefits as with the first site. The affidavit concluded with a proportionality analysis to justify the exactions.

Plaintiff's expert's affidavit raised questions regarding the city's analysis, suggesting the second development squarely met applicable neighborhood plans while the first was not covered by any specific plan policy. The expert noted that the neighborhood association did not ask for any of the improvements proposed, some similarly situated properties in the area did not have these improvements, the pedestrian plan had been applied inconsistently by the city in other cases in the neighborhood, and the existing improvements were sufficient to handle traffic. The city filed a response affidavit contradicting the affidavit of plaintiff's expert.

The court never reached the rough proportionality issue, finding that the city failed to demonstrate the "essential nexus" required by *Nollan* with regard to the 2-foot dedication at S.E. 52nd and Woodstock. The court noted for this development that an existing 10-foot wide sidewalk was to be replaced by a 6-foot sidewalk so that a one-foot 6-inch frontage area and the street furniture area of 4 feet 6 inches could be accommodated. *Reducing* the size of the sidewalk and asserting that the vehicle trips generated by plaintiff's development in was the basis for the exaction was inconsistent. The court opined that no reasonable jury could find a nexus between the impacts and the dedication requirements, so it granted summary judgment to plaintiff on that issue.

The court concluded the other development at S.E. 52nd and Cooper would require a fact trial on both the essential nexus and the rough proportionality issues. The court noted that the requested improvements at the 52nd and Cooper site forced the relocation of the existing 6-foot sidewalk without changing its width and that the additional 2 feet would be used for a planting strip. In the court's view, these changes could not justify a denial of the proposed development and, therefore, could not support the required dedication of right-of-way.

The opinion in this case does not reveal why it was decided in federal court. Nevertheless, the case illustrates the need for local governments to justify exactions in a consistent and intelligible manner.

Edward J. Sullivan

Skoro v. Portland, 2008 WL 490642 (D. Or., Feb. 21, 2008).

Cases from Other Jurisdictions

■ STREAMLINED HEARINGS PROCESS INVALID SAYS CALIFORNIA APPELLATE COURT

Environmental Defense Project of Sierra County v. County of Sierra, 158 Cal App 4th 877, ___ P3d ___ (2008) involved defendant's approval of a zoning map amendment and tentative subdivision plan using a two-step procedure that required a hearing and recommendation by the county planning commission and hearing and final action by the county board of supervisors. The county had adopted a "streamlined zoning process" in which it gave notices of the planning commission hearing and the board of supervisors' hearing at about the same time. In this case, the petitioner filed a declaratory judgment action, arguing the county violated state law by giving notice of the board of supervisors' *before* the planning commission held its hearing on the proposal and by failing to include a summary of the commission's actual recommendation in the notice.

The trial court found that state law requires that notice of a right to respond to a zoning proposal must be given at least 10 days before the board of supervisors' hearing, but also found that the law implicitly requires the substance of the planning commis-

sion's recommendation to be included in the notice. The county gave an 11-day advance notice of a planning commission hearing and a 10-day advance notice of the county supervisors' meeting, but did the latter before the planning commission had heard the matter and made a recommendation. The notice assumed a positive planning commission recommendation, which occurred in this case, but the recommendation in this case also included a condition that was contained in the original staff report and thus was not known when the notice of the board of supervisor's hearing on the planning commission recommendation was set.

Plaintiff complained that it only had one working day to respond to the planning commission recommendation and contended that the 10-day notice statute must be calculated from the date of the planning commission action, when that recommendation was actually known. The trial court granted plaintiff's motion for summary judgment on that claim and defendant appealed, claiming that the trial court abused its discretion by granting a declaratory judgment when plaintiff had no standing and also contended that the trial court erroneously construed the applicable law.

The appellate court first considered the standing issue. Plaintiff claimed the declaratory judgment action was proper because there is an actual controversy between the parties. The court found the facts sufficiently developed so that standing was a question of law, which it reviewed *de novo*. If there is an actual controversy, it is within the trial court's discretion to grant a declaratory judgment. Notice of the board of supervisors' hearing was given seven days before the planning commission held its hearing and the Board asserted its procedure was lawful while plaintiff contended otherwise. Defendant also indicated it would continue its practice of "streamlining" future proceedings in the same manner. Under the circumstances, the appellate court concluded the question before it was not an academic one and the trial court did not abuse its discretion in granting declaratory relief.

The court then turned to the substantive issue in the case – whether notice of the board of supervisors' review of the planning commission recommendation can be given before that recommendation has been made by the planning commission. The court said the language of the statutory notice requirement was silent as to when notice must be given, so it looked to related statutory sections to aid in resolving this question. A related statute required that the notice include a "general explanation of the matter to be considered," which it construed to mean the planning commission's recommendation. In the court's view, this interpretation is consistent with the high value California law places on public participation in the planning process The court concluded:

> [t]ogether, there can be little doubt that the purpose of notice in cases such as this one is to inform the public of the legislative body's hearing so they will have an opportunity to respond to the planning commission's recommendation and protect any interests they may have before the legislative body approves, modifies, or disapproves that recommendation. If notice could be given before the planning commission made its recommendation and, therefore, without inclusion of what this recommendation was, the purpose behind the notice provision would be ill-served, as the notice would not inform the public to what "clearly defined alternative objectives, policies, and actions" they would be responding. 158 Cal App 4th at 891-92.

Allowing one business day to prepare for a hearing on the recommendation contradicted these substantial interests, so the trial court decision was affirmed.

This case presents a matter of statutory construction and would give pause to those in Oregon who might otherwise have to deal with the 120- or 150-day rules. It should be noted that Oregon law also allows a city or county governing body to "call up" a decision of an inferior officer or tribunal. Whether LUBA or Oregon appellate courts would take the same position as this California court in the instant case is still an open question.

Edward J. Sullivan

Environmental Defense Project of Sierra County v. County of Sierra, 158 Cal App 4th 877, ___ P3d ___ (2008).

■ *LAND USE SETTLEMENT BETWEEN CITY AND ITS MAYOR RESCINDED BY NEW JERSEY COURT*

Thompson v. Atlantic City, 190 NJ 539, 921 A2d 427 (2007) involved a federal lawsuit against defendant city by plaintiff Langford who was subsequently elected its mayor. The mayor and his co-plaintiff, Marsh, then negotiated a settlement of the suit after assuming office and together received $850,000. The state Office of Governmental Integrity ("OGI") brought an action in state court to rescind the settlement for violations of various conflict of interest laws. The trial court acknowledged the violations, but it refused to void the settlement for reasons of comity with the federal courts. The Appellate Division reversed and on review, the New Jersey Supreme Court concluded:

> [t]he primary purpose of conflict of interest laws is to ensure that public officials provide disinterested service to their communities and refrain from self-dealing. A secondary purpose is to promote confidence in the integrity of governmental operations. The conflict-ridden actions of Mayor Langford's political appointees, entering into a financial settlement to benefit their boss at the expense of the City, can hardly be viewed as disinterested or inspiring confidence in government. We now hold the City's settlement with its own mayor was so infected with conflicts of interest that it is void as a matter of state law. Because the City's unlawful settlement agreement with Langford and Marsh is a nullity, the monies disbursed to both must be returned to the municipal coffers. Any further relief sought by Langford and Marsh, such as reinstating the civil rights suits, must be pursued in federal court. 921 A2d at 430.

The genesis of the litigation was Langford's unsuccessful run for mayor in 1998 against an incumbent, Whelan, who was reelected. Whelan then eliminated the positions held by Langford and Marsh, his campaign manager, as liaisons with the local board of education. Langford and Marsh brought a civil rights suit against the city and alleged that their positions as neighborhood facilities coordinator and liaison were eliminated for impermissible political reasons. The trial court initially dismissed the case but the Third Circuit reinstated it and discovery began. While the lawsuit was pending, Langford ran again for mayor and was elected to the position. His lawyer, Ercole, once served as his campaign manager, and

Langford and Marsh initially consulted Ercole about suing the city, although Ercole referred them on to other lawyers who specialized in employment discrimination. Settlement talks began before Langford took office. Langford and Marsh rejected the city's offer of $300,000, and demanded a $1 million settlement. The settlement judge suggested the case was of nominal value.

Under New Jersey law only the mayor could consent to a settlement of outstanding litigation against the city and the outgoing mayor, Whelan, had declined to settle for the $1 million requested. On taking office, Langford appointed a friend as the city's business manager and deputy mayor, who would act in his absence and also appointed Ercole as outside counsel to the city. He offered another job as confidential aide to a sitting city council person who accepted the offer and had tendered his resignation but was still on the council. Langford appointed his deputy to act in his stead on the settlement matter and insisted that the old council (with the councilor who had resigned but not left the council to become his aide) sit in on the confidential resolution of the outstanding lawsuit. Langford was not present during these proceedings, but sent his deputy. The council on a split vote approved the $850,000 settlement payment with Ercole acting as outside counsel on the case. Ercole did not disclose that he had met with the Lanford and Marsh to discuss a potential employment discrimination lawsuit against the city before the case was filed.

After the city approved the settlement, the federal judge dismissed the lawsuit and allowed a 30-day period for any party to raise questions over the settlement. The council was advised by its in-house attorney that it should have had an independent source review the settlement before it proceeded, but declined to do so. A dissenting city councilor asked for an investigation by the state's attorney general, who then asked that the funds from the settlement be held in trust. The city authorized the distribution of funds nevertheless and Lanford's and Marsh's lawyers declined the attorney general's request to hold the funds in escrow pending the investigation.

The OGI brought suit to void the settlement agreement. The trial court found the settlement violated state law because Lanford and other participants had multiple conflicts of interest and once Langford became mayor settlement was a "legal impossibility." 921 A.2d at 433. The court noted that the business manager acted to settle the case, the settlement benefited his superior, and the council member who was just about to take a paid position with Langford also voted. But because the trial court determined that rescinding the settlement would be tantamount to vacating the federal court order of dismissal, it decided not to do so. The OGI filed an appeal with the Appellate Division to rescind the settlement and send the matter back to the trial court to determine the reasonableness of the settlement. The OGI also requested the imposition of a constructive trust on the settlement proceeds.

Langford and Marsh sought review contending that any action affecting the settlement should have been filed in federal court, that the trial court could not reopen these federal claims settled by the federal court, that the constructive trust was an oppressive instrument for resolution of the case because they had paid their counsel and their taxes and finally that they did nothing wrong.

The court began by saying that the strong mayor form of government that Atlantic City provided for in its charter imposed a heightened standard of ethical responsibility on the mayor. Langford would be disqualified in this case if he were to be asked to approve the settlement. The issue is whether the settlement can be accomplished by those beholden to him. The test for disqualification is fact-sensitive and involves whether under the circumstances a public official may have other interests or loyalties that tempt him to depart from his sworn public duties. It is unlikely that Ercole, the deputy-mayor business manager, or Langford's new confidential aide could retain favor if they opposed the settlement. Moreover, the court found it significant that Ercole never disclosed his past consultation regarding the lawsuit.

Given that the settlement violated state law, the question was whether the OGI could challenge this federal court settlement in state court when OGI was not a party to the federal settlement. The court noted that federal courts' jurisdiction is limited to resolving federal issues while a settlement agreement is governed by state contract law, which includes the remedies of rescission or enforcement. Even if a federal court retains jurisdiction to address questions involving enforcement of a settlement, the federal court did not do so here. Those questions can be resolved by contract law in state courts. Although the federal dismissal order allowed any party to reopen the matter within 60 days, OGI correctly said it was not a party and had no standing to reopen the matter. While it might have been better for OGI to have gone to the federal court, that action was not necessary. Because no contract can stand in opposition to the public good, there is a state law remedy available to deal with those ethic laws violations – "strong remedies" to determine whether the contract was void *ab initio* and to prevent unjust enrichment of the mayor and his co-plaintiff.

The court was not impressed by the arguments of Langford and Marsh that they had already spent the settlement proceeds on attorney's fees, taxes and other matters. The court used the equitable maxim that he who seeks equity must do equity and noted that these parties refused to slow down distribution of the settlement proceeds. The Federal Rules of Civil Procedure allow a court to reopen a final judgment. As a result, the New Jersey Supreme Court held that Langford's and Marsh's only avenue was to seek relief from the dismissal order in federal court. If the federal court declines to reopen the judgment, the court authorized the state trial court to determine the reasonableness of the settlement agreement.

This case does not directly involve land use issues but there are related issues that can arise over the conflicting interests of a municipality and a private person who subsequently takes elective office and who can influence the outcome of pending litigation that may involve a conflict between the personal interests of the office holder and that of his office. The decision in the New Jersey court is Solomonic in its reasoning and outcome.

Edward J. Sullivan

Thompson v. Atlantic City, 190 NJ 539, 921 A2d 427 (2007).

■ SECOND CIRCUIT DISMISSES TAKINGS CASE FOLLOWING RESPONSE TO CERTIFIED QUESTION TO NEW YORK STATE COURT

O'Mara v. Town of Wappinger, 518 F3d 151 (2d Cir. 2008) was a brief Second Circuit *per curiam* opinion that belied an extensive struggle between plaintiff landowners and the defendant town that regulated their land. The town granted subdivision approval to the land in 1963, allowing for a 10-unit development plus open space. When plaintiffs made application to construct a dwelling in the open space, it was denied. Plaintiffs then brought actions for declaratory and injunctive relief, alleging that the open space restriction was not of record and that they lacked actual or constructive notice of it. The trial court found that a substantive due process violation invalidated the restriction and granted attorney's fees.

When the case first came to the Second Circuit, it certified the question of whether subdivision conditions not recorded in the local deed records could be enforced against property owners. In doing so, the Second Circuit dismissed the civil rights claim that had been granted by the trial court. *See O'Mara v. Town of Wappinger,* 485 F3d 693 (2d cir. 2007). The specific question the Second Circuit certified to the New York Court of Appeals was: "Is an open space restriction imposed by a subdivision plat under New York Town Law Section 276 enforceable against a subsequent purchaser, and under what circumstances?" 518 F3d at 152The New York Court of Appeals found that an open space restriction placed on a final plat under state law was effective against the subsequent purchaser. *O'Mara v. Town of Wappinger,* 9 NY3d 303, 309 (2007). Given this construction of state law by a state court, the Second Circuit reversed the trial court judgment and remanded the case for further proceedings.

If another reason for not bringing local land use cases to federal courts were needed, it is this: the federal court may certify the question to a state court which will rule on the validity of local action in any event, even in the absence of the time and expense of the federal court proceeding.

Edward J. Sullivan

O'Mara v. Town of Wappinger, 518 F3d 151 (2d Cir. 2008).

■ NEW YORK APPELLATE COURT REMANDS LARGE TAKINGS VERDICT

Noghrey v. Town of Brookhaven, 852 NYS App.2d 220, ___ NE2d ___ (2008) involved property in Brookhaven that plaintiff had purchased in 1985 with the intent to build a shopping center. In 1987, the town placed a moratorium on new commercial development in most areas of the town and in 1989 it rezoned plaintiff's property for residential use. The parties litigated the matter in both state and federal courts for many years and eventually a state court jury found against plaintiff on his *Lucas* claim for a regulatory taking but, in balancing the three *Penn Central* factors, found a partial regulatory taking. Brookhaven appealed.

The court reviewed the jury instructions regarding the three *Penn Central* factors and focused on the first factor, which dealt with the economic impact of the regulation on the plaintiff. The court said the jury instruction on this factor allowed plaintiff to prevail if the jury found Brookhaven's action caused a "substantial decrease" or "significant reduction" in the value of the land. The court noted that very significant decreases in value did not constitute a taking under United States Supreme Court precedent and a mere diminution in value did not equate to a taking. The court concluded that the terms "substantial" and "significant" were insufficient to convey the extent of diminution necessary to support compliance with this factor.

The Appellate Division remanded the matter for a new trial and said the jury instructions must convey that the *Penn Central* factor at issue requires a decrease in value that is one step short of a complete taking by denying all viable economic use and leaving only a "bare residue" of value. In the alternative, the instructions must "use similar language which would properly convey to the jury the high threshold of loss necessary to support a partial regulatory taking." The case was thus remanded.

This case deals, perhaps unsatisfactorily, with the first *Penn Central* factor that requires an evaluation of the extent of loss to the plaintiff. This New York decision, like the federal takings decisions on which it relies, does not seek to quantify that diminution. It only says that the words "substantial" and "significant" are inadequate to capture the meaning of this factor. While we may know more about the first factor of *Penn Central* and what it does not say, we must still struggle with what it is intended to convey.

Edward J. Sullivan

Noghrey v. Town of Brookhaven, 852 NYS App.2d 220, ___ NE2d ___ (2008).

LUBA Cases

■ EFU ZONES

The issue before LUBA in *Wetherell v. Douglas County*, ____Or LUBA ___, LUBA No. 2007-133 (2/12/2008) (*Wetherell* II) was whether it was permissible under ORS 215.184(2)(b) for the county to approve a nonfarm dwelling on land generally unsuitable for farm use when the well, septic system, and driveway serving the dwelling are located on farm land. After carefully considering the intervenor-applicant's statutory construction arguments, LUBA concluded the answer is "no."

ORS 215.184(2)(b) allows a nonfarm dwelling on a lot or parcel "that is generally unsuitable land for the production of farm crops or livestock . . . considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract." The county's initial decision approved a nonfarm dwelling on a .3-acre portion of the intervenor's 3 acre parcel of property and allowed the well, septic system, and driveway to be located on the remainder of the property used for farm purposes. On appeal, LUBA remanded the decision because there was not substantial evidence to support the county's findings that the .3-acre portion was generally unsuitable for farm use. LUBA also reasoned that the legislature "certainly did not intend to allow improvements such as driveways, wells, septic systems and drainfields to occupy lands

suitable for growing crops just because the dwelling itself is situated on a portion of the parcel that is generally unsuitable [for farm use]." *Wetherell v. Douglas County*, 51 Or LUBA 699, 715-16, *aff'd* 209 Or App 1, 146 P2d 343 (2006) (*Wetherell I*). On appeal, the Court of Appeals affirmed LUBA's decision, but did not address the issue of whether infrastructure to support a nonfarm dwelling could be located on farm property. On remand, the county again determined the .3-acre portion was generally unsuitable for farm use and allowed a nonfarm dwelling on this portion and the well, septic system driveway serving the nonfarm dwelling to be located on the remaining 2.7-acre portion that is suitable for growing crops.

Applying the statutory construction methodology established in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), LUBA examined the meaning of the word "dwelling" as used in ORS 215.284(2)(b). Although the statute does not define this term, the Oregon Residential Specialty Code defines a "dwelling unit" to include a residential structure and the amenities typical of such a structure, including sanitation.

Moving from the text of the statute to its context, LUBA brushed aside the intervenor's argument that other provisions of ORS Chapter 215 that use the word "dwelling" suggest that term encompasses only the building structure. LUBA noted that ORS 215.283 identifies identifies "indoor plumbing" that is connected to a "sanitary waste disposal system" as an essential component of a dwelling. LUBA also found inconclusive the reference to "dwelling" in the lot of record provisions in ORS 215.700, which the intervenor cited. Finally, LUBA rejected the intervenor's argument that the word "dwelling" in ORS 215.284(2)(b) should be given the same meaning as the word "homesite" in ORS 308A.053, which includes improvements "customarily provided in conjunction with a dwelling." The latter statute is part of the statutes governing preferential tax assessments for resource lands and defines the term "homesite" for a very specific and different purpose: "to identify an area of land that can be taxed at a different rate than the surrounding farm parcel." That intent and purpose is very different than the intent and purpose underlying ORS 215.184(2)(b). Accordingly, LUBA concluded that "dwelling" as used in ORS 215.284(2)(b) "includes any essential or accessory improvements or structures and, therefore, like the dwelling itself, those essential or accessory improvements and structures are authorized only on portions of the farm parcel that are generally unsuitable for farm use." (Slip Op. at 20.) Since the county's findings allowed the well and septic system to be located on land suitable for farm use, LUBA again remanded the county's decision.

LUBA conceded one point to the intervenor and acknowledged that it went too far in *Wetherell I* in ruling that access roads and driveways must also be located on land generally unsuitable for farm use. While an access road or driveway to serve a nonfarm dwelling may be located on farm land, the county must necessarily analyze the impacts of the driveway under a related subsection, ORS 215.284(2)(a), before it approves a nonfarm dwelling.

■ GOAL 5

LUBA's decision in *Hegele v. Crook County*, ___ Or LUBA ___, LUBA No. 2007-078 (2/8/2008) illustrates that a flawed identification of conflicting uses can undercut a local government's analysis of a Goal 5 resource and triggers a remand to redo the Goal 5 process. Petitioner in *Hegele* appealed the county's decision approving his request to amend the comprehensive plan map to add a 24-acre portion of his property to the county's Goal 5 inventory of significant mineral sites and denying his application for a conditional use permit to mine the site. The proposed mining site is located in the scenic Lone Pine Valley and is approximately 1,500 feet from Lone Pine Valley Road, which attracts recreational visitors and bicyclists. According to the petitioner, the site contains Columbia River basalt, which is unique because it is easy to extract and highly desirable for road paving projects. Nearby residents opposed the proposed mining use, which the county initially denied and petitioner appealed in *Hegele v. Crook County*, 44 Or LUBA 357 (2003) (*Hegele I*), *aff'd* 190 Or App 376, 78 P3d 1254 (2003) (*Hegele II*).

The county identified uses that could conflict with the mine as "all residents, residences, properties, recreational visitors, motorists, and bicycles that currently exist or could in the future exist within sight and sound of this mine . . . ." Petitioner argued that the county erred in considering "recreational visitors, motorists, and bicycles" because only uses allowed in the county's broad zoning districts can be considered as potential conflicting uses according the Goal 5 rule, and road users are not a use listed in the county's zoning code. The county argued that petitioner reads the Goal 5 rule too narrowly and, in any event, residential uses are listed in the county's zoning code and local residents would comprise some of the recreational users, motorists and bicycles on Lone Pine Valley Road.

LUBA agreed that potential conflicting uses may include "uses that, while not specifically listed in the zoning district as allowed *land* uses, are nevertheless uses that could conflict with a Goal 5 resource." (Slip Op. at 10.) In *Hegele II*, the Court of Appeals adopted a broader view of conflicting uses and their impacts, ruling that legal, social, and economic impacts of conflicting uses could include social protests or economic boycotts by opponents of the mining use. However, LUBA concluded the county erred because the evidence in the record did not support the county's determination that nonresident "recreational visitors, motorists, and bicycles" would mount organized opposition to the mine and, therefore, they could not be considered conflicting uses.

The county compounded this error by considering the impact of these casual recreational users on the mine in reaching its decision to fully allow these conflicting uses and deny the mining use in its Goal 5 ESEE analysis. LUBA also noted that the county devoted 10 pages to a detailed discussion of the ESEE consequences of allowing the mining use and only two paragraphs to a cursory discussion of the ESEE consequences of denying the mining use. The county's analysis ignore petitioner's evidence concerning the unique economic and energy benefits of the proposed mine resulting from low cost, easy extraction of rock. On remand, LUBA directed the county to address all four ESEE factors and to consider petitioner's evidence as part of the county's ESEE analysis.

■ LOCAL PROCEDURE

Bias/Disqualification of Local Official

Petitioner in *Gooley v. City of Mt. Angel*, ___ Or LUBA ___, LUBA No. 2007-206 (3/18/2008) successfully challenged the city's

denial of his application for a quasi-judicial comprehensive plan and zoning map amendment because the local governing body failed to respond to petitioner's claims that two members of the local governing body should be disqualified on grounds of bias and conflict of interest. The city initially denied petitioner's application to change the comprehensive plan map and zoning designations of his 7.69-acre parcel from Light Industrial to Residential Single Family in October, 2006. Petitioner appealed the city's decision to LUBA and several opponents, including Janet Donohue and Regina Schiedler, intervened on the city's side. The parties subsequently agreed to a voluntary remand in June, 2006.

As a result of elections in November, 2006, three new council members were elected. They included Michael Donohue, husband of Janet Donohue, and Richard Schiedler, son of Regina Schiedler. The new city council considered the remand at a meeting on August, 2007. Although petitioner's attorney submitted a letter challenging Michael Donohue and Richard Schiedler on the basis of bias and conflict of interest, the letter was referred to the city attorney and apparently never circulated to the council. At the August meeting, Donohue disclosed his wife was an intervenor in the prior LUBA appeal, but stated he had no conflict of interest. Schiedler also disclosed that his mother was an intervenor in the LUBA appeal and stated he, too, had no conflict of interest. After some discussion about whether to hold a public hearing on the remand, the council decided not to do so. The council voted 3-2 to deny petitioner's application and continued the matter to September, 2007 for the adoption of findings. At the September, 2007 meeting, the council rejected petitioner's requests to address his claims of bias, reopen the hearing, and reconsider its August, 2007 decision, and voted to adopt findings and a final decision to deny petitioner's requested comprehensive plan and zoning map amendment.

On appeal to LUBA, petitioner argued the city violated Section 16.1 of its rules governing participation in quasi-judicial matters based on bias and conflicts of interest. The rule allows any party to a proceeding to challenge a city councilor's participation in a hearing and decision, and requires the challenging party to state the facts he or she is relying on and to state the challenge "prior to commencement of the public hearing." The city asserted the council's August, 2007 consideration of petitioner's request was a "meeting," not a "public hearing," and that Rule 16.1 was inapplicable.

Not surprisingly, LUBA found unpersuasive the city's distinction between a "meeting" and a "public hearing." While acknowledging that the August, 2007 meeting was not a full evidentiary hearing, it was a hearing for purposes of Section 17 of the council's rules of procedure, which implement ORS 227.183's requirements for disclosure of ex parte contacts and which the city did not dispute were applicable to the meeting. Additionally, LUBA noted that the city's argument leads to an illogical result as applied to the facts of this case: the challenges to Donohue's and Schiedler's participation could not have been raised at the initial public hearing in September, 2005, or at the time the initial decision was made in October, 2006, because neither man was a member of the city council at that time. Although petitioner tried to raise his bias and conflict of interest claim at the earliest practicable opportunity after Donohue and Schiedler were elected to the council, the city's position would preclude him from doing so on the basis that that the August, 2007 meeting was not a public hearing. In LUBA's view, this result is inconsistent with other procedural rules designed to keep quasi-judicial proceedings free of bias.

LUBA also rejected the city's claim that petitioner failed to state sufficient facts to support his claim the two councilors were biased. Petitioner's letter asserted the marital and family relationships between the intervenors in the prior LUBA appeal and the two councilors as the basis for his claim. LUBA interpreted Rule 16.1 to require the petitioner to state a *prima facie* claim of bias, which petitioner did, and the challenged councilors and the city to respond, which they did not. The rule does not require petitioner to *prove* that one or both of the challenged councilors are biased, as the city argued. Since the city did not address petitioner's challenge to Donohue and Schiedler and did not require either councilor to respond, LUBA remanded the decision to allow the city to follow the procedures of Rule 16.1.

Completeness of a Land Use Application

In *Painter v. City of Redmond*, ___ Or LUBA ___, LUBA No. 2007-221 (3/13/2008), LUBA ruled that the provisions of ORS 227.178(4) governing the completeness of a land use application mean what they say and an application is void on the 181st day after it is submitted under ORS 227.128(4)(d) unless the applicant has previously complied with the requirements of ORS 227.178(4)(a)-(c). The intervenor-applicant in *Painter* submitted its application to the city for a conditional use and site plan approval in October, 2006. Shortly afterward, the city notified intervenor its application was incomplete and in January, 2007 treated intervenor's request to withdraw the application as a request to place it on hold. On April 3, 2007, intervenor sent the city a fax stating that a traffic study would be forwarded and "that this will complete [the] application." The city requested additional information from intervenor on April 25, 2007 and declared the application complete on May 9, 2007. The city's hearings officer held a public hearing on the application and issued a decision approving it.

On appeal to LUBA, the petitioner argued the application was void on April 14, 2007, the 181st day after it was submitted, because the intervenor failed to take one of the steps required by ORS 227.178(2)(a)-(c) and, as a result, the city erred in approving the application. The intervenor argued that its April 3, 2007 fax indicated it was submitting some of the missing information (a traffic study) and that no more was forthcoming, rendering the application complete on that date under ORS 227.178(2)(b). LUBA disagreed, noting that the fax indicated the traffic study was forthcoming and that the intervenor continued to send information in support of the application to the city after that date. LUBA also rejected the intervenor's argument that its decision in *Caster v. City of Silverton*, 54 Or LUBA 441 (2007) held that a local government has the discretion to continue processing an application after the 180-day period expires even if the applicant does not complete one of the steps prescribed by ORS 227.178(2)(a)-(c). To the extent any of the language in *Caster* could be interpreted in that way, LUBA stated that "we now disavow that suggestion." (Slip Op. at 6.) Given the unambiguous statutory language that an application "is void" on the 181st day unless an applicant has complied with ORS 227.178(a)-(c), an applicant who fails to take one of the necessary steps cannot avoid this result even if the local government continues processing the application after the 181st day.

Measure 56 Notice

Ballot Measure 56, codified as ORS 215.503 for counties and

ORS 227.___ for cities, requires a local government to send written notice to an affected property owner of any amendment to a comprehensive plan or implementing ordinance that will rezone the owner's property. A proposal will rezone a property within the meaning of ORS 215.503 if it will change the base zoning classification of the property or will limit or prohibit uses previously allowed in the affected zone. In *Murray v. Multnomah County*, ___ Or LUBA ___, LUBA No. 2007-191 (3/27/2008), LUBA was presented with its first opportunity to examine the meaning of the term "rezone" in ORS 215.503.

Petitioner in *Murray* appealed the county's adoption of an ordinance that amended various chapters of the county code to add criteria for replatting and consolidating lots and parcels. He argued that the ordinance limited or restricted his ability to eliminate lot lines on his property by requiring him to go through a new replatting procedure or possibly a land division review, whereas he argued he could have accomplished this result prior to the ordinance through a simple property line adjustment. Accordingly, he asserted the county's ordinance rezoned his property within the meaning of ORS 215.503 and the county erred by failing to give him the individual mailed notice required by that statute. The county argued that petitioner's premise was incorrect because petitioner was advised prior to adoption of the ordinance that his desired lot reconfiguration would have to be reviewed as a replat under ORS Chapter 92 and the new ordinance did not change that. He could not have accomplished his objective through a simple property line adjustment. Since the ordinance did not limit or prohibit land uses previously allowed on the petitioner's property, the county contended it was not required to give petitioner notice under ORS 215.503.

Noting that "no court or review body has addressed the meaning of 'rezone' under ORS 215.503(9)(b)," LUBA turned to a letter of advice from the Department of Justice (DOJ) to the Department of Land Conservation and Development (DLCD) to help ascertain the meaning of that term. The DOJ advised that a local ordinance limits land uses previously allowed in an affected zone when it *will* change standards for uses currently allowed in the zone and the change either "physically restricts or constrains those uses, or narrows the circumstances under which the use may occur at all." (Slip Op. at 13.) LUBA accepted and applied this interpretation of the term "rezone" and, applying it to the county ordinance, concluded it did not limit or prohibit petitioner's use of his property. Before adoption of the ordinance, petitioner could not have eliminated a property line or consolidated lots by means of a property line adjustment. The ordinance added new review uses and criteria, but did not eliminate any of the prior available reviews. Accordingly, LUBA held that the ordinance did not "rezone" petitioner's property within the meaning of ORS 215.503 and petitioner was not entitled to individual mailed notice under that statute. Additionally, LUBA noted that even if ORS 215.503 was applicable, petitioner became the owner of the property after the first evidentiary hearing on the ordinance and it is petitioner's predecessor in interest, not petitioner, who would have been entitled to notice. Based on other jurisdictional defects discussed elsewhere in its order, LUBA dismissed the appeal.

■ LUBA JURISDICTION

In *Bohnenkamp v. Clackamas County*, ___ Or LUBA ___, LUBA No. 2007-157 (2/8/2008), LUBA concluded a county decision vacating an unimproved 30-foot by 100-foot section of public right-of-way is neither a statutory nor a significant impact land use decision. As part of its determination of whether a proposed road vacation is in the public interest, the county's standards require analysis of nine factors, including "[w]hether the right-of-way to be vacated has present or future value in terms of development potential" and "[w]hether anticipated growth or changes in use of the surrounding area are likely to impact the future use of the right-of-way proposed to be vacated." Petitioner argued that evaluation of these factors necessarily requires the county to consider its comprehensive plan and zoning regulations. The county argued that while these factors may touch on land use matters, they do not make the comprehensive plan or the county's zoning regulations approval standards for the road vacation.

LUBA agreed with the county that the two cited factors are intended to assist the county in determining whether the proposed road vacation is in the public interest and do not apply or "concern" the county's comprehensive plan or zoning regulations. "[A] decision concerns the application of a statewide planning goal, comprehensive plan provision or land use regulation only if the goal, plan provision or land use regulation functions in some meaningful sense as an 'approval standard' that the local government is required by law to apply in making the decision." (Slip Op. at 7.) Since that is not the case here, LUBA ruled the county's decision is not a statutory land use decision.

LUBA also rejected the petitioner's claim that the approved road vacation is a significant impact land use decision, noting that the portion of vacated right-of-way is unimproved, has never been used by vehicles, and will not lead to future development of the surrounding area. Maps and photos show that the area's land use pattern is established and the only impact of the road vacation will be to allow construction of one single family home on an abutting lot, consistent with development on surrounding lots. In LUBA's view, this is not a significant impact on present or future land uses. Absent a land use decision to review, LUBA transferred the county's decision to circuit court.

■ LUBA PROCEDURE

In *Dahlen v. City of Bend*, ___ Or LUBA ___, LUBA No. 2007-251 (Order, 2/29/2008), LUBA denied a motion to disqualify the intervenor-respondent's counsel under the Oregon Rules of Professional Conduct (ORPC). Petitioner argued that the intervenor's attorney and his law firm should be disqualified because the attorney previously issued decisions as a Deschutes County hearings officer that the city's hearings officer interpreted in the challenged decision in this appeal. Petitioner cited ORPC 1.12, entitled "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral," which prohibits a lawyer from representing anyone in a matter in which the lawyer participated personally or substantially as a judge or adjudicative officer unless all parties consent in writing. The intervenor responded that other attorneys in the law firm provided legal representation to the petitioner during the local proceedings and argued this is permissible under ORPC 1.10(c) as long as the

attorney in question is screened from participation. LUBA noted that neither the ORPC nor LUBA's enabling statute grant LUBA any authority to disqualify an attorney in an appeal to LUBA. Relying on its ruling in *Burghardt v. City of Molalla*, 28 Or LUBA 788, 789 (1995) in which it denied a motion to disqualify counsel on the basis of an alleged conflict of interest, LUBA concluded it lacked authority to disqualify the intervenor's counsel in this appeal.

■ *MEASURE 37*

Petitioners in *Hines v. Marion County*, ___ Or LUBA ___, LUBA No. 2007-185 (3/19/2008) challenged the county's preliminary approval of a subdivision pursuant to previously granted Measure 37 waivers on the ground that some of the coapplicants for the subdivision were not subject to the waivers. The six intervenors-applicants, all tenants in common, included Leroy Laack, who acquired his interest in the property in 1971. Only the Measure 37 waivers granted by the state and county to Laack would allow the entire property to be subdivided. The waivers granted to intervenors Andrew and Margaret Rainone, who acquired their interest in the property in 1973, authorized the state and county to not apply different laws as to them.

As approved, the intervenors' application proposed to divide a 217.43-acre parcel of EFU-zoned property into 43 lots. The county found that the waivers granted to Laack and the Rainones "would allow each of them to develop the property in a manner consistent with his or her waiver" and noted that "a condition of approval will require that their ownership interest in the subject property remain unchanged until the subdivision plat is recorded." Among the conditions of approval was Condition 7: "[t]ransferring ownership of the subject property from Leroy Laack, Andrew Rainone, and Margaret Rainone prior to the final plat being recorded could void this approval." (Slip Op. at 5-6.)

Although LUBA had some difficulty parsing the petitioners' argument on appeal, petitioners appeared to argue that the county should have applied any laws applicable to any of the intervenors to its review of the proposed subdivision with the result that the subdivision could not be approved under the combined set of applicable laws. This is a broader position than DLCD asserted during the local proceedings, which LUBA summarized as requiring the county to deny the subdivision approval as to all intervenors except Laack. Specifically, DLCD contended that ORS 92.010(6) and (8) and ORS 215.263 prohibit subdivision of the property and were waived pursuant to Measure 37 only as to Laack.

The intervenors argued that all six property owners signed the application because the county's zoning ordinance requires the signature of all owners of property for which a land use approval is sought. In the intervenors' view, Condition 7 effectively assures that the subdivision approval is consistent with the approved state and county Measure 37 waivers.

LUBA agreed with DLCD's position that as long as the proposed subdivision complies with all laws applicable to Laack, the county could approve the subdivision as to Laack and deny it as to all other intervenors. Even if the county's regulations required all of the intervenors to sign the application, the county could issue an applicant-specific decision. Although the county could have taken this approach, which LUBA characterized as "the more straightforward approach," the county chose to approve the subdivision for all applicants as long as Laack and the Rainones remained property owners until the final plat was approved and recorded. LUBA questioned whether the county's choice of approval methods complied with Measure 37 since it left open the possibility that one of the intervenors who is not entitled to subdivision approval could submit a final plat for approval as long as Laack and the Rainones remained owners of the property until the plat was recorded. Even assuming the county's approach is permissible, LUBA identified Condition 7 as a fatal flaw for several reasons. First, the condition was merely a warning statement and not a condition. Second, it did not limit subdivision approval to the intervenors who received Measure 37 waivers and were authorized to subdivide the property. Accordingly, LUBA remanded the decision to the county.

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