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Contents

Appellate Cases – Land Use

■ *COURT OF APPEALS ALLOWS TRAVEL CENTER DEVELOPMENT TO PROCEED*

Devin Oil Company v. Morrow County, 236 Or. App. 164, 235 P.3d 705 (2010), concerned Morrow County's approval of the City of Boardman's application to partition a 456-acre parcel of land into two parcels. The city intended to sell the smaller, 49-acre parcel to Love's Travel Stops and Country Stores, Inc. (Love's) for the development of a travel center that would include automobile and truck fueling stations, a truck wash and truck repair shop, a convenience store, and possibly a restaurant. A zoning change would be required, and Love's would have to obtain the necessary permits, but the partition logically had to occur first. Morrow County Subdivision Ordinance (MCSO) 5.030(2) provides that a land partition application may not be approved unless "[e]ach parcel is suited for the use intended or offered; including, but not limited to, size of the parcels, topography, sewage disposal approval and guaranteed access." MCSO 5.030(3) requires that approval of a partition be withheld unless "[a]ll required public service and facilities are available and adequate."

The Morrow County Planning Commission held a hearing to determine the merits of the city's partition application. A surveyor for the engineering firm hired by Love's testified in support of the city's application. The planning commission approved the application, finding that it did not need to determine whether the parcel was suited for a travel center (presumably because of the preliminary nature of the application) and, in the alternative, that the record reflected that the parcel was in fact suited for this use. Devin Oil Co., Inc. (Devin) is an established business in the area. Not pleased with the planning commission's conclusion in favor of a competing business, the company appealed to the county court, which affirmed the planning commission's decision. Devin then appealed to LUBA.

LUBA agreed with Devin's argument that the county erred in concluding it did not have to find that the parcel was suited for its intended purpose. However, LUBA affirmed the county's alternative finding that the record sufficiently established suitability with regard to the issues primarily in dispute: water supply, sewage disposal, and stormwater disposal. (In the end, LUBA still remanded to the county on the issue of guaranteed access, a finding for which Love's did not seek judicial review given the early stage of development and the fact that access could be guaranteed by easement or deed post-sale.) Devin then petitioned to the Oregon Court of Appeals for review, seeking to halt the development of the travel center by blocking the partitioning of the parcel.

Devin had argued to LUBA that the evidence was lacking on the disputed issues because the surveyor testified in general about what engineers and others had found regarding suitability of the parcel for a travel center. As the court of appeals noted on review, LUBA is required to follow the "substantial evidence" standard in reviewing a county's land use decision. To affirm a decision at the county level, LUBA must review all of the evidence in the record, determine whether the county's decision is supported by substantial evidence, and conclude that a reasonable person could make the same decision based on the evidence presented. LUBA addressed the substantial evidence standard head-on when it stated that the surveyor's testimony "might not constitute substantial evidence if the application were to approve a specific development and its facilities under more focused and rigorous development standards, for purposes of approving a partition under MC[S]O 5.030(2) . . . ." *Devin Oil Co., Inc. v. Morrow County*, LUBA No. 2009-103, slip op. at 14 (Jan. 20, 2010). However, in the context of approving a partition, "substantial evidence" means something different than it does later in the development process, LUBA found. The court of appeals agreed.

This is the crux of the case: "substantial evidence" varies in meaning depending on the context within which the evidence is analyzed. In the preliminary stages of a land development process, prior to the drafting of engineering reports and detailed plans, the "substantial evidence" standard may be met by indirect and somewhat speculative testimony. Later in the development process, more rigorous development standards

as applied to a specific development require a more demanding analysis of the evidence with regard to suitability or other enumerated requirements.

The court went on to conclude that LUBA also correctly decided that MCSO 5.030(3) did not apply in this case because the evidence showed that Love's intended to provide its own water supply, sewage disposal, and stormwater disposal on-site. As a private entity, its provision of those services for itself, and no one else, made the express language of the ordinance relating to "public service and facilities" inapplicable.

Nicholas P. Merrill

Devin Oil Co., Inc., v. Morrow County, 236 Or. App. 164, 235 P.3d 705 (2010)

Cases From Other Jurisdictions

■ SUPREME COURT PLURALITY FINDS NO "JUDICIAL TAKING"—YET

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, ___ U.S. ___, 177 L. Ed. 2d 184, 130 S. Ct. 2592 (2010), involved a 1961 Florida law, known as the Beach and Shore Preservation Act, that allowed local governments to establish an erosion control line at the existing high water mark and create a new dividing line between private and public beach ownership. Prior to passage of the law, the mean high water line divided private and public property, and private owners had the right to receive accretions (gradual additions of sand) and relictions (gradual exposure of formerly submerged land) to maintain this dividing line. However, sudden increases or decreases of land, known as avulsion, did not change the boundary line between public and private ownership. The 1961 law created a process for local governments to undertake projects designed to add (restore) and maintain (nourish) sand added to eroded beaches. As part of this process, an erosion control line could be set and could become the new dividing line between private and public property rather than the fluctuating ordinary high water line under previous law. The State would become owner of all lands seaward of the erosion control line, though beachfront owners would "continue to be entitled to all common-law riparian rights" except accretion. 130 S. Ct. at 2599 (quoting Fla. Stat. § 161.201 (2007)).

Plaintiff, a membership corporation consisting of landowners who alleged a taking of their "rights" to be in contact with the water and to accretions, challenged the application of the city of Dustin and Walton County, Florida for permits under the law. The Florida Supreme Court upheld the 1961 Act and the plaintiff successfully petitioned the United States Supreme Court for review.

Justice Stevens did not participate in the case, presumably because he owns beachfront property in Florida. Justice Scalia wrote a plurality opinion for the Court, affirming the Florida Supreme Court decision and noting that, although property interests are generally defined by common law, precise property rights vary from one state to another. He also explained that Florida law entitles the state to all property seaward of the mean high water line.

Justice Scalia wrote that riparian rights are "property" subject to the Fifth Amendment's Takings Clause even if property is destroyed. Moreover, the Takings Clause bars the state from appropriating private property rights, regardless of which branch of the state effects a taking. Thus, "if a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the state had physically appropriated it or destroyed its value by regulation." 103 S. Ct. at 2602. Thus, there could be a "judicial taking" under this analysis, as with "judicial reconstruction of a State's laws of private property." *Id.* (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 79, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)).

The plurality found no inconsistency between background principles of Florida property law and the decision of the Florida Supreme Court in this case. Because that court did not change established rights, plaintiff had not borne its burden of proof.

Much of the plurality's opinion was a response to the two concurring opinions, which viewed reaching the takings issue as unnecessary; Justice Scalia noted a number of cases where a constitutional issue was raised and discussed but ultimately failed. The plurality also derided the use of substantive due process as a constitutional standard in such cases, especially where there is a specific constitutional provision on point, and found the elimination of "established property rights" to be outside the common law tradition and thus trumped by the Takings Clause.

Justice Kennedy wrote for himself and Justice Sotomayor, concurring in the judgment but stressing the perceived difficulties of finding a taking from the elimination of an established property right. Instead, Justice Kennedy suggested use of the Due Process Clause of the Fourteenth Amendment and noted that some laws that allowed a taking to be reversed after formal condemnation proceedings, due to the amount of the reward, were valid so long as litigation costs were paid. Unlike a taking, where the act could be done so long as the government pays, due process places a limit on irrational governmental action. Because the area of "judicial takings" is new, Justice Kennedy would not sanction use of the Takings Clause in this case but would instead use the Due Process Clause to invalidate any unconstitutional effect. Moreover, he expressed concern over extending the Takings Clause to non-physical actions, such as regulation, concluding: "It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators. . . ." *Id.* at 2617-18.

Justice Breyer, speaking for himself and Justice Ginsburg, also concurred in the judgment but wrote that, as there was no unconstitutional action in this case, the decision as to whether the actions were constitutional was speculative and should be left to another day. It was the unknown results of affirming the possibility of a judicial taking that concerned him, particularly when state property law was allegedly changed by a court decision. Such decisions would open federal courts to many claims in the areas of state property law with which the Supreme Court was not familiar. Whether a constitutional claim was valid or not, the Court could dispose of this case without finding a new right—courts might find a taking through the change of state property law. In a swipe at the Court's right wing, Justice Breyer concluded:

> In the past, Members of this Court have warned us that, when faced with difficult constitutional questions,

> we should "confine ourselves to deciding only what is necessary to the disposition of the immediate case." . . . I heed this advice here. There is no need now to decide more than what the Court decides [above], namely, that the Florida Supreme Court's decision in this case did not amount to a "judicial taking." *Id.* at 2619.

Justice Breyer appears to be correct. If there were no takings here, why was it necessary for the plurality to discuss a "judicial taking" unless it wished to rely on this case as precedent in future excursions to broaden the Takings Clause?

Edward J. Sullivan

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., ___ U.S. ___, 177 L. Ed. 2d 184, 130 S. Ct. 2592 (2010)

■ *ELEVENTH CIRCUIT UPHOLDS ORLANDO ORDINANCE REGULATING FEEDING IN PUBLIC PARKS*

First Vagabonds Church of God v. City of Orlando, Fla., 610 F.3d 1274 (11th Cir. 2010), involved challenges to defendant city's Large Group Feeding Ordinance under the First and Fourteenth Amendments and the Florida Religious Freedom Restoration Act (FRFRA). One plaintiff was a church that meets regularly in a city park and serves food as part of its religious services, while another is an association of political activists that serves food at its meetings, also in city parks. The city passed an ordinance requiring a permit to feed large groups with a maximum of two permits per park per year. The trial court granted plaintiffs' free speech, free exercise, and free assembly claims, but dismissed the other claims. The city appealed the adverse judgments, while plaintiffs appealed dismissal of their due process (i.e., void for vagueness), equal protection, and FRFRA claims.

The trial court had found that feeding was expressive conduct; however, the Eleventh Circuit found that not all conduct is expressive or covered by the First Amendment. To determine First Amendment protection, a court inquires as to whether there was intent to convey a particularized message and whether it was likely that those who received it would understand it. 610 F.3d 1274, 1282 (citing *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)). The appellate court found the first standard met but not the second, as it was unlikely that plaintiffs' message that food should be provided to all members of society was readily apparent to a reasonable observer. The conduct at issue was too ambiguous and had to be explained by other media (such as speeches, t-shirts, buttons, and banners). Expressive conduct must have an apparent message to justify First Amendment protection.

Similarly, the court found that a neutral law of general applicability with a rational basis may regulate free exercise of religion. The ordinance is presumed constitutional and the burden is on the plaintiff to show that the law is not rationally related to a legitimate governmental interest. The court accepted that the stated reasons of preservation and management of city parks and adjacent neighborhoods to protect them from large group feedings were legitimate ends. It is not for the courts to justify the wisdom or effectiveness of a judgment of the local government.

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As to the due process (void for vagueness) argument, the court noted plaintiffs did not specify if this was a facial or an as-applied challenge and added:

> Language has limits and precision is rarely possible. An ordinance cannot be expected to address specifically every set of potential facts; a law need not be a book in length. When passing on the vagueness of a law, we must remember that, because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." . . .

610 F.3d at 1286 (quoting ***Grayned v. City of Rockford***, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).

Reviewing the definitions and prohibitions of the challenged ordinance, the court noted that it had a ***scienter*** requirement (i.e., the conduct must be knowing). If the indeterminacy deals with the establishment of a fact rather than its operation in the statutory scheme, the regulation is not void for vagueness for that reason. The court concluded that plaintiffs did not show the ordinance was vague as applied to them or that it regulated conduct protected by the Fourteenth Amendment. To be facially unconstitutional, an ordinance must be invalid in all of its applications. Similarly, the equal protection challenges failed as the court used a rational basis test and found a rational distinction between vendors licensed to sell food in the parks and others distributing food.

Finally, as to FRFRA, the Eleventh Circuit affirmed the trial court's determination that the free exercise of the religious plaintiffs was not substantially burdened. While the statutory protection is broader than that provided under the First Amendment and deals with substantial limitations that may operate as prohibitions on religious conduct, it does not include mere inconvenience. The burden is on the plaintiff to show the violation and the plaintiff in this case failed to do so. While church members might have difficulty in learning where services in parks may be held or in getting there, that inconvenience is insufficient to find a violation of FRFRA, which does not guarantee that a church will be able to conduct services when and where it chooses in a public park. At best, FRFRA prohibits a city from denying a church feeding to its members absent a compelling state interest. There are other city parks and not all of them were subject to the ordinance here. The trial court decision on that matter was affirmed. ***Id***. at 1291-92.

This decision shows that a carefully drafted ordinance restricting expressive and religious activities may be upheld if it does not prohibit those activities in all places but limits them so as to reduce adverse impacts.

Edward J. Sullivan

First Vagabonds Church of God v. City of Orlando, Fla., 610 F.3d 1274 (11th Cir. 2010)

THIRD CIRCUIT NIXES CREATIVE ATTEMPTED EVASION OF PITTSBURGH SIGN REGULATIONS

Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010), involved a Pittsburgh sign code provision prohibiting advertising signs on buildings but allowing identification signs. Plaintiff named two buildings on which it had a lease to place a naming sign: "wehirenurses.com" and "paralegalhelp.com." Defendant city found that this was advertising, the trial court agreed, and plaintiff appealed on First Amendment free speech and Fourteenth Amendment equal protection grounds.

Before using the two names at issue, plaintiff bought naming rights, as well as the right to erect identification signs, to several buildings and initially used conventional names. Four years later, in 2001, plaintiff submitted an application to rename the buildings. The city code distinguished between identification signs and other signs that are subject to more rigorous regulations. The zoning administrator denied the permits for the names and the city's Board of Adjustment affirmed, finding that the names represented "a plan or strategy of evasion."

However, one month before that decision the same board approved the naming and identification for "Heinz Field" in accordance with a sponsorship agreement between the City and the Heinz Corporation that included naming rights. The board's decision there interpreted the sign ordinance and distinguished the Heinz case, where it found the name was not a subterfuge to evade the code. That interpretation was based on the presence of four attributes that distinguish an identification sign that contains an advertising element from an advertising sign. Those attributes are: (1) the sign's purpose is to create a destination point at a specific location, (2) the location is important to a significant segment of the public, (3) there is evidence the sign will remain at the location for a long period of time, and (4) the facility owner (a principal user), not a third party, controls the destiny of the sign. The federal magistrate recommended dismissal of the case to the trial court judge, applying the analysis of commercial speech restrictions articulated in Central ***Hudson Electric Corp. v. Public Utility Commissioner***, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), and the trial court agreed, adopting a modified version of the magistrate's opinion in granting summary judgment for the city.

On appeal, the Third Circuit agreed with the trial court's conclusion, but for different reasons. The court did not apply ***Central Hudson*** but instead used ***Rappa v. New Castle County***, 18 F.3d 1043 (3d Cir. 1994), which dealt with the distinctions between content-based and content-neutral speech. If speech is content-based, regulation of it may be justified only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end, whereas a content-neutral regulation deals only with the quantity of speech through time, place, and manner restrictions. Regulations in the latter category will be upheld if they are justified without reference to content, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.

In *Rappa*, the Third Circuit recognized that the relationship of sign content to a specific location was legitimate and could fall within the content-neutral exception so long as it is not used to censor certain viewpoints or control what might be appropriate for public debate. In that case, the court found that the exception was substantially related to advancing an important

state interest (at least as important as that found in the underlying regulations), was no broader than necessary to advance that special role, and was narrowly drawn so as to impinge as little as possible on that overall goal. An example might be a sign directing the public to a specific site. In deciding such cases, the court used what it called a "context-sensitive" test.

Applying that test applied, the court noted that the ban on advertising signs was in the code, but that the code also allowed identification signs. The court termed identification signs a classic application of the context-specific rule, as they "clearly better convey their information at the location they are intended to identify, rendering them similar to address signs. . . . They also promote public order by providing the public with information regarding specific buildings." ***Melrose***, 613 F.3d 380, 390 (internal citation omitted). Plaintiff sought to classify its advertising as identification signs and cited the Heinz decision by the Board of Adjustment. However, the court found no indication that the city sought to "censor certain viewpoints," ***id***. at 389 (quoting ***Rappa***, 18 F.3d at 1065), and concluded the city had "an important interest in allowing the public to identify a particular name with a geographic location, enabling the public to recognize and find these locations," ***id***. at 390.

The context-sensitive test allows identification signs to be excepted from the general prohibition on advertising and the court found that test satisfied by the city's requirements that sign content not change often and that the signs themselves be "intended to remain in place for a significant period of time." ***Id***. at 391. These context-sensitive criteria were not applied unconstitutionally in this case. The court found no showing of intended longevity (particularly when there was no agreement under the contract not to change names). The court noted that the plaintiff was not the owner of the buildings it named and there was no relationship between the name and the geographic place. The court also concluded application of the ordinance, as interpreted in the Heinz case, provided narrow, objective, and definitive standards to guide the Board of Adjustment, rather than leaving unbridled discretion in place.

The court disposed of plaintiff's equal protection claim fairly easily. According to the court, a plaintiff must show that any comparison to those allegedly "similarly situated" with it be precise. Plaintiff showed no such comparison to those entities whose signs were approved and the court easily distinguished the signs in this case from those in the Heinz case. Moreover, the court found the criteria were not content-based, but facilitated the context-sensitive analysis, thereby surviving any equal protection. This case shows one circuit's resolution of the seemingly intractable problem of banning regulation of speech content while allowing for an exception, also seemingly based on content. While the decision seems to make sense, the United States Supreme Court has not reached this issue.

Edward J. Sullivan

Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010)

Legislation

■ NO CHANGING THE GOAL POSTS IN NEW JERSEY

On May 5, 2010, New Jersey's Governor Christie signed Senate Bill 82, taking a page from Oregon's playbook to adopt a "no changing the goal post" rule. New Jersey's new time-of-application rule mandates that the development regulations in force at the time that a land use application is filed be utilized throughout the consideration of the application. Oregon's adoption of the goal posts rule as ORS 215.427(3)(a) (counties) and ORS 227.178(3)(a) (cities) in 1983 took more than 25 years to catch on in New Jersey.

The New Jersey vote was not without controversy. The state legislature faced opposition from the League of Municipalities, New Jersey planning officials, the New Jersey chapter of the Sierra Club, the New Jersey Environmental Federation, the Conservation Foundation of New Jersey, and the Association of New Jersey Environmental Commissions. One of the main arguments against the legislation was that the bill went too far in tipping the scales in favor of developers. These groups argued for maintaining a time-of-decision rule in which the laws, ordinances, and regulations in effect at the time a decision on a development application is rendered by a municipality are the regulations that are applicable. Opponents argued that the time-of-decision rule protects the public interest by allowing for rectification of an error in the zoning ordinance without requiring a municipality to revise its Master Plan and zoning ordinances.

However, the developer community interests prevailed in their argument that a time-of-decision rule allows a municipality to re-zone property up until the moment its land use board decides the fate of a development application, thus depriving applicants of the ability to know what the applicable criteria will be at the time that an application is filed. Based on this uncertainty, the proponents argued that economic development was stifled, as future applicants could not rely on existing ordinances when deciding whether to pursue approvals. Further, proponents argued that local governments would be encouraged to take more seriously their master planning process every six years and to evaluate regularly their zoning ordinances in the intervening years as local circumstances change.

Notwithstanding the controversy, the bill was enacted with an exception for those health and safety regulations that may be adopted after submittal of a land use application.

(The arguments from the opposition have been summarized from William G. Dressel, Jr.'s commentary, "N.J. 'Time of Application' Bill Goes Too Far In Tipping the Scales In Favor of Developers," published on April 28, 2010 in the New Jersey Newsroom. Mr. Dressel is the Executive Director of the New Jersey State League of Municipalities. The arguments from the proponents have been summarized from Ted Zangari's commentary, "It's About Time New Jersey Towns Stand By Their Plan!" published on April 25, 2010 in the New Jersey Newsroom. Ted Zangari is a real estate attorney with Sills Cummis & Gross.)

Jennifer M. Bragar

New Jersey Senate Bill 82

Land Use Board of Appeals

LUBA PROCEDURE

■ ATTORNEY FEES

In *Zeitoun v. Yamhill County*, LUBA No. 2009-088 (July 9, 2010), LUBA considered whether to award attorney fees where it denied three of the petitioner's assignments of error on the merits and denied the remaining four assignments of error because they raised arguments that had been waived. Petitioner in *Zeitoun* challenged the county's approval of a nonfarm dwelling on the intervenor-respondents' property. LUBA rejected the petitioner's claim that a nonfarm dwelling could not be approved because the property was part of a tract that included a dwelling, finding no legal basis for the petitioner's argument. Similarly, LUBA also denied two assignments of error challenging the soils analysis on which the county based its decision and the intervenor's ownership of the affected property. Again, LUBA determined both arguments were unmeritorious and, in ruling on the motion for attorney fees, stated that it tended to agree with the intervenor that all three assignments of error "were lacking in probable cause." LUBA No. 2009-088, at 2.

Turning to the arguments presented in the remaining four assignments of error, LUBA phrased the question before it as "whether, in determining whether any arguments in the entire presentation met the probable cause standard, it is proper for us to consider arguments that were made in assignments of error that we found were waived." LUBA No. 2009-088, at 4. To defeat the intervenor's motion for attorney fees, LUBA concluded the petitioner must show that the position it took in response to the intervenor's waiver/exhaustion challenge satisfies the probable cause standard in ORS 197.830(15)(b) and/or the exhaustion/waiver standard the Court of Appeals articulated in *Miles v. City of Florence*, 190 Or. App. 500, 506-507, 79 P.3d 382 (2003). In *Miles*, the Court of Appeals held that the requirement to exhaust remedies at the local level may mean that a party must have identified a basis for a local appeal and that failure to do so forecloses the party from raising that basis in an appeal to LUBA.

The petitioner's first three assignments of error at LUBA focused on the nonfarm dwelling's effect on the stability of the land use pattern in the area. In his reply brief, the petitioner highlighted issues he raised in his local appeal concerning the impact of a new well for the proposed nonfarm dwelling and increased runoff on neighboring properties. While LUBA concluded that his assignments of error did not raise the same issues as the intervenor raised in his local appeal, both sets of issues addressed the "stability of the overall land use pattern" contained in state law and the county zoning code. As a result, LUBA determined he "made a reasonable argument in his reply brief, which we allowed, that the discussion in his notice of local appeal regarding the impacts of a new dwelling on adjacent property was sufficient" to meet the statutory and *Miles* standards. LUBA No. 2009-088, at 5. Since attorney fees may be awarded only if every argument in the petitioner's entire presentation is lacking in probable cause, LUBA denied the intervenor's motion for an award of attorney fees.

■ TIMELINESS OF APPEAL

LUBA's decision in *Turner v. Jackson County*, LUBA No. 2010-007 (July 22, 2010), addressed whether the challenged decision was quasi-judicial and therefore not subject to the three-year statute of ultimate repose in ORS 197.830(6) for appealing some local land use decisions to LUBA. Generally, a petitioner has a twenty-one-day period to appeal a local land use decision to LUBA. Under ORS 197.830(3), when a local government makes a land use decision without a hearing or makes a decision that is significantly different than the action described in the proposed notice, the twenty-one-day appeal period is tolled and begins to run on the date the petitioner received actual notice of the decision or the date the petitioner knew or should have known of the decision. However, ORS 197.830(6)(a) limits the right to appeal to LUBA to a maximum of three years from the date of the decision with one exception. If a notice of a hearing or an administrative decision made under ORS 197.763 is required and hasn't been provided, ORS 197.830(6)(b) states the three year statute of ultimate repose does not apply.

Although somewhat complicated, the relevant facts in *Turner* involve a series of related appeals and turn on the parties' differing characterizations of the effect of the appealed county actions on a 5.24-acre parcel known as Tax Lot 1708. In 1999 the county approved a quasi-judicial rezoning of Tax Lot 1708 from Exclusive Farm Use (EFU) to a zone that would have allowed rural residential use. That decision was appealed and LUBA remanded the decision in 2000. Petitioners contend the county never responded to LUBA's remand and Tax Lot 1708 remains zoned EFU. In 2004 the county updated its land development ordinance and adopted four ordinances, three of which were appealed to LUBA. One of the appealed ordinances (2004-3) rezoned Tax Lot 1708 from EFU to Rural Residential (RR), even though the ordinance's findings stated that there were no zoning map changes proposed for EFU-zoned properties. One of the petitioners in *Turner* was also one of the petitioners in the appeal of the 2004 ordinances and raised no issues concerning Tax Lot 1708. LUBA upheld the ordinance that rezoned Tax Lot 1708 and, as a result, the county claims that parcel is now zoned RR. In 2008 and 2009, petitioners in *Turner* received notices of variance applications for Tax Lot 1708 and learned the county took the position that it was zoned RR. On January 26, 2010, petitioners appealed Ordinance 2004-3 to LUBA in *Turner*.

The county moved to dismiss the appeal, arguing the petitioners' appeal was untimely since it was filed six years after the county mailed notice of adoption of Ordinance 2004-3. If the twenty-one-day appeal period in ORS 197.830(9) for appealing post-acknowledgment plan amendments and land use regulations is applicable, LUBA indicated it agreed with the county. Petitioners contended, however, that the twenty-one-day appeal period was tolled under ORS 197.830(6) because the notice that preceded Ordinance 2004-3 did not reasonably describe the proposed rezoning of Tax Lot 1708. Additionally, the petitioners characterized the rezoning of Tax Lot 1708 by Ordinance 2004-3 as quasi-judicial and not subject to the three-year statute of ultimate repose in ORS 197.830(6)(a). LUBA disagreed, noting that the exception in ORS 197.830(6)(b) only applies to quasi-judicial decisions made under ORS 197.763, and concluded that Ordinance 2004-3 is clearly legislative in

nature when the three factors in Strawberry Hill 4 ***Wheelers v. Benton County Board Of Commissioners***, 287 Or. 591, 601 P.2d 769 (1979), are applied. As a result, LUBA concluded that the petitioners' attempt to appeal Ordinance 2004-3 was subject to the three-year statute of ultimate repose in ORS 197.630(a) and that the petitioners' appeal was untimely.

■ LOCAL PROCEDURE

Fees and fee refunds were the subject of LUBA's decision in ***Sperber v. Coos County***, LUBA Nos. 2010-030/2010-031 (July 22, 2010). Petitioner in ***Sperber*** appealed the county's denial of his requests for refunds of the application fees he paid for a partition and a variance. He argued that the county violated the statutory deadline for processing his partition application and must refund half of his partition application fee under ORS 215.427(8). With respect to his variance application, which the county denied and petitioner successfully appealed to LUBA, petitioner argued the county erred in requiring him to pay an additional fee for conducting a hearing on remand from LUBA.

Before addressing each of the petitioner's arguments, LUBA first considered the county's waiver argument. The county asserted the petitioner failed to raise the fee issues in the local proceedings on the partition and variance applications and, as a result, waived the right to raise the fee issues on appeal. Although the county characterized its argument as a challenge to LUBA's jurisdiction, LUBA correctly addressed it as a waiver issue. Issues concerning any entitlement to fee refunds were not raised or decided in the county's partition and variance decisions. Accordingly, LUBA concluded the petitioner was not required to raise the fee refund issues at the local level and was not precluded from raising them on appeal to LUBA.

Turning to the partition application, LUBA's decision turned on whether the petitioner requested an extension of the 120-day period during the county's decision making process. The county asserted that petitioner's request for a thirty-day extension in a related, but separate, enforcement proceeding also extended the time for processing the partition and, as a result, the county approved the partition within the statutory deadline. Petitioner argued his request for more time to respond to the zoning enforcement proceeding was independent of the partition application and the county issued its decision on the partition six days late. LUBA sided with the petitioner, agreeing that the county approved the partition after the 120-day deadline and ruling petitioner was entitled to a refund under ORS 215.427(8).

The final issue involved petitioner's entitlement to a refund of the additional fee the county charged for processing the variance denial after it was remanded by LUBA. Specifically, LUBA framed the issue as "[w]hether the fee refund provisions of ORS 215.427(8) apply to fees charged for proceedings following a LUBA remand." LUBA Nos. 2010-030/2010-031, at 7. In LUBA's view, the answer is "no" since the proceedings on remand are treated as a continuation of proceedings on the original application and the statute does not provide for the payment of additional fees following a remand. Additionally, the statute requiring the county to make a final decision on a remanded matter within ninety days of the remand (ORS 215.435(1)) says nothing about fees and indicates a legislative intent not to require an applicant to pay additional fees for remand proceedings.

Finding that both of the petitioner's assignments of error were meritorious, LUBA remanded the county's decision "so that the county can refund the amounts required by the statute." LUBA Nos. 2010-030/2010-031, at 10.

■ POPULATION FORECASTS

LUBA's decision in ***Myer v. Douglas County***, LUBA No. 2010-004 (July 2, 2010), illustrates the importance of meaningful data and analysis to support the population forecast required by ORS 195.036 and OAR 660-024-0030(1). Petitioner in ***Myer*** appealed the county's adoption of an update to its 1998 population forecast, arguing the county violated OAR 660-024-0030(1) because the county failed to base its update on "current, reliable and objective sources and verifiable factual information," to consider "documented long-term demographic trends," and to take into account historical trends concerning population growth, as required by the rule. Instead, the county relied on the same forecasting model and assumptions on which it based its 1998 forecast. The county contended it was reasonable to do so because the 1998 population forecast was challenged and sustained by LUBA in ***DLCD v. Douglas County***, 37 Or. LUBA 129 (1999). In upholding the 1998 forecast in that case, LUBA noted the county deviated from the Oregon Office of Economics Analysis (OEA) projections and model but concluded the county relied on an adequate factual base in developing its forecast.

LUBA rejected for two reasons the county's adherence to its 1998 forecasting model as a basis for the challenged 2009 forecast. First, DLCD adopted OAR 660-024-0030 during the interim and the rule now directs counties how to prepare population forecasts. Second, actual population figures are now available to compare with the county's 1998 population projections and to test the accuracy of the earlier model and assumptions. As a result, LUBA concluded the county erred by failing to review whether the assumptions underlying the 1998 model remain accurate and by relying on these assumptions without explaining why it is reasonable to do so. The absence of any consideration of historical data or trends from the 2009 forecast constituted an additional flaw in the county's analysis.

For similar reasons LUBA also found fault with the county's calculation of growth rates for the county as a whole and for individual cities within the county. Although it was reasonable for the county to choose a growth rate from a range of growth rates, the county failed to explain how its calculations account for current growth patterns and instead appeared to rely on the 1998 forecast model and assumptions. Again, the county's assignment of growth rates to cities within the county also appeared to rely on the 1998 forecast and preferences for higher growth rates expressed by the cities. The county's failure to explain why the 1998 assumptions and model remained valid and to support them with additional data led LUBA to conclude the assigned city growth rates lacked an adequate factual base. Given the county's consistent reliance on the 1998 forecast and consistent failure to support the 2009 forecast with meaningful data, LUBA remanded the county's decision.

Kathryn S. Beaumont