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Highlights

Appellate Cases – Land Use

■ THE THIRD TIME IS NOT THE CHARM (WHEN YOU FAIL TO PRESERVE YOUR APPEAL RIGHTS)

In *Wetherell v. Douglas County*, 226 Or. App. 320, 203 P.3d 300 (2009), petitioner Umpqua Pacific Resources Company, Inc. (Umpqua) applied to Douglas County for permission to build a non-farm dwelling on a three-acre parcel in an exclusive farm use (EFU) zone. The county approved placing the house on a 0.3-acre parcel it declared to be unsuitable for farm use and the placement of accessory improvements, like wells, a driveway, drainfields, and septic systems, on abutting parcels that *were* suitable for farm use.

Wetherell, a neighbor of the property, appealed the decision to LUBA, alleging a lack of substantial evidence regarding the unsuitability for farm use of the 0.3-acre site. She also alleged that permitting the placement of accessory improvements on land *suitable* for farming violated ORS 215.284(2)(b), which limits the placement of dwellings in EFU zones to land "unsuitable . . . for the production of farm crops and livestock or merchantable trees species . . . ." It was Wetherell's position that the word "dwelling" should include accessory improvements.

LUBA agreed with Wetherell that (1) there was no substantial evidence to support a determination that the 0.3-acre parcel was not suitable for farm use, and (2) the improvements accessory to the dwelling could *not* be located on the land that *was* suitable for farm use. LUBA's decision was sustained by the Court of Appeals on the basis of a lack of substantial evidence. The court did not reach the second question.

On remand the county took additional evidence regarding the lack of suitability for farm use of the 0.3-acre area and reinstated the applicant's right to place accessory uses on land that was suitable for farm use. *See Wetherell v. Douglas County*, LUBA No. 2007-133 (Feb. 12, 2008).

Wetherell appealed that decision to LUBA. LUBA found there now was substantial evidence that the 0.3-acre site was not suitable for farming but repeated its holding that improvements accessory to the dwelling also had to be placed on the property unsuitable for farm use and remanded the matter to the county. Umpqua accepted the remand and did not further appeal LUBA's decision.

On rehearing and re-approval of the dwelling and accessory improvements, the county made a finding that appeared to honor LUBA's determination that the accessory improvements also be located on land unsuitable for farm use. All the parties agreed, however, that this finding could have been interpreted to mean that the location limitation only applied to improvements *to be* built or installed and that, therefore, existing improvements could remain on land suitable for farming, albeit contrary to LUBA's rulings. (The petitioner offered information that Umpqua had begun drilling a well on the land *suitable* for farming, but the county had refused to open the record to receive this evidence.)

Wetherell appealed the County's decision to LUBA, addressing the ambiguity in the county's approval, and LUBA agreed with her argument. *See Wetherell v. Douglas County*, LUBA No. 2008-074 (Sept. 7, 2008). LUBA remanded the matter to the county to eliminate the ambiguity. Umpqua appealed LUBA's decision, resulting in this case.

On appeal, Umpqua contended that LUBA's remand to eliminate the ambiguity was creating a criterion that local decisions "be clear," that this "set an erroneously high standard," and that local decisions should be given a "presumption" of being "valid, reasonable, and correct." 226 Or. App. at 325. The court rejected Umpqua's "it's too hard to be clear" argument. (The Umpqua argument might also have been

the reason that the county did not appear at the hearing. It might have been a difficult argument for the public body itself to make.) The court found LUBA's remand for clarification to be appropriate.

Umpqua argued that LUBA could not have come to its conclusion regarding the ambiguity of the county's holding without considering outside evidence. The court rejected this argument without discussion.

Finally, Umpqua argued that LUBA misconstrued ORS 215.284(2) when it held that improvements accessory to a dwelling in an EFU zone must also be on a parcel unsuitable for farm use. Once again emphasizing the need to preserve one's rights on appeal, the court held that Umpqua's failure to raise this issue after LUBA's *second* decision precluded Umpqua from raising the issue on appeal of LUBA's third decision.

For now, the answer to the question of whether the concept of "dwelling" under ORS 215.284(2) includes accessory improvements such as driveways, wells, septic systems and drainfields has been answered affirmatively by LUBA. Any appellate determination of this issue will have to await a future case.

Ruth Spetter

Wetherell v. Douglas County, 226 Or. App. 320, 203 P.3d 300 (2009)

■ *BEAVERTON ANNEXATION BATTLE: THE LAST CANNONBALL?*

When a city expands its limits without the consent of a property owner it is often called "hostile annexation." Rarely, however, has such a *casus belli* arisen than that which followed the City of Beaverton's 2005 foray into unincorporated Washington County. In recently upholding de-annexation of some of that property, the Court of Appeals might persuade the combatants to lay down their swords. *Cogan v. City of Beaverton*, 226 Or. App. 381, 203 P.3d 303 (2009).

Many readers know the history of conflict between Beaverton and some of its would-be/could-be/might-be residents. Oregon law had long allowed "island annexation" without landowners' consent. ORS 222.750. Over a period of years, Beaverton annexed property (much of it road right-of-way) that surrounded swaths of unincorporated area. In late autumn 2004, the city, weary of providing various services to unincorporated residents, summarily decided to annex some of this area.

Most of the annexees submitted, but others fought their new city hall. The Beaverton spring of '05 saw the battle joined at court and capitol. Fearing any spread of the power of *annexatious nonconsentialis*, the 2005 legislature precluded future such moves statewide. S.B. 887, 73rd Leg. Assem., Reg. Sess. (Or. 2005).

But S.B. 887 did not stop there. It added a back-dated prohibition on certain such annexations. Specifically, the state's plenary policy-makers decreed that any such annexation undertaken within the six preceding months could not stand if the "area of land":

- was larger than seven acres;
- was zoned for industrial use;
- was owned by an Oregon-based business entity that had been in continuous operation for at least 60 years; and
- employed more than 500 individuals on the land.

Its legal quiver armed with such legislative arrows, one such-described annexee (how many could there be?) took the legislation to court. While recognizing its obvious relevance to the subject at hand, LUBA, *Leupold & Stevens, Inc., v. City of Beaverton*, 51 Or. LUBA 65 (2006), and the Court of Appeals, *Leupold & Stevens, Inc., v. City of Beaverton*, 206 Or. App. 368, 138 P.3d 23 (2006), pointed out that they had no record on which to judge the effect of S.B. 887.

Back the matter went to square one, which in this instance was a petition by the dissident property owner to the city for de-annexation. Unwilling to part easily with its hard-fought territory, the city denied the petition. LUBA reversed the denial and the city petitioned the Court of Appeals. Before each appellate body, the city pressed two points.

Noting that one of the five Leupold & Stevens parcels was zoned residential, the city first argued that the affected "area of land" was not "zoned for industrial use." LUBA and the court carefully analyzed the text of S.B. 887. Each concluded that the relevant "area of land" for purposes of de-annexation included only the industrially zoned land containing the factory.

The City's second point was that, having already presented the S.B. 887 argument to LUBA and the Court of Appeals, claim preclusion prevented Leupold & Stevens from doing so again. LUBA and the court disagreed, pointing out that the prior case had not accorded Leupold a full and fair opportunity to submit evidence and litigate the underlying issue of S.B. 887's reach.

In a related case, Leupold & Stevens filed a declaratory judgment action against the city seeking a declaration that the city's order denying its request to de-annex the four lots was void following the adoption of S.B. 887. *Leupold & Stevens, Inc. v. City of Beaverton*, 226 Or. App. 374, 203 P.3d 309 (2009). The trial court dismissed the action for lack of subject matter jurisdiction, ruling that the property owner was asking the court to make a land use decision, which it could not do. On appeal, Leupold & Stevens argued that its action asked the trial court to declare the validity of the city's order in light of S.B. 887 and, because circuit courts retain jurisdiction to grant declaratory relief under ORS 197.825(3)(a), the trial court improperly dismissed its action. The Court of Appeals agreed, holding that

the trial court was simply asked to decide the applicability of S.B. 887 to the city's order and not to make a land use decision. Accordingly, the appellate court reversed and remanded the trial court's decision.

There is probably not a lot of legal precedent here, but there is certainly plenty on the political side.

Ty K. Wyman

Cogan v. City of Beaverton, 226 Or. App. 381, 203 P.3d 303 (2009)

Leupold & Stevens, Inc., v. City of Beaverton, 226 Or. App. 374, 203 P.3d 309 (2009)

Appellate Cases – Ninth Circuit

■ *NINTH CIRCUIT UPHOLDS CALIFORNIA BILLBOARD LAW*

Maldonado v. Morales, 556 F.3d 1037 (9th Cir. 2009), involved a Redwood City property owner's (Maldonado) challenges to California's billboard law, which allowed the use of billboards to advertise onsite businesses or products and prohibited offsite commercial advertising and all non-commercial speech. After a long-running dispute, the state sued Maldonado in nuisance and obtained an injunction. However, Maldonado persisted in his use of the site for offsite commercial advertising and was twice cited for contempt in state court. He then brought suit in federal court challenging the state law on its face and as applied. The district court first found the regulations unconstitutional but subsequently issued an injunction on summary judgment. The injunction prohibited the state from enforcing the billboard law against non-commercial speech on billboards where onsite commercial speech is allowed. Maldonado appealed.

The court of appeals first considered the issue of mootness because the billboard regulations were amended after the district court issued its injunction, so as to prohibit regulation of non-commercial speech. Describing mootness as "the doctrine of standing set in a time frame," 556 F.3d at 1042 (quoting *Abdala v. I.N.S.*, 488 F.3d 1061, 1063 (9th Cir. 2007)), the court noted that the injunction first issued by the trial court was duplicated by the amended regulations. However, there were other claims that remained even after the amendment, including claims for vagueness, overbreadth, equal protection violations, and violation of the suppression doctrine, rather than mere violations of the billboard law.

The court then considered whether Maldonado had standing because, even if he were to have prevailed on his claims, other valid state and local regulations likely would have prevented the erection of the billboards. Acknowledging that possibil-

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ity, the court nevertheless decided to proceed, explaining that "standing is broader for facial First Amendment challenges . . ." and that "plaintiffs have standing to challenge exceptions as underinclusive when the exception does not apply to the plaintiff." *Id.* at 1044.

The state next argued that Maldonado had not been prosecuted criminally and therefore the case was not ripe. Consideration of such a case would force the court to decide an abstract disagreement. The court responded that ripeness is both a constitutional and a prudential doctrine. On the constitutional prong, the court asked whether Maldonado had articulated a plan to violate the law, whether there was a threat of prosecution from the state, and whether the law had previously been in force. The question, in other words, was whether there was a genuine threat of enforcement so that the court could weigh the fitness of the issues in the case for judicial decision against the hardship to the parties of withholding judicial consideration. The court had previously considered the issue to be ripe when it remanded to the trial court and had also found prudential ripeness met as it was not necessary to develop the case further to address the constitutional challenge. Moreover, withholding a judicial decision could have subjected Maldonado to contempt proceedings. The court concluded that the case was ripe.

Maldonado's overbreadth and related vagueness challenges emphasized the risk of criminal prosecution and the imprecision of the distinction between onsite and offsite advertising in a free speech context. The court responded that vagueness in this context involved (1) whether a person of ordinary intelligence was given fair notice of what was prohibited, or (2) whether the standards were so meaningless as to authorize or seriously encourage discriminatory enforcement. The court declared it to be the "settled" law of the Ninth Circuit that "the commercial/ non-commercial and onsite/offsite distinctions are not unconstitutionally vague." *Id.* at 1045 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (concluding that such claims must fail)).

The court then turned to Maldonado's claim of suppression of free speech through content-neutral limitations that nearly foreclosed an entire medium of expression, such as the banning of window signs in *City of Ladue v. Gileo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994). The appellate court concluded, however, that the state's regulation in this case did not ban all signs—only off-premises commercial billboards—and did not involve the suppression of virtually all types of signs, as did the regulation struck down in *Gileo*.

Maldonado also claimed enforcement of the billboard law was a prior restraint on speech, but the court said a content-neutral law and injunction to enforce the same did not rise to the level of a prior restraint. The fact that non-commercial advertising was allowed did not render the injunction content-based. Rather, it merely provided court-ordered compliance with California law. And while courts apply more stringent rules to injunctions involving free speech, the injunction in this case did not burden speech more than necessary to comply with the law. The public interests in traffic safety and aesthetics in this case were significant governmental interests and the injunction merely prohibited Maldonado from violating the law.

Maldonado's equal protection claims challenged the billboard law's exclusion of signs that were in place at the time the law was enacted in 1967. The court rejected his claim that the appropriate standard of review of this content-neutral regulation was strict scrutiny. Under the rational basis standard of review, the regulation survived scrutiny. Otherwise, the state would have been required to pay just compensation to existing billboard owners because it would have had to demolish their billboards. Maldonado purchased his site after the prohibition had been in effect for twenty years and his billboard was never lawfully used. The trial court decision was dismissed in part and affirmed in part.

This case illustrates the perils of public billboard regulations but demonstrates that it is possible to bring a successful injunction action under the federal constitution.

Edward J. Sullivan

Maldonado v. Morales, 556 F.3d 1037 (9th Cir. 2009)

■ *NINTH CIRCUIT DECIDES DIFFICULT FIRST AMENDMENT ADVERTISING CASE*

Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898 (9th Cir. 2009), required the Ninth Circuit to evaluate the city's sign ordinance, which prohibited all off-site advertising with certain exceptions, in light of a city contract granting Metro Lights the exclusive right to advertise at publicly owned transit stop shelters. The city issued a 20-year contract with Metro Lights under which Metro Lights would install public transit shelters and make annual payments to the city in exchange for the exclusive right to place commercial advertising on the shelters. The city's sign regulations prohibited all other offsite advertising (i.e., relating to goods and services not sold or provided on the premises), including such advertising at the approximately 18,500 other transit stops in the city.

After being cited numerous times for violating the city's sign regulations, plaintiff Metro Lights brought this action for declaratory and injunctive relief in federal court. The trial court upheld some policies of the ordinance but granted Metro Lights's motion for a preliminary injunction on others. Both parties brought motions for summary judgment. The trial court granted Metro Lights's motion on First Amendment grounds, stating that the city could not prohibit off-site advertising while contracting to permit advertising at its transit stops. However, the trial court rejected Metro Lights's request for damages. Both parties appealed.

The Ninth Circuit acknowledged that the First Amendment was not absolute and that commercial speech received a lesser degree of protection as compared to other speech, according to the four-part test of *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*: The commercial speech must not be "misleading nor related to unlawful activity;" there must be a substantial state interest in regulating that speech; that interest must be directly advanced; and the regulation must not be more extensive than necessary to advance that interest. 447 U.S. 557, 562-63, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). No one disputed the city's ordinance satisfied the first two elements of the test. With respect to the third test, the parties focused upon two factors: whether the city's substantial interests in aesthetics and traffic safety were directly advanced by the challenged regulations and whether the regulations were either overbroad or underinclusive.

Metro Lights claimed the challenged regulations were underinclusive, citing *Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 9 (1993), where a distinction between newspapers and commercial handbills in newsracks was not upheld. Similarly, in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999), a prohibition on casino ads with an exemption that allowed for Indian gaming was also struck down.

The Ninth Circuit concluded that the ordinance met the "directly advances" prong of *Central Hudson* but that an ordinance could be under-inclusive if it contains one or more exceptions that undercut some, but not all, of the interests advanced by the ordinance in two situations: (1) the exception ensures that the regulations will not achieve their stated end; and (2) the ordinance does not "materially advance its aim," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995). If the regulatory scheme is "so pierced by exemptions," *Greater New Orleans Broadcasting*, 527 U.S. at 190, that it cannot be exonerated or no longer relates to the interests sought to be advanced, it will be struck down.

Regarding the overbreadth prong of *Central Hudson*, the United States Supreme Court does not require a public agency to use the least restrictive means of regulation—only one that exhibits a reasonable fit between ends and means. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). The court noted that the United States Supreme Court had upheld a similar far-reaching ban on off-site advertising in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), which contained exemptions and analyzed those exemptions using the *Central Hudson* standard. In reviewing under-inclusiveness pursuant to *Central Hudson*, (whether the regulations swept too far), the *Metromedia* Court rejected an under-inclusivity argument (for an alleged failure to prevent on-site advertising) by noting that a law preventing some part of the perceived harm was better than none at all. The *Metromedia* analysis has withstood many challenges and the Ninth Circuit found itself bound to follow it.

Metro Lights alleged *Metromedia* was contrary to the *Central Hudson* analysis, for while *Metromedia* upheld transit stop advertising as an exception to the general prohibition on off-site advertising, that kind of advertising was less pervasive in Los Angeles County at the time of the *Metromedia* decision than currently. The court responded that the United States Supreme Court had nonetheless found the exception scheme valid and specifically did so with regard to the exceptions in the San Diego ordinance. Moreover, the court rejected the significance of the contract with the commercial advertiser granted the franchise for the transit stops. *Discovery Network* and *Greater New Orleans Broadcasting* were decided after *Metromedia*, in which the court "exudes deference" to local judgments over the regulation of commercial speech. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 910 (9th Cir. 2009). While Metro Lights possessed two signs with off-premise advertising—one on a building and the other on a transit stop—the fact was that only one of them was allowed under the city's regulatory scheme, which meant that the ordinance would reduce visual clutter by half consistent with the city's interest in promoting aesthetics. Moreover, the successful bidder was required to build attractive local transit stops and that scheme did not relate to the content of those signs. The scheme did not operate at cross purposes with the off-site advertising regulation's goal of reducing clutter, "a worthy legislative goal." *Id.*at 911. In any event, the court found *Metromedia* controlled the outcome of the instant case.

As to the narrow-tailoring prong of *Central Hudson*, the court noted that this prong guards against over-inclusivity, not under-inclusivity. If a total ban would be effective, so also would be a partial one. Moreover, the court noted that the limitation on off-site advertising to transit stops allowed for more effective regulation of clutter. There was no evidence that the city discriminated against or exercised discretion in approving messages. Nor did the court agree with Metro Lights's view that the regulations would conflict with First Amendment rights. The franchise focused on safety and aesthetics rather than on revenue and dealt with city property in a manner that harmonized the city's property management with those stated goals. The city could restrict commercial advertising but allow it through bidding on city property without controlling the message. The court reversed the trial court and found the ordinance valid.

This is a difficult case for many because the city prohibited off-site commercial speech but then sold off the rights to provide for that speech on its own property. Professor Laurence Tribe argued the case for the billboard advertising company and the length of the opinion may be due to the need to respond to his many arguments. This case has the potential to go further.

Edward J. Sullivan

Metro Lights, L.L.C. v. City of Los Angeles,
551 F.3d 898 (9th Cir. 2009)

Cases From Other Jurisdictions

■ UNITED STATES SUPREME COURT: NO FIRST AMENDMENT VIOLATION IN REFUSAL OF RELIGIOUS MONUMENT IN PUBLIC PARK

Pleasant Grove City, Utah v. Summum, 555 U.S. ___, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009), involved a request by plaintiff religious organization to place a monument containing the "Seven Aphorisms" of its religion in a public park in which the city had previously allowed monuments of a secular and religious character, including one of the Ten Commandments. Following denial of its request, plaintiff Summum brought a First Amendment claim against the city. The trial court denied a preliminary injunction, but the Tenth Circuit, using a "traditional public forum" analysis, concluded that the burden was on the city to demonstrate a compelling justification that could not be served by a response other than denial. Because that court found it unlikely the city would be able to justify the denial, it ordered the preliminary injunction to issue.

Justice Alito, writing for the Court, said this was the first case to consider application of the First Amendment to acceptance of public monuments, so whether to characterize it as "government speech" (as the city did) or as a "traditional public forum" (as Summum did) was the issue. He said that if Summum were engaging in its own expressive conduct, the free speech clause would not apply, as that clause deals with government regulation of private speech. Governments are in the business of supporting (or not) different points of view as part of the task of governing. However, government speech is not wholly unconstrained—it must defer to the establishment clause and applicable law and its use must be accountable to the electorate in the political process.

Nor does government have a free hand in regulating speech on government property. Government is limited in its regulation of expression in traditional public forums, such as parks and streets. Any regulation must satisfy strict scrutiny, i.e., regulations must be tailored to serve a compelling governmental interest and be viewpoint-neutral. Governments may also provide a "designated public forum" where such expression is not ordinarily allowed but is made available for a particular purpose—when government does so, the same rules apply. The government may also open a public forum to discuss certain subjects, in which restrictions must still be viewpoint-neutral and reasonable.

Installation of permanent monuments in public parks involves government speech, often with the goal of conveying a thought or instilling a feeling in the receiver. Commemorating a statesman or historical event in a monument constitutes government speech. The same analysis applies in allowing privately funded and placed monuments to remain in public parks. The Court said that the practice of most governments is one of "selective receptivity"—e.g., the Statue of Liberty and the Iwo Jima and Vietnam Veterans Memorials, all of which were privately funded but placed on public property, were chosen to be located there. Private funding saves tax dollars and allows placement of monuments that might not otherwise be on public property. Traditionally, governments have adopted regulations for consideration of such monuments, including legislative approval. Public parks are identified in the public mind with the government that owns or controls those parks and public spaces and the monuments reflect the image that government wishes to project.

Here, Summum had effectively controlled the placement of monuments as government speech and the concern was about the criteria for the placement of future monuments. However, the Court rejected Summum's proposed solution that the acceptance of the monument be equated with the acceptance of the message—especially when this rule applies to past monuments, a "pointless exercise that the Constitution does not mandate." 129 S. Ct. at 1134. Moreover, the demand that the city accept the message of the monument provider assumes there is only one message to accept. In fact, a monument may convey different messages to different viewers and the motives for presenting and accepting the monuments may differ as well. Additionally, the message conveyed by a memorial may be altered by changing times and the addition of other memorials.

In any event, the public forum analysis, which deals with a different kind of expression—speeches or leaflets or demonstrations—does not apply to government speech involving monuments where there is no tradition of temporary use but rather a permanent occupation of public space. Public bodies need not be faced with the choice of either cluttering public spaces or taking out long-standing monuments. The majority opinion concluded:

> In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the free speech clause, and the Court of Appeals erred in holding otherwise. We therefore reverse.

129 S. Ct. at 1138.

Five Justices concurred with four opinions. Justice Stevens, along with Justice Ginsburg, agreed with the majority analysis but said that a denial could also be upheld as refraining from an implicit endorsement of the donor's message. These justices did not join in the Court's newly-minted doctrine of government speech, adding that where there is an association of a message with the government, there may be also be establishment or equal protection clause issues that must also be analyzed.

Justices Scalia and Thomas also concurred, noting that the case was decided in the shadow of the establishment clause and that the city should not fear that it has jumped from "the Free Speech Clause frying pan into the Establishment Clause fire," 129 S. Ct. at 1139, as no part of the First Amendment was

violated in this case. This concurrence pointed to *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005), where a donated Ten Commandments monument on the Capitol Grounds in Austin was challenged and in which the Court agreed that government speech was at issue. However, in that case there was no Establishment Clause violation as the monument had historical, as well as religious, significance and this was sufficient as a basis to retain the monument.

Justice Breyer concurred as well, stating that the "government speech" doctrine was a rule of thumb rather than a rigid category and that if the city were to discriminate in the selection of monuments in a manner unrelated to the theme of the monument, it could violate the First Amendment. Justice Breyer counseled caution with the use of judge-made categories such as "public forum," "government speech," and the like, lest the free speech doctrine be turned into "a jurisprudence of labels." *Pleasant Grove City, Utah v. Summum,* 129 S.Ct. at 1140. By declining to accept the monument, the city had not foreclosed Summum's free expression but rather had reserved its parks for other free speech and other goals. Parks, Justice Breyer said, do more than provide free speech. While Summum's expression was restricted "given the impracticability of alternatives, and viewed in the light of the City's legitimate needs, the restriction was not disproportionate." *Id.* at 1141. In any event, the restriction was lawful.

Justice Souter also concurred in the judgment, agreeing with the majority's government speech analysis but expressing hesitation with the use of an absolute application of that analysis in future cases. He suggested a cautious setting of boundaries to this newly-minted doctrine, especially where, as in this case, the Establishment Clause is implicated but neither briefed nor argued. The government speech doctrine is not an antidote to the Establishment Clause in the selection of monuments on public grounds. Instead, Justice Souter suggested a per se rule not be used when government speech is involved, especially to the exclusion of other constitutional considerations, but rather suggested the use of an informed observer test so that a monument could be analyzed in how it would be viewed objectively.

All the justices agreed in the outcome of the case, but the plurality of concurring opinions appears to reflect jockeying in the use of the government speech doctrine in future cases.

Edward J. Sullivan

Pleasant Grove City, Utah v. Summum, 555 U.S. ___, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009)

■ *FLORIDA APPELLATE COURT FINDS TAKING IN FAILED EXACTION*

St. Johns River Water Management District v. Koontz, No. 5D06-1116, ___ So. 2d ___, 2009 WL 47009 (Fla. App. Jan. 9, 2009), *question certified by* No. 5D06-1116, ___ So. 2d ___, 2009 WL 722016 (Fla. App. Mar. 20, 2009), involved a successful takings claim in the trial court against defendant district in a matter that was before the Florida appellate courts for the fourth time. The matter involved a 1994 permit to use more of the subject site than had previously been permitted. The site had a wetland that was heavily restricted by a road and a power line easement. Koontz sought to develop some upland property along with 3.7 acres of wetland. The district said that it would allow the permit in exchange for mitigation work on offsite properties, a reduction of the development area to one acre, and a conservation easement over the remaining fourteen acres of the site. When Koontz refused, the district denied the permit and Koontz sued in inverse condemnation. In its denial decision following the failure of the two sides to agree, the district stated that the development would have adversely affected the riparian habitat protection zone applicable to the site and that the mitigation proposed had been designed to meet that impact.

The trial court found no essential nexus under *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), between the impact of the proposed mitigation and the condition, nor any rough proportionality under *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The district appealed, contending, *inter alia*, that (1) the exaction was never completed so there was no unconstitutional action, and (2) the trial court had no jurisdiction over the exaction because there was an administrative system available to challenge the same.

The majority opinion decided the case was controlled by *Nollan* and *Dolan*, where the majority of the United States Supreme Court determined there was a taking in the imposition of conditions requiring exaction. Moreover, the Florida court rejected the district's additional contention that *Dolan* does not cover cases other than those involving physical dedications of property. In this case, the exaction related to offsite mitigation work but the court applied *Dolan*, citing the U.S. Supreme Court's remand—on the same day as the *Dolan* decision—of *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S. Ct. 2731, 129 L. Ed. 2d 854 (1994) (involving exaction of fees rather than of property), to the California courts for reconsideration in light of *Dolan*. Until the Florida Supreme Court acts definitively on the issue, the appellate court majority said it would consider required physical improvements to be exactions subject to *Nollan* and *Dolan*.

One judge concurred, noting that the nature of an exception subject to *Nollan* and *Dolan* was controversial but that it appeared to include any development condition apart from an outright prohibition. The judge agreed with the dissent that there was no taking here as Koontz gave up no property.

Moreover, the judge's view was that the "doctrine of unconstitutional conditions" (a constitutional requirement cannot be made to be given up in return for a discretionary benefit) was far less understood and settled than *Dolan* would suggest, especially if the relationship was only slightly incorrect. This may, in a close case, allow a developer to get off scot-free from development requirements. Risk-averse governments will either avoid bargaining or refuse to consider conditions. The concurring opinion asked rhetorically whether any misinterpretation in this area invites constitutional liability.

The dissent said that this was not an ordinary exactions case and pointed out a need for reform. Koontz had conceded he had no right to the permit, but his application turned out to be a lucrative venture. He had declined the condition, leading to the denial of the permit, and the matter had morphed into constitutional litigation, even though he had not been deprived of all or substantially all economically viable use of the property. The original theory was that the district's action had not substantially advanced a legitimate governmental purpose as required by *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), a theory that collapsed after *Lingle v. Chevron*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (holding that the "substantially advances" test articulated in *Agins* is not appropriate for takings determinations). The trial court had substituted a *Nollan/Dolan* theory to find for Koontz and fixed damages at $376,144, based on the rental value of the property with the permit. The district had appealed from that judgment, claiming that there was no taking.

The dissent pointed out that *Dolan* involved a completed exaction rather than a denial. More importantly, that case involved a dedication of real property as a condition of permit approval, a point made by the U.S. Supreme Court later in the *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702-03, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). If there was no completed exaction, there was no taking, especially when the exaction in this case was offsite work rather than property itself. Here, the inverse condemnation remedy was inappropriate. Moreover, the law of unconstitutional conditions is not a fit analogy for takings cases, as it was developed from such things as free speech and loyalty oaths and, in the view of the dissent, has little application outside the free speech arena.

The dissent also said that the U.S. Supreme Court has not addressed the issue of whether a taking occurs when the applicant rejects a proposed condition but noted that there was a denial of certiorari involving that issue in *Lambert v. City and County of San Francisco*, 67 Cal. Rptr. 2d 562 (Cal. App. 1997), *cert. denied*, 529 U.S. 1045, 120 S. Ct. 1549, 146 L. Ed. 2d 360 (2000). There, Justice Scalia dissented from the denial of certiorari but found the city's defense to be "plausible." *Id.* at 1048. The dissent here rejected the majority's view that the issue was settled in the *Dolan* majority opinion in the rejection of Justice Stevens's dissent. The majority in *Dolan* did not respond to Justice Stevens's point at all, probably because the majority did not deem it relevant and Ms. Dolan did not actually make the dedication when the case came before the Court. If, after exhausting her appeals, the conditions were found to be valid or constitutional, she could then decide whether to accept or decline—all the Court did in *Dolan* was to announce the second prong of the exactions test and send it back to the Oregon courts to determine whether Ms. Dolan should prevail in her appeal. The dissent added:

> If we are going to be deciding this issue based on what was *not* said in an opinion, surely the fact that Justice Scalia never mentioned in his *Lambert* dissent that this issue already had been decided in *Dolan* is significant. For my money, given Justice Scalia's proclivities in this area of the law, for him to refer to the absence of a "taking" as a "plausible" defense to a "takings" claim is a pretty big deal. Besides, in what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner?

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Moreover, the dissent said that deciding a case in which a permit was denied and no property was ever exacted by dedication or deed might be actionable in a pre-*Lingle* world, but not when the "substantially advances" test is no longer a part of takings jurisprudence and no benefit was given in response to coercive circumstances. A compensable taking may only be found if there was an exaction. Koontz could have undertaken the mitigation and contested it as a taking or challenged the basis for the denial. He did neither. And using the "doctrine of unconstitutional conditions" where an agency may have guessed at the meaning of rough proportionality makes no sense. Making that determination is inherently arbitrary, which would discourage any agency from discussing conditions. All Koontz had a right to was a constitutional condition—no more, no less. In the view of the dissent, Koontz had no right to damages in inverse condemnation.

This case involves three thoughtful opinions working out the implications of *Nollan* and *Dolan*. Oregon has resolved some of these issues by statute under ORS 197.796 but has not resolved the related problem of the denial of a permit that may or may not be predicated on the refusal to accept a proffered condition. Given the practical dynamics of the planning process and the difficulties of showing "nexus" and "rough proportionality," this case illustrates a practical concern of local governments of how to avoid transmuting miscommunication in the development process into a constitutional law case.

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Land Use Board of Appeals

■ AIRPORTS

In *Port of St. Helens v. City of Scappoose*, LUBA No. 2008-114 (Dec. 31, 2008), LUBA rejected a facial challenge to the city's adoption of comprehensive plan amendments and a new zone that would allow residential airparks adjacent to the Scappoose Airport. The new Airport Residential (AR) zone allows homes with home-based aircraft and permits aircraft to have airport access by means of a through-the-fence (TTF) agreement with the Scappoose Airport. Additionally, the AR zone requires an applicant to provide a letter from the Federal Aviation Administration (FAA) in support of a proposed residential development as well as a TTF agreement with the airport before approval of the final plat and any development permits. Although a potential developer supported the proposed comprehensive plan and zoning amendments, the city's decision did not apply the AR zone to any specific property.

During the proceedings before the city, the FAA asserted that airport residential development is not compatible with larger public airports that receive federal funding. The Scappoose Airport is a public, high-activity general aviation airport that has received federal funding of almost $5 million dollars since 2007. As a condition of receiving this funding, petitioner Port of St. Helens was required to agree to a set of standard assurances, including Assurance 21 that commits the airport sponsor to "restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and take-off of aircraft." In companion proceedings before the Port to amend its airport master plan to allow residential airparks, the FAA opposed the amendment, based on a 2007 order involving a Wyoming airport (known as the Afton order) in which the FAA expressed its general dislike of residential airparks and concluded that residential development adjacent to airport property violates Assurance 21. The FAA also asserted the Port's and city's approval of the proposed amendments would violate Assurance 21 and jeopardize the Port's federal funding. In response, the Port suspended its consideration of the proposed amendment. The city approved changes to its comprehensive plan and adoption of the AR zone and the Port appealed.

As a preliminary matter, LUBA noted that because the city's decision does not actually apply the AR zone to specific property, the Port's challenges must be viewed as facial challenges to the city's decision. Additionally, LUBA rejected the Port's argument that the city's adoption of the AR zone categorically violates Assurance 21 and its underlying statutory authority, 49 U.S.C. § 47107(a)(10) (2000). While both require airport sponsors to assure that they will act reasonably to restrict land uses near the airport to uses that are "compatible with normal airport operations," they do not prohibit the city from adopting a zone that could be applied to property to allow residential airparks. Until property near the airport is actually rezoned AR, LUBA reasoned there is no way to know whether the FAA will view airport residential development as categorically incompatible with airport operations, as it did in the Afton order. LUBA also noted that the Port, as the contracting party with the FAA, is bound by Assurance 21; the city is not.

LUBA quickly dismissed the Port's assertion that the city's decision violated a TTF pilot program for rural airports authorized by ORS 836.640 – 836.642 and implementing administrative rules. The Port argued the pilot program was limited to commercial and industrial users and the proposed AR zone, which allows residential uses, is inconsistent with this program. Agreeing with the city, LUBA concluded the statutory pilot program was not the sole or exclusive authority for TTF operations and, contrary to the Port's assumption, the city did not rely on this statutory authority in making its decision. Instead, the city exercised the broad powers to plan and zone conferred by ORS Chapters 197 and 227.

LUBA also rejected two other arguments the Port advanced. In the first, the Port asserted the city violated its coordination and planning obligations under the Airport Planning Rule (APR), OAR 660, Division 013. In the absence of a basis for finding the city violated any legal standard simply by adopting the AR zone, LUBA concluded the city has not violated the APR, but noted the city will need to fully comply with the rule when it considers an amendment to apply the AR zone to one or more pieces of property. LUBA treated the Port's coordination argument as a Goal 2 challenge and concluded the city accommodated the Port's and FAA's needs as much as possible by amending the AR zone to expressly require an applicant for a residential airpark development to submit a letter from the FAA supporting the proposed development and a TTF agreement from the Port. These requirements effectively give the FAA and the Port "what amounts to independent veto authority over any potential proposal for airport related development." LUBA No. 2008-114, slip op. at 22. Finally, LUBA denied the Port's arguments that the city's decision violates Statewide Planning Goals 9 (Economic Development), 10 (Housing), and 14 (Urbanization). Since the city's decision did not rezone any land AR, LUBA characterized the Port's arguments as premature and affirmed the decision.

■ FOREST TEMPLATE DWELLINGS

In *Friends of Yamhill County v. Yamhill County*, LUBA No. 2008-196 (Feb. 6, 2008), LUBA again reversed the county's approval of a forest template dwelling, ruling the county misconstrued ORS 215.750(1)(c), which requires a finding that "[a]ll or part of at least 11 other lots or parcels that existed on January 1, 1993" and "at least three dwellings that existed on January 1, 1993, on the other lots or parcels" are within the template area. In its decision reversing the first approval of a template dwelling, LUBA held that the statutory reference to "lots or parcels that existed on January 1, 1993" means only lawfully established lots or parcels. *Reeves v. Yamhill County*, 53

Or. LUBA 4 (2006). In so ruling, LUBA relied on the Court of Appeals' decision in *Maxwell v. Lane* County, 178 Or. App. 210, 35 P.3d 1128 (2001), *adhered to as modified*, 179 Or. App. 409, 40 P.3d 532 (2002), in which the court considered "other applicable legislation" in determining whether an otherwise silent law requires a lot or parcel to be lawfully created.

Despite the ruling in *Reeves*, the county concluded that the definition of "parcel" in ORS 215.010 was not "applicable, related context" for determining the meaning of "parcel" in the forest template statute, particularly since that statute does not expressly require a determination of the legality of affected parcels. Although the definition of "parcel" was adopted almost 20 years before the forest template statute, the county reasoned this definition was included in ORS Chapter 215 for a different purpose and had no relevance to ORS 215.750(1)(c). LUBA disagreed, noting that "parcel" had been specifically defined to mean a lawfully established parcel when the forest template statute was adopted. Accordingly, LUBA concluded "[t]here is simply no support for the county's conclusion that the word 'parcel' as used in ORS 215.750(1)(c) should not have the meaning given it in ORS 215.010(1)." Since the county appeared to have counted illegally created parcels and lots in making the required findings under the forest template statute, LUBA reversed the county's decision.

■ LOCAL PROCEDURE

LUBA reaffirmed that a local appeal may not be dismissed for failure to satisfy local appeal requirements unless the applicable code specifies the jurisdictional nature of the requirements and dismissal as the consequence for failing to meet them. In *Golden v. City of Silverton*, LUBA No. 2008-031 (Feb. 20, 2009), the city council dismissed an appeal of a planning commission decision because the appellants failed to identify the decision to be reviewed and the date of the decision on the appeal form as required by the city code. Despite this error, an attachment to the appeal form described the planning commission decision the appellants were seeking to appeal and the staff prepared a detailed report to the city council that discussed the decision. After reviewing applicable case law governing dismissal of local appeals, LUBA concluded the city erred in dismissing this appeal, stating:

> As the foregoing cases illustrate, where a city or county code makes it clear that requirements are "jurisdictional" or mandatory requirements, in the sense that failures to comply with those requirements will lead to dismissal of a local appeal, a local government may reject or dismiss a local appeal when a local appellant fails to comply with those requirements. The cases also illustrate that when the local code specifically provides other measures for remedying the omission, dismissal of the local appeal is improper. The present case falls somewhere in between these two extremes. . . . The [city code] is silent as to what the consequences of failing to comply with RSMC 18.02.800.010 are.

Id., slip op. at 8. In this case, LUBA concluded that dismissing a local appeal for failure to comply with an informational requirement is a "sufficiently harsh sanction," that dismissal is appropriate only if the city's code is explicit that dismissal will result if this information is not provided. Since the city's code lacks language to that effect, LUBA concluded the city misconstrued its code by dismissing the local appeal.

In *dicta*, LUBA noted that while local governments have latitude to define which procedural appeal requirements are jurisdictional, there are potential limits to this latitude. "[I]t also seems likely that an attempt to make some more mundane procedural requirements jurisdictional may well at some point be found to impinge on the rights that are extended to parties in proceedings under state law." *Id.*, slip op. at 9. Finding it unnecessary to resolve the outer limits of this authority, LUBA remanded the decision to the city.

■ LUBA JURISDICTION

LUBA dismissed an appeal of a land use compatibility statement (LUCS) pertaining to the application of treated domestic septage to land pursuant to a DEQ permit, ruling that under ORS 215.247 the LUCS is not a land use decision subject to LUBA's jurisdiction. ORS 215.247 allows as an outright use the transport and application of biosolids to property under the terms of a DEQ license, permit, or approval and states that "a state or local government license, permit or approval in connection with the use is not a land use decision." On the LUCS at issue, the county noted that the proposed activity, "land application of lime/alkaline stabilized treated domestic septage," is regulated by DEQ and is not regulated by the county's zoning and development ordinance. In response to the county's motion to dismiss the appeal, the petitioner argued ORS 215.457 applies only in exclusive farm use (EFU) zones and the affected property was zoned Timber (TBR). LUBA rejected this reading of the statute, noting that nothing in its text limits its application to EFU zones. Accordingly, LUBA ruled it lacked jurisdiction to review the county's determination that its zoning regulations did not apply to the activity described in the LUCS and dismissed the appeal.

■ MEASURE 49

In two recent decisions, LUBA reiterated that a local government's vested rights determination under Measure 49 is not a land use decision subject to LUBA's review. Petitioners in both cases made conditional motions to transfer the appeals to circuit court, which were granted as result of LUBA's determination that it lacked jurisdiction to hear the appeals.

In *Fischer v. Benton County*, LUBA No. 2008-115 (Nov. 20, 2008), petitioners appealed the county's determination that

they did not have a vested right to build six new houses on a 30-acre parcel pursuant to state and county Measure 37 waivers that were approved in 2006. Following approval of the waivers, petitioners applied for and the county approved a tentative plat for a seven-lot subdivision. In December 2007, the county prohibited petitioners from seeking final plat approval as a result of the passage of Measure 49. Petitioners subsequently applied for a vested right to build six additional houses on the basis of the approved tentative plat. The county board ultimately concluded petitioners had a vested right to subdivide the property but did not have a vested right to build the requested dwellings.

On appeal, LUBA affirmed the county's determination, relying on its previous decision in *Friends of Yamhill County v. Yamhill County*, ___ Or. LUBA ___, LUBA No. 2008-060 (July 2, 2008), holding that a Measure 49 vested rights determination concerning development allowed under a previously approved Measure 37 waiver is not a land use decision subject to LUBA's jurisdiction according to the text of Measure 49. Although petitioners argued their claim of vested rights was based on the goal post statute (ORS 215.427) and the subdivision vesting statute (ORS 92.040) as well as Measure 49, LUBA concluded the county's decision was based solely on Measure 49 and, therefore, was exempt from LUBA review.

In *Alto v. City of Cannon Beach*, LUBA No. 2008-126 (Nov. 25, 2008), petitioners challenged the city's affirmative determination that the intervenors had a vested right to complete conversion of a duplex to a single family home and construction of a 1,000 square foot addition. The city approved the intervenors' Measure 37 waiver for the conversion and addition and construction was underway at the time Measure 49 passed. On appeal, petitioners argued the city's decision made a vested rights determination *and* authorized building permits and, therefore, the building permit element of the decision was a reviewable land use decision. LUBA disagreed and again relied on its *Yamhill County* decision to conclude the city's vested rights determination under Measure 49 is not a reviewable land use decision.

■ *PROPERTY LINE ADJUSTMENTS*

In *Kipfer v. Jackson County*, LUBA No. 2008-205 (Feb. 27, 2009), LUBA analyzed the effect of recent statutory changes in the definition of "property line adjustment" on a local government's ability to approve multiple property line adjustments in a single proceeding. LUBA concluded the statutory amendments effectively overruled its decision in *Warf v. Coos County*, 43 Or. LUBA 460 (2003)(holding a local government coudl only approve a single property line adjustment in a single decision).

In *Kipfer*, the county planning division approved an application for three property line adjustments that reconfigured boundaries between lots in a previously approved subdivision. Petitioners attempted to appeal the planning division's decision to the county hearings officer who rejected their appeal. The hearings officer noted that prior to 2005 a property line adjustment was defined as "the relocation of a common property line between two abutting properties." In *Warf v. Coos County*, LUBA concluded this language meant that a property line adjustment could adjust only a single property line between two existing properties and limited a local government to approving only one property line adjustment in a single decision. In 2005, the legislative assembly redefined a property line adjustment to mean "the relocation of or elimination of a common property line." ORS 92.010(11). In his decision, the hearings officer interpreted this language to mean "a common property line may be adjusted among *any* number of properties" and concluded the planning division properly applied the amended statutory language in its decision.

On appeal, petitioners argued the county erred by applying the 2005 statutory amendment rather than the county's code, which petitioners contended reflected the pre-2005 definition of a property line adjustment and the decision in *Warf*. LUBA disagreed with petitioners on two fronts. First, the county's approval criteria for property line adjustments, which referred to "both properties" and "both parcels," was not as limited as petitioners portrayed it to be. In LUBA's view, this language is ambiguous and does not necessarily restrict property line adjustments to a single property line between abutting parcels. LUBA speculated that the language attempted to describe the most common and simple type of property line adjustment—movement of a single line between two abutting properties—but did not preclude moving multiple common property lines between abutting properties. Second, LUBA agreed with the hearings officer's interpretation of the amended statutory definition of "property line adjustment" and concluded removal of the word "two" from the definition meant that multiple property line adjustments could be reviewed and approved in a single decision, effectively overruling its decision in *Warf*. Finding no error in the county's decision, LUBA affirmed it.

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