Oregon State Bar

OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 32, No.3
June/July 2010

Also available online

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Appellate Cases – Land Use

■ *THIRD APPLICATION TO PERMIT TRIPLEX IS TRIPPED UP ON TREBLE REVIEW*

Three times have not charmed the builder of a triplex in a Bend neighborhood of single-family residences. Reviewing LUBA's third decision on the matter, the court of appeals in *Zirker v. City of Bend*, 233 Or. App. 601, 227 P.3d 1174 (2010), remanded the matter to the city yet again.

Neighbors challenged the city's first, administrative approval of the building to LUBA and won a remand. *Zirker v. City of Bend*, 55 Or. LUBA 188 (2007). When the city's second decision upheld its use of the administrative process, the neighbors again challenged and won. *Tallman v. City of Bend*, 56 Or. LUBA 398 (2008).

Construction had proceeded while these prior permits were in effect, so by the time the applicant went to hearing on its request for variances to a setback standard and a street widening requirement, the structure was already built. Three tribunals reviewing the application (city hearings officer, LUBA, and court of appeals) all disagreed on its legality.

The hearings officer approved each variance as applied-for and, in an apparent "belt and suspenders" move, also approved the development based upon the city engineer's code-granted authority to waive public facility requirements. (The engineer had provided evidence at the hearing supporting the waiver.)

At LUBA, the opponents contended that the variances were unsupported and that the "waiver" allowance lacked the clarity that ORS 227.173(1) requires of permit approval criteria. LUBA reversed the hearings officer on the variances but upheld the engineer's waiver.

The court of appeals was even less impressed with the city's decision, ruling that, because it did not relate to a public facility, the setback standard was outside of the engineer's waiver purview. *Zirker*, 233 Or. App. at 613. Because the court went on to turn down the applicant's cross-appeal of LUBA's denial of the variances, the builder is back at square one.

This opinion is noteworthy for its discussion of ORS 227.173(1). Quoting its opinion in *Lee v. City of Portland*, 57 Or. App. 798, 646 P.2d 662 (1982), the court summarized that provision as mandating, *inter alia*, that development ordinances set forth "reasonably clear standards" for discretionary permit approvals. Id. at 607-608. To provide adequate guidance for exercising official discretion in decision-making, "the standards must be sufficiently definite to give the parties and the decision-maker an understanding of what proof and arguments are necessary to show that the applicant complies with those criteria and to make the outcome capable of prediction by the decision-maker." *Id.* at 609.

The standard governing the subject waiver authority was "special circumstances." Relying heavily on the fact that such circumstances were a matter of engineering judgment, the court deemed this standard to have met the clarity

requirement of ORS 227.173(1). So perhaps engineering is less art than science after all.

Ty K. Wyman

Zirker v. City of Bend, 233 Or. App. 601, 227 P.3d 1174 (2010)

■ *PROFITABILITY NOT A CONSIDERATION FOR DETERMINATION OF "FARM UNIT" ANALYSIS*

In *Wetherell v. Douglas County*, 235 Or. App. 246, 230 P.3d 976 (2010), the Oregon Court of Appeals concluded that profitability is not a consideration in determining whether certain parcels make up a "farm unit" for purposes of OAR 660-033-0020(1). That rule provides that "[l]and in capability classes other than I-IV/I-VI that is adjacent to or intermingled with lands in capability classes I-IV/I-VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed . . . ." OAR 660-033-0020(1)(b) (2010).

In this particular case, the land at issue was a 259-acre parcel that Garden Valley Estates, LLC (Garden Valley), had sought to divide into five-acre residential lots. In order to do this, Garden Valley applied for amendments to Douglas County's comprehensive plan and zoning maps. The parcel, which had been part of a 590-acre livestock ranch, was originally designated Agriculture and zoned Exclusive Farm Use-Grazing. In 2005, Douglas County approved a partition that created the parcel, along with two other farm parcels lying to the north and east. Following partition, each of the three parcels was managed separately, with the 259-acre parcel used for seasonal grazing. Douglas County determined that the parcel was not agricultural land under OAR 660-033-0020(1).

The county's decision was appealed to the Land Use Board of Appeals (LUBA), which remanded the case on several grounds including "for findings [under OAR 660-033-0020(1)(b),] addressing whether the [259-acre] parcel remains part of a 'farm unit' along with the two other parcels that made up the original 590-acre ranch." 235 Or. App. at 251 (quoting LUBA).

On remand, the county found that "joint management of the 590-acre ranch for grazing and haying activities similar to its historic use [was] not possible" and that, therefore, "the former 590-acre unit was not a viable farm unit." *Id.* at 252 (quoting LUBA). As the appeals court explained, the county had determined that the 259-acre parcel, when "[r]educed to its fundamental core," was not within a "farm unit" because the 590-acre ranch could not be used profitably for grazing and so was not suitable for "farm use." *Id.* at 253. Therefore, the county determined that the 259-acre parcel could not be inventoried as agricultural land under OAR 660-033-0020(1)(b).and approved the amendments to the comprehensive plan and zoning maps that would allow the subdivision. This determination was again appealed to LUBA.

"Ultimately," the court wrote, "LUBA concluded that 'whether or not a 'farm unit' has been or can be farmed 'profitably' is not a consideration' under OAR 660-033-0020(1)(b)" because the text of OAR 660-033-0020(1)(b) does not "include any suggestion that the profitability of a 'farm unit' is a consideration under that prong of the agricultural land definition." *Id.* (quoting LUBA).

In addition, LUBA expressly declined to apply the concept of profitability to OAR 660-033-0020(1)(b) for two reasons. First, "'the inherent manipulability and unreliability of any profitability evaluation cautions against extending and relying on that type of evaluation in . . . determining whether the subject property is part of a 'farm unit' for purposes of OAR 660-033-0020(1)(b).'" *Id.* (quoting LUBA). Second, "because OAR 660-033-0020(1)(a)(B) expressly refers to '[l]and . . . that is suitable for farm use as defined in ORS 215.203(2)(a),' extending the [profitability analysis] in this case would make OAR 660-033-0020(1)(a)(B) and OAR 660-033-0020(1)(b) 'largely indistinguishable.'" *Id.* (quoting LUBA).

Because LUBA concluded that profitability was not a consideration, it then examined "'whether the subject property [was] properly viewed as part of a 'farm unit,' despite the recent cessation of joint use,'" for purposes of OAR 660-033-0020(1)(b). *Id.* at 254 (quoting LUBA). LUBA's most important criterion was "'whether there [was] some significant obstacle to resumed joint operation.'" *Id.* (quoting LUBA).

LUBA reasoned that "'[t]here can be no possible dispute that the former ranch was a 'farm unit' for purposes of OAR 660-033-0020(1)(b), with a long and recent history of use for a hay/grazing operation that included the [259-acre parcel].'" *Id.* (quoting LUBA). LUBA also noted the county's failure to demonstrate the impossibility of resuming a similar operation on the property. LUBA therefore reversed the county's decision.

Garden Valley sought judicial review of LUBA's order and contended that, "because the term 'farm unit' implicitly incorporates an examination of the economic viability of the farm operation," the county's determination was proper that the 259-acre parcel was not agricultural land within the larger property. *Id.* at 255. The Department of

Land Conservation and Development, appearing as *amicus curiae*, argued that Garden Valley put forth a definition of "farm unit" that was akin to "graft[ing] a use test—one already provided in OAR 660-033-0020(1)(a)(B)—onto a rule designed to address a parcel's relationship to surrounding land." *Id.* at 256.

The court then interpreted OAR 660-033-0020(1)(b), first noting that the term "farm unit" is not defined, and reviewed two cases—*Department of Land Conservation v. Curry County*, 132 Or. App. 393, 888 P.2d 592 (1995), and *Riggs v. Douglas County*, 167 Or. App. 1, 1 P.3d 1042 (2000)—that address the function of OAR 660-033-0020(1)(b) in the context of the definition of "agricultural land" and that explain the nature of a "farm unit."

In *Curry County*, the court had concluded that, for purposes of the farm-unit rule, "land within a unit is suitable for farm use not because of its particular quality but rather because of its location within and relationship to the contiguous whole." *Wetherel*l, 235 Or. App. at 258 (citing *Curry County*, 132 Or. App. at 398). In *Riggs*, the court based its holding on an understanding that a "farm unit" includes "lands, whether in common or diverse ownership, on which there is a recent history of concurrent farm operations." *Id.* at 259 (citing *Riggs*, 167 Or. App. at 8). *Riggs* further established that,

> when farm operations have recently ceased on a parcel that historically has been used for farming operations with other lands as part of a single "farm unit," the parcel is within the unit unless the applicant can demonstrate circumstances—the most important of which is whether there is a significant obstacle to resumed joint operation—that dictate a contrary result.

Id. at 260.

Based on its review of these cases, the *Wetherell* court concluded that profitability is not a consideration in determining whether the 590-acre ranch in this case was a "farm unit." *Id.* The court went on to agree with LUBA's analysis and to hold that the 259-acre parcel was agricultural land under OAR 660-033-0020(1)(b) because it was within the 590-acre farm unit. *Id.* at 260-61.

Marisol Ricoy McAllister

Wetherell v. Douglas County, 235 Or. App. 246, 230 P.3d 976 (2010)

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.
Subscription Price: free to Real Estate and Land Use Section Members, $24.50 per year for others.
To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

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Assistant Editor
Eric Shaffner

Associate Editors
Alan K. Brickley
Edward J. Sullivan

Contributors

Nathan Baker
Richard S. Bailey
Gretchen S. Barnes
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Appellate Cases – Washington

■ STATE APPROVAL OF SHORELINES MANAGEMENT PLAN MAKES THE PLAN A STATE ACTION, NOT A LOCAL GOVERNMENT ACTION

Citizens for Rational Shoreline Planning v. Whatcom County, 230 P.3d 1074 (Wash. App. 2010), involved a preemption challenge to certain buffers, setbacks, and other building restrictions adopted in Whatcom County's most recent Shoreline Master Program (SMP). The Superior Court ruled that because of the requisite and extensive state involvement in the development of SMPs under the Shoreline Management Act of 1971 (SMA), Chapter 90.58 RCW, the "tax, fee, or charge" prohibitions contained in RCW 82.02.020 do not apply to Whatcom County's SMP. The Court of Appeals affirmed.

Whatcom County initiated the process of amending its SMP in 2004. The amendments included provisions for limitations on buildable areas for nonconforming shoreline lots and setback/buffer zone requirements. The Department of Ecology (Ecology), which oversees the SMA planning process, required thirteen pages of mandatory revisions and two pages of recommended changes before approving the SMP in 2008.

Citizens for Rational Shoreline Planning and the Building Industry Association of Whatcom County immediately filed suit, alleging that the building limitation provisions of the SMP violated RCW 82.02.020. That statute prohibits a local government from imposing taxes, regulatory fees, or dedications on development applications. However, a local government may require the dedication of land or easements if it can demonstrate these exactions are "reasonably necessary as a direct result" of the proposed development. The purpose of the prohibition is to prevent "the imposition of general social costs on developers, while at the same time allowing the continued imposition of costs that are directly attributable to the development." 230 P.3d at 1076 (quoting ***Isla Verde Int'l Holdings, Inc. v. City of Camas***, 49 P.3d 867, 878 n.14 (Wash. 2002)). RCW 82.02.020 expressly restrains actions of local governments, not actions taken by the state. Accordingly, the court focused on whether an SMP is a state or local government action and concluded that preparation and approval of an SMP is directed by and effective only on approval by the state.

The court premised its reasoning on the SMA's goals of protecting the state's resources in the fragile coastline and coordinating management of the shorelines between local governments and the state for purposes of the state's SMP. See RCW 90.58.020, 90.58.050. Notwithstanding the fact that local governments navigate the planning process and design the SMP, the court noted that the statute vests the state with the duty to regulate (and approve) the development of local SMPs, to participate in the local planning process, and, where local governments fail to develop an adequate SMP, to develop one for the local government. *See* 90.58.070(2), 90.58.090(1) & (5). The court reasoned that, under the SMA, local governments may not act without approval of Ecology: the state's "statutorily-mandated involvement in the process of SMP development is considerable and, ultimately, determinative." 230 P.3d at 1077. Given the extent of state involvement in SMA planning and approval, the court held that any "tax, fee, or charge" arising in an SMP would be a state act and is therefore not subject to RCW 82.02.020. Id. at 1080.

Nikki Nielson

Citizens for Rational Shoreline Planning v. Whatcom County, 230 P.3d 1074 (Wash. App. 2010)

Cases From Other Jurisdictions

■ PLANTER IN WRECKED AUTO NOT PROTECTED SPEECH, SAYS FIFTH CIRCUIT

Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010), involved application of defendant city's junk vehicle ordinance to a wrecked Oldsmobile 88 that had been converted to a cactus planter colorfully painted and adorned with the words "make love, not war." In the face of a challenge based on the First Amendment and the Visual Artists Rights Act, 17 U.S.C. § 166A(2) and (3), the trial court rejected both claims and ordered plaintiffs to comply with the city's removal order.

Kleinman operated a chain of "Planet K" stores in Texas. The chain has a tradition of opening a new store with a charity sledgehammer demolition of an old car, which is then converted into a planter and painted. This routine was followed in this case, with the artist suggesting the planter was a protest against the prevalent "car culture," the oil industry, and the Iraq War. After the

city ticketed the car under its junk vehicle ordinance, Kleinman and an artist who worked on the piece filed for an injunction in state court to prohibit its application to this case. The city removed the case to federal court. After the plaintiffs added the federal statutory claim, the trial court found for the city and granted relief. On appeal, the Fifth Circuit said it would review the trial court's findings for clear error and its legal conclusions *de novo*.

Turning to the First Amendment issue, the court rejected plaintiffs' contentions that the ordinance was content-based, noting that although the United States Supreme Court has not pronounced the limits of the First Amendment as applied to visual, non-speech objects or artwork, lower federal courts have done so on a case-by-case basis. In *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006), although the Second Circuit denied that all decorative art constituted protected expression, an approach it said would drain all meaning out of the First Amendment, it upheld a narrowly-tailored ordinance that left open ample channels of communication. That court determined that First Amendment protection of fine art does not require a "crafted hierarchy of artistic expression." 597 F.3d at 327.

The Fifth Circuit applied this test as follows:

> Irrespective of the intentions of its creators or Planet K's owner, the car-planter is a utilitarian device, an advertisement, and ultimately a "junked vehicle." These qualities objectively dominate any expressive component of its exterior painting. Appellants concede that the car falls within the definition of the San Marcos ordinance. . . . When the "expressive" component of an object, considered in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation. We therefore pretermit "recourse to principles of aesthetics."

Id. at 327-28 (internal citations omitted).

However, out of an abundance of caution, the court also applied the First Amendment intermediate scrutiny analysis of *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), to this case, balancing the right of free expression with the power of government to regulate, concluding that when expression includes both speech and non-speech elements, the expression may be regulated if (1) it is within the constitutional power of government to do so, (2) the regulation furthers a substantial or important governmental interest unrelated to suppression of speech, and (3) the incidental restriction goes no further than necessary to further that interest.

Under that analysis, the city could constitutionally regulate the placement of junked vehicles in a content-neutral way (i.e., having nothing to do with the message of the owner or artist) to protect public health and safety or substantial and important public interests in preventing actual or potential public nuisances, even if this vehicle could be made "safe." The court noted that Texas statutory law, as well as the challenged ordinance, exempted enclosed displays, car dealerships, and licensed junkyards from their provisions, so the regulations did not sweep too broadly. Moreover, the restrictions left open other adequate alternatives for expression and thus passed constitutional muster.

Similarly, the Fifth Circuit affirmed dismissal of plaintiffs' federal statutory claim under a law that prohibited destruction or mutilation of art in a way that prejudices the "honor or reputation" of the artist. The court agreed with the trial court that the planter was "promotional" material outside the ambit of the statute.

Because the city did not request any affirmative relief in the trial court, the Fifth Circuit determined it was error for the trial court to require compliance with the removal order, vacating that portion of the lower court decision, but otherwise affirming.

Application of the First Amendment based on the intentions of the owner or artist in a free-expression case would likely be unworkable and the Fifth Circuit appears to have taken a pragmatic approach to the matter. Both the trial and appellate courts made short work of the statutory claim. However, look for both the First Amendment and more sophisticated claims based on the statute to be raised in future cases.

Edward J. Sullivan

Kleinman v. City of San Marcos, 597 F.3d 323 (5th Cir. 2010)

■ *FOURTH CIRCUIT AFFIRMS INVALIDATION OF AIRPORT NEWSRACK REGULATIONS*

T*he News and Observer Publishing Company v. Raleigh-Durham Airport Authority*, 597 F.3d 570 (4th Cir. 2010), involved the review of a trial court grant of summary judgment to plaintiff newspaper publishers (the Publishers) who challenged defendant airport authority's (the Authority) total ban on newspaper racks in its airport facility. The Fourth Circuit determined that the asserted governmental interests did not justify the ban.

To qualify for federal funds, the Authority was required to make its facilities as financially sustainable as possible.

It therefore leased advertising space, shops, and the like. The Publishers approached the Authority in 2002 about coin-operated newsracks, noting that the shops were open less than 24 hours, even though the airport was a 24-hour facility, and were sometimes out of newspapers. The Authority told the Publishers there was an informal policy limiting newspaper sales to terminal shops and that there were revenue, floor space, and security issues with changing the existing paradigm. In 2004, the Publishers noted the existing ban would not likely pass First Amendment scrutiny and proposed free newsrack placement with a commitment to security. The Authority again refused and the Publishers sued, alleging violations of the federal and state constitutional free expression provisions, as well as of the Civil Rights Act, and requesting a permanent injunction. On cross-motions for summary judgment, the trial court granted the Publishers' First Amendment claim, finding no justification for the total ban. The Authority appealed.

The court cited its decision in *Multimedia Publishing Company v. Greenville-Spartanburg Airport District*, 991 F.2d 154 (4th Cir. 1993), in which it held that the First Amendment protects the distribution of newspapers as well as their publication. It also noted that the United States Supreme Court has declared airports as "non-public forums," in which states may impose reasonable time, place, and manner restrictions on use and may reserve the forum for its intended use, but they may neither restrict speech unnecessarily nor on account of its content or viewpoint. 597 F.3d at 577 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983); and *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992)). In this case, the court reviewed only the reasonableness of the regulations in light of the purpose of the forum and surrounding circumstances. *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)).

In evaluating the Authority's policy as limiting access to political speech, especially in limiting newspaper distribution to shops which, even when open, may limit such access without a practical alternative, the court concluded the ban significantly affected the protected expression of the Publishers. *Id.* at 578. Noting the purposes of the facility in promoting secure travel and raising revenue, the court looked at four of the Authority's asserted interests in justifying the ban: aesthetics, revenue, preventing congestion, and security.

First, the Authority offered no proof of injury to its aesthetic interest, especially as it already allowed vending machines, ATMs, and brochure racks. As to revenue, even if customers would buy fewer incidentals if newspapers were available outside shops, that fact would not be sufficient to uphold the ban. The court expressed skepticism that revenue would be lost in any event, as papers would be available when shops were closed, and found no evidence that newsracks would be inconsistent with the Authority's business model for the facility (nor did the Authority consider revenues from renting space for newspapers). Next, although the Authority presented evidence to show how foot traffic could be hampered by placement of newsracks in some places, the court said it would not consider such blockage in the abstract, especially if some newsracks were strategically placed in the airport. In any event, any such placement would be a trivial addition to those facilities already in the terminal and would not justify a ban. Finally, the Authority relied on an affidavit of its Security Director, who testified as to the security problems inherent in the placement of 208 newsracks. The Authority had banned all newsracks from its facility and the affidavit did not speak to a "carefully calibrated newsrack presence," *id.* at 581, which could be *de minimus*. The court noted that the Federal Aviation Administration has no specific rules on the subject. While a bomb could be placed anywhere in the facility, the clear plastic door of a newsrack made it an unlikely security concern. Finding insufficient evidence to justify the ban, the court upheld the trial court's injunction.

The dissent argued that, although there may have been insufficient evidence, a summary judgment motion requires that no real evidentiary dispute exist. The parties had not consented to convert the summary judgment proceedings into a trial, and the dissent noted that the trial court had previously refused summary judgment in the first instance because there were genuine issues of material fact.

The decision on summary judgment in this case is troubling. It may well be that the justification was insufficient; however, the nature of a trial is to weigh that evidentiary sufficiency.

Edward J. Sullivan

The News and Observer Publishing Co. v. Raleigh-Durham Airport Authority, 597 F.3d 570 (4th Cir. 2010)

Land Use Board of Appeals

■ LUBA JURISDICTION

Three recent decisions further define the contours of LUBA's jurisdiction. The "land use decisions" appealed include: (1) a letter denying final plat approval; (2) a written denial of a partition application made after a mandamus action was filed; and (3) a letter seeking payment of fees incurred in processing a subdivision application. In all three cases, LUBA concluded the appealed city actions were not land use decisions and were reviewable by the circuit court, not LUBA.

Denial of Final Plat Approval

Petitioner in *Calvary Construction, LLC v. City of Glendale*, LUBA No. 2009-074 (Mar. 24, 2010), appealed a letter from the city stating that a previously-recorded subdivision final plat was invalid because petitioner failed to fulfill the project completion requirements stated in the preliminary plat approval decision. The city approved a preliminary plat for an 11-lot subdivision and, as part of the approval, required the applicant to fulfill a list of project completion obligations. The list included payment of all fees for city services on the project, a requirement that echoed a statement in the signed application affirming the applicant's understanding that "any additional costs incurred by the City in processing this application are my responsibility." Despite the city's ordinance requirement that all water, sewer, and street improvements must be completed or guaranteed before the final plat can be approved and recorded, the city recorder signed a final plat in September 2007 and it was recorded before this requirement was satisfied.

Over the course of the next two years, the city and the applicant disputed the amount of money owed the city and the validity of the September 2007 plat. The city took the position that the applicant owed the city money for engineering services, no final plat could be approved until these costs were paid, and the previous final plat approval was invalid. Additionally, the city expressed concerns about the way in which a sewer trench was built and whether it complied with state requirements. The applicant asserted it owed the city no additional money for engineering services and refused to rescind the recorded final plat. In a June 2009 letter, the city informed the applicant it had failed to comply with the city code requirements for installing infrastructure before final plat approval, no building permits could be issued, and the applicant had failed to satisfy the project completion requirements contained in the preliminary plat approval. Petitioner appealed this letter to LUBA.

Before LUBA, the city argued the June 2009 letter effectively denied final plat approval and therefore was not a land use decision subject to LUBA's review jurisdiction. Citing ORS 92.100(7), which states that "approval or withholding approval of a final subdivision . . . plat . . . is not a land use decision or limited land use decision," LUBA agreed. Although the appealed letter did not state explicitly that the city was denying or withholding final plat approval, the city had sent the applicant letters over the intervening two years that reiterated it could not approve the final plat until the applicant paid outstanding fees and satisfied the preconditions stated in the preliminary plan approval. In LUBA's view, "there is nothing in the June 12, 2009 letter to suggest that the city's position regarding the need for and preconditions for final plat approval have changed." Slip op. at 11. While the city argued it had not made a "quasi-judicial decision" that could be transferred to circuit court, LUBA disagreed and granted the applicant's motion to transfer the appeal to circuit court.

Post-Writ Decision

In *Stewart v. City of Salem*, LUBA No. 2009-052 (Apr. 9, 2010), the petitioner appealed to LUBA a decision denying his partition application, which the city made *after* the petitioner filed a petition for writ of mandamus alleging the city violated the statutory 120-day deadline for final decision-making. Underlying the mandamus action was a dispute over when petitioner's application became complete for purposes of starting the 120-day clock. The parties' calculations differed by eight days. Petitioner filed his mandamus action on April 3rd, four days after the city council orally denied his application. On April 6th, the city council adopted a final written decision and issued it two days later, asserting it acted within the 120-day deadline. The petitioner appealed to LUBA the city council's April 6th decision. On July 9, 2009, the circuit court dismissed the petitioner's mandamus action and the petitioner appealed the court's decision to the Court of Appeals.

The parties brought both the circuit court action and the appellate proceeding to LUBA's attention at oral argument on January 14, 2010. LUBA questioned whether it had jurisdiction and granted the city's subsequent motion to suspend the appeal while the mandamus case was pending at the court of appeals. On March 26, 2010, the

petitioner filed a mandamus action in Marion County Circuit Court, asserting that LUBA had violated its statutory duty in ORS 197.830(14) to issue a decision within 77 days of the local government's record transmittal to LUBA and had failed to explain why the "ends of justice" served by suspending the appeal outweighed "the best interest of the public and the parties" in a speedy decision, as required by ORS 197.840(1)(d).

Although it had not used the precise language in ORS 197.840(1)(d), LUBA concluded its order suspending the appeal satisfied the requirements of that statute. Even if it had not, LUBA concluded it lacked jurisdiction to hear the appeal and exclusive jurisdiction to review the city's decision was vested in the circuit court under ORS 227.179(2). Subsection (1) of ORS 227.179 authorizes an applicant to file a mandamus action if a local government fails to make a final decision on its application within 120 days of the date the application is complete. Under Subsection (2), the local government retains jurisdiction to make a final decision until a petition for writ of mandamus action is filed; after that point, "jurisdiction for ***all decisions regarding the application***, including settlement, shall be with the circuit court" (emphasis added).

Applied to this appeal, the city lost jurisdiction to issue its final written decision when the petitioner filed its mandamus action on April 3rd. As a result, LUBA concluded the written decision the city made on April 6th was a decision "regarding the application" and jurisdiction to review it was vested in the circuit court. LUBA found contextual support for its decision in ORS 197.015(10)(e)(B), which exempts from the definition of "land use decision" a local decision on a permit, limited land use decision, or zone change made after a writ of mandamus has been filed. In short, LUBA concluded the legislature expressed a clear intent in both ORS 227.179(2) and 197.015(10)(B) to give the circuit court exclusive review jurisdiction over post-writ decisions. In the absence of a motion to transfer the appeal to circuit court by the petitioners, LUBA dismissed the appeal.

Fiscal Decision

The purported decision on appeal in *Montgomery v. City of Dunes City*, LUBA No. 2009-125 (Apr. 13, 2010), was an October 2009 letter from the city demanding payment of almost $22,000 in unpaid fees for processing petitioner's subdivision application and threatening to refer the matter to a collection service. A 2005 city ordinance established a fee schedule for land use reviews, including subdivisions. Under a 2007 city resolution, any fee paid under the 2005 ordinance is considered a deposit toward the actual amount and cost of all city expenditures in processing a land use application. A land use applicant is responsible for paying any balance owing after the city issues a final decision on the application.

In *Montgomery*, the city denied petitioner's application for subdivision approval and, on appeal, LUBA remanded the city's decision. Separately, the city notified petitioner of the $22,000 balance owing for processing its subdivision application. The October 2009 letter appealed in Montgomery was the culmination of several years of correspondence between the petitioner and the city. The petitioner disputed the city's authority to seek reimbursement of the $22,000 land use application processing costs and sought to file a local appeal. The city asserted the 2005 ordinance and 2007 resolution provided the necessary authority and there was no local process to appeal the $22,000 invoice. Shortly after the city sent the October 2009 letter appealed to LUBA, a collection agency sent the petitioner a letter demanding payment of the invoice with interest.

The city moved to dismiss the appeal, relying on LUBA's decision in *Friends of Lincoln County v. Newport*, 7 Or. LUBA 114 (1982), to argue the appealed decision is a "fiscal decision" that LUBA lacks jurisdiction to review. In *Friends of Lincoln County*, LUBA dismissed an appeal challenging the city's decision dismissing a local land use appeal and requiring payment of transcript preparation and appeal fees incurred in processing the underlying land use application. Citing the Court of Appeals' decision in *Housing Council v. City of Lake Oswego*, 48 Or. App. 525, 617 P.2d 655 (1980), *rev. dismissed*, 291 Or. 878, 635 P.2d 647 (1981), LUBA held the city's decision to seek recovery of the unpaid fees was a fiscal decision and outside of LUBA's statutory review jurisdiction.

While *Friends of Lincoln County* appears to support the city's motion to dismiss this appeal, LUBA also noted two later decisions that appeared to reach a contrary result. In *Ramsey v. City of Portland*, 29 Or. LUBA 139 (1995), LUBA considered and rejected the petitioner's argument that the local appeal fee the city charged violated statutory limits on appeal fees and, as a result, the city erred in dismissing his local appeal for failure to pay the required fee. Sidestepping the question of whether the fee question is more appropriately raised as a facial challenge to the ordinance adopting the fee schedule or "as applied" in a local land use appeal, LUBA concluded there was no evidence in the record to support the petitioner's argument. In *Friends of Yamhill County v. Yamhill County*, 43 Or. LUBA 270 (2002), LUBA concluded it had jurisdiction to review a county ordinance increasing county

land use appeal and hearing fees because the fees were an integral part of its zoning ordinance, even if the fees were not codified as part of the zoning code. LUBA did not address the ***Housing Council*** decision in the "as applied" fee challenge in ***Ramsey,*** but did in the facial challenge to the fee ordinance appealed in ***Friends of Yamhill County***.

Turning to the October 2009 city letter demanding payment of costs in this appeal, LUBA acknowledged that "we likely will at some point have to reconcile ***Friends of Lincoln County*** and ***Ramsey***" and concluded this appeal is not the place to do that. Slip op. at 18. The petitioner here never questioned the city's fees in its initial LUBA appeal of the city's decision denying its subdivision application, although the petitioner could have done so. LUBA likened this appeal to ***The Petrie Company v. City of Tigard***, 28 Or. LUBA 535 (1995), in which LUBA held it lacked jurisdiction to hear challenges to a fiscal decision that was made more than a year after the underlying land use decision. LUBA explained:

> It may be that under ***Ramsey*** and our decisions that followed and applied ***Ramsey*** that it is appropriate for LUBA to resolve any permit application fee or permit appeal fee disputes that may arise as part of a land use proceeding, ***in an appeal of the permit decision that results from those land use proceedings***. However, neither ***Ramsey*** nor any of the cases that have followed ***Ramsey*** are authority for the proposition that LUBA has jurisdiction to resolve a fee dispute that does not arise until well over a year ***after*** the decision on the underlying land use application becomes final. . . . Like the decision in ***Petrie***, the decision that petitioner has appealed to LUBA in this appeal postdates the city's decision on his subdivision application and is entirely divorced from the merits of the subdivision decision under applicable land use law. In its current posture, the fee dispute between petitioner and the city is a purely fiscal matter.

Slip op. at 20. Concluding that it lacked jurisdiction to review the October, 2009 letter, LUBA granted the petitioner's motion to transfer the appeal to circuit court.

■ *LUBA PROCEDURE*

Although the principal issues in ***Falls v. Marion County***, LUBA No. 2009-129 (Mar. 23, 2010), involved substantive compliance with the county's zoning ordinance, LUBA's decision is noteworthy for the practice reminder it offers practitioners before LUBA. The petitioners in Falls challenged the county's denial of conditional use approval for a wind farm on their 10.25-acre parcel near Sublimity. In their first assignment of error, petitioners challenged the adequacy of the city's findings discussing conflicts between the wind farm and potential future agricultural uses of an adjacent parcel. In several footnotes, petitioners also asserted these findings and others were unsupported by substantial evidence.

LUBA took great pains to note that its rules, like the rules of appellate procedure, require assignments of error to be clearly stated under separate headings. The court of appeals also refuses to consider assignments of error raised in footnotes. Applying these practice guideposts, LUBA indicated it will not consider the substantial evidence challenge petitioners asserted in footnotes (although LUBA went on to address and reject at least one of the substantial evidence challenges petitioners raised in this manner).

■ *LOCAL ORDINANCE INTERPRETATION*

Petitioners in ***Columbia Riverkeeper v. Clatsop County***, LUBA No. 2009-100 (Apr. 12, 2010) (***Bradwood II***), challenged the county's approval of comprehensive plan amendments and zone changed to allow development of a liquefied natural gas (LNG) facility on the site of the former Bradwood Mill along the Columbia River. This is the second county decision on the Bradwood facility and responds to LUBA's remand of the first decision in ***Columbia Riverieeper v. Clatsop County***, 58 Or. LUBA 190 (2009) (***Bradwood I***). The Bradwood site is 411 acres with approximately a mile of frontage on the Columbia River and the proposed LNG facility includes the development of "a bridge replacement, concrete batch plants, a construction worker park-and-ride facility, dredging of the Columbia River and disposal of dredged materials, power lines, in-water facilities, storage and staging areas, LNG storage tanks and gasification plant, underground pipeline, railroad realignment, and road improvements." 58 Or. LUBA at 192-193. In their second appeal, petitioners argued the county erred in interpreting applicable provisions of its comprehensive plan and failed to address adequately the issues that were the basis for LUBA's remand in *Bradwood I*.

Among the issues the petitioners raised in ***Bradwood II*** was whether the county correctly interpreted provisions of the Northeast Community Plan (NCP) and Bradwood Subarea Plan. Both are elements of the county's comprehensive plan and identify the Bradwood site as appropriate for "small or moderate scale" development activities "not involving extensive filling" and "small to medium sized

water-dependent industrial development." In approving the LNG facility on remand, the county concluded: (1) the development activity proposed at Bradwood is less than 100 acres and, therefore, is small-to-moderate in scale; (2) dredging 46 acres of the river channel adjacent to the site is not "development activity" within the meaning of the comprehensive plan; and (3) areas temporarily occupied during construction of the LNG facilities are not counted as part of the 100-acre dividing line between small/moderate and large development activity. Petitioners challenged each of these conclusions.

Relying on *Siporen v. Medford*, 231 Or. App. 585, 220 P.3d 427 (2009), *rev. allowed*, 348 Or. 19 (2010), LUBA found plausible the county's interpretation that sites less than 100 acres constitute small or moderate industrial development sites. Language elsewhere in the Goal 9 element of the county's comprehensive plan suggests that large industrial sites are at least 100 acres in size. LUBA agreed the Goal 9 language provided "relevant context" for interpreting the provisions of the NCP and Bradwood subarea plan.

Turning to the question of what constitutes "development activity" of small or moderate scale, LUBA noted that *Bradwood I* held that dredging was clearly included in this term. In *Bradwood II*, LUBA held that construction activity—for both the LNG terminal and a 100-foot construction easement for the gas pipeline—is included as well given the definitions of "development" in the county's Goal 16 comprehensive plan provisions and development ordinance. Finally, LUBA agreed with the petitioners that dredging in the Clifton Channel adjacent to the site also should be counted as development activity. LUBA found particularly puzzling the county's decision to include as development activity the in-water structures to be anchored to submerged land in the channel, but to exclude dredging of 46 acres of submerged land in the same channel. Based on the county's failure to include the 46 acres of dredging and uncertainty about the number of acres devoted to temporary construction activities, LUBA remanded the decision to the county to calculate compliance with the 100-acre limitation for small to moderate industrial development activity.

Petitioners also challenged the county's determination that the LNG facility complies with comprehensive plan policies that state "traditional fishing areas shall be protected" and "endangered or threatened species habitat shall be protected from incompatible development." In *Bradwood I*, the county interpreted the term "protect" to encompass an attempt or intent to protect. LUBA disagreed and concluded the county erred by failing to apply the definition of "protect" in the statewide planning goals ("save or shield from loss, destruction, or injury or for future intended use"). The county responded on remand by defining "protection" as "avoiding those [estuarine] areas to the extent possible and making development sensitive to the environment where it does in fact occur." Slip op. at 16.

LUBA again rejected the county's interpretation, finding it little different than the "attempt/intent to protect" standard LUBA found implausible in *Bradwood I* and inconsistent with the "stringent language" the dictionary uses to define the term. Slip op. at 17. The language of Goal 16 also provides ample context for concluding that "protection" of estuarine resources means they should be saved or shielded from all but the most minimal impacts. Finally, LUBA disagreed with the county's determination that certain protective measures would protect estuarine values as a whole. Regardless of the language of Goal 16, LUBA found this language insufficiently addressed the county's comprehensive plan requirements to protect two specific resources: "traditional fishing areas" and "endangered and threatened species habitat."

The county addressed dredging in Clifton Channel, a designated traditional fishing area, by finding that "some disturbance is allowed so long as the disturbance does not have a substantial adverse effect" on this resource. Slip op. at 23. The county also relied on compliance with its dredging standards as a way to minimize the effect of dredging on the channel. In LUBA's view, the county's findings were inadequate because they "seem to rely on 'minimization' of harm but do not establish that the harm to the protected resource will be ***de minimis***." Slip op. at 24. LUBA also found fault with the county's determination that closing the channel to accommodate tanker traffic to the LNG facility would protect the Clifton Channel fishing area. Given the anticipated frequency of tanker traffic, the county failed to demonstrate how the proposed facility would result in only a ***de minimis*** impact on a traditional fishing channel used by both recreational and commercial fishermen.

Petitioners argued the county's findings addressing the protection of endangered or threatened species habitat were equally flawed. To the extent the county relied on measures that reduce impact to resources, but failed to find these measures reduce impacts to a ***de minimis*** level, LUBA agreed. In some instances, the county found that impacts to habitat resources could be allowed where it is not possible to avoid them, but did not address whether the allowed impacts were at or below a ***de minimis*** level. Again, LUBA ruled these findings were insufficient

to demonstrate the affected resources were protected within the meaning of the county's comprehensive plan. Although LUBA sided with the county that requiring off-site mitigation and restoration could effectively protect habitat resources, the county's findings failed to explain how the proposed mitigation or restoration would result in ***de minimis*** impacts to these resources.

In summary, LUBA concluded the county failed to address adequately the issues that resulted in a remand in ***Bradwood I*** and again remanded the county's decision.

Kathryn S. Beaumont

Oregon State Bar
Section on Real Estate and Land Use
16037 SW Upper Boones Ferry Rd
PO Box 231935
Tigard, OR 97281-1935