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Contents

1 **Oregon Supreme Court Clarifies Ripeness Rules and Extent of *Nollan* and *Dolan***

2 **Court of Appeals Identifies Key Factors in Measure 49 Waiver Consistency and Common Law Vested Rights Determination**

4 **Court of Appeals Affirms Conversion of Broughton Lumber Mill Site to Recreation Resort**

5 **Vesting Rights: Timing Remains in the Name of the Game**

6 **Pennsylvania Supreme Court Invalidates State Way of Necessity Statutes**

6 **LUBA Summaries**

Appellate Cases – Land Use

■ *OREGON SUPREME COURT CLARIFIES RIPENESS RULES AND EXTENT OF* NOLLAN *AND* DOLAN

On September 23, 2010, the Oregon Supreme Court issued its long-awaited decision in *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 240 P. 3d 29 (2010), responding to certain questions certified to it by the Ninth Circuit Court of Appeals under ORS 28.200. The case involved claims by a developer against the city over the imposition of a condition to make off-site improvements that did not involve the acquisition of real property by the City. The developer sued in state court and the city removed the case to federal court, which decided against the developer. On appeal by the developer, the Ninth Circuit sought the Oregon Supreme Court's answer to several questions involving Oregon's taking jurisprudence. Those questions, and the responses of the Oregon Supreme Court, are summarized below.

1. Question: "[W]hether a plaintiff bringing an inverse condemnation action alleging that a condition of development amounts to an exaction or a physical taking is required to exhaust available local remedies as a prerequisite to bringing his claim in state court."

349 Or. at 61 (quoting *West Linn Corporate Park, L.L.C. v. City of West Linn*, 534 F.3d 1091, 1093-94 (9th Cir. 2008)).

The court answered that, assuming Oregon law allows an inverse condemnation action alleging a condition of development requires an exaction that was not roughly proportional to the impacts of the development, Oregon law requires the applicant to pursue available local administrative remedies. However, the local decision need not be appealed to LUBA before resorting to the courts. The court observed that the developer here had not pursued local remedies before bringing its suit and that ORS 197.796, which provides a cause of action for unconstitutional or otherwise invalid exactions, was not in effect when this case arose. The city may now claim that this case may not be ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

2. Question: "[W]hether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking."

Id.

This case dealt not with exactions of real property but with a required off-site improvement that was allegedly not "roughly proportional" to the impacts of the development. The Supreme Court responded that such facts do not give rise to a taking claim under the Oregon Constitution. The court thus held that the requirement for the improvements was not cognizable under the Fifth Amendment:

> In the absence of a Supreme Court ruling to the contrary, we conclude that a government's requirement that a property owner undertake a monetary obligation that is not roughly proportional to the impacts of its development does not constitute an unconstitutional condition under *Nollan/Dolan* or a taking under the Fifth Amendment, nor does it require payment of just compensation. We also conclude that a requirement that a property owner construct off-site improvements is the functional equivalent of the imposition of a monetary obligation. When a governmental entity requires a property owner to construct improvements, it simply requires the property owner to put money to a particular use. The government could accomplish the same result by requiring the property owner to pay a specified sum, which the government could then use to construct the improvements. The government, through its exercise of the power of eminent domain, can compel neither off-site construction nor the expenditure of money.

Id. at 86-87.

While there may be relief under common law, statute, or other constitutional provisions, there was no relief under the Fifth Amendment.

Moreover, the court decided,

> [w]hen government regulates the use of a property, it effects a taking if it deprives the owner of all economically viable use of the land. In that instance, the regulation of the property is tantamount to the acquisition of the property. When, instead, the regulation requires that the owner pay a sum of money or use a sum

of money for a particular purpose, the regulation is not tantamount to acquisition of the property, even when the obligation exceeds the impact of the development, unless, of course, the obligation is so high that it imposes a burden tantamount to acquisition. Absent additional allegations, a property owner that alleges that a local government has conditioned development on construction of off-site improvements at a cost that is not roughly proportional to the impacts of the development, does not allege a taking under Article I, section 18, of the Oregon Constitution. Plaintiff in this case did not allege such additional facts, and, consequently, plaintiff's claim for inverse condemnation under the state constitution was not cognizable in state court.

Id. at 93-94 (footnote omitted).

3. Question: "[W]hether the vacation of a street approved by the City Council purporting to act pursuant to [ORS 271.110] is *ultra vires* where the petition does not comply with the landowner consent provisions of [ORS 271.080]."

Id. at 61 (quoting *West Linn Corporate Park, L.L.C. v. City of West Linn*, 534 F.3d 1091, 1093-94 (9th Cir. 2008)).

The court found that failure to follow the landowner consent requirements for a city-initiated vacation does not render the unappealed final decision *ultra vires*, noting that certainty and stability of property are important considerations. The street vacation was not void.

Edward J. Sullivan

West Linn Corporate Park, L.L.C. v. City of West Linn, 349 Or. 58, 240 P. 3d 29 (2010)

■ COURT OF APPEALS IDENTIFIES KEY FACTORS IN MEASURE 49 WAIVER CONSISTENCY AND COMMON LAW VESTED RIGHTS DETERMINATION

In *Friends of Yamhill County, Inc. v. Bd. of Commissioners of Yamhill County*, 237 Or. App. 149, 238 P.3d 1016 (2010), the Oregon Court of Appeals ruled that (1) Yamhill County should have determined the applicable zoning law at the time a Measure 49 claimant acquired his property, and (2) the county should have determined the "extent and general cost to the project to be vested and to give proper weight to the expenditure ratio factor in the totality of the circumstances of the case." 237 Or. App. at 18.

This case arose out of a landowner's (claimant) attempt to acquire a Measure 37 waiver to subdivide his 38.8-acre parcel zoned AF-80 (Agriculture Forestry) in Yamhill County. Claimant purchased his property in 1970 prior to the imposition of the AF-80 designation, which places restrictions on residential development. After Measure 37 (ORS 197.352 (2005)) passed in 2004, claimant applied for Measure 37 waivers from the state and county. In 2006 the county approved his waiver and the state waived the application of Goals 3 and 4 to the extent necessary to allow his proposed subdivision and residential development in lieu of monetary compensation.

In 2007 the county approved claimant's preliminary subdivision plat. He then graded the property, partially constructed roads, and arranged to provide electricity to the subdivision, spending more than $155,000 in the process. The county approved, and claimant recorded, the final subdivision plat on December 5, 2007.

Meanwhile, in November of that year the voters approved Measure 49, which reduced the amount of residential development permitted under a Measure 37 waiver, and it took effect on December 6, 2007. Under Measure 49, Measure 37 claims filed by June 28, 2007 are subject only to the land use regulations in effect at the time of the purchase provided that they meet the criteria established in section 5 (ORS 195.318(5)). Specifically, a claimant must show (1) that the proposed use is consistent with the Measure 37 waiver, and (2) that the right to develop the property vested on or before Measure 49's effective date.

Measure 49 established a process that enabled landowners to seek county certification of vested Measure 37 claims. Yamhill County adopted such a process and claimant sought county approval. Friends of Yamhill County (Friends) participated in the vesting adjudication by the county. The vesting officer found that claimant had established a vested right to develop the subdivision. Friends then sought review under section 16 of Measure 49. The reviewing court affirmed the vesting officer's findings and conclusions and Friends appealed, assigning error to the finding that claimant had established a vested right with substantial evidence.

First, Friends argued that claimant was required to begin construction of the proposed homes or show that he made substantial expenditures to complete the proposed development. Friends contended that claimant's expenditures should be weighed against the total cost of the development. Second, Friends argued that claimant should not receive credit for expenditures he incurred after Measure 49 was referred to the voters because claimant acted in bad faith by continuing his development efforts despite the likelihood that the voters would approve it. Finally, Friends argued that the reviewing court should have found that the vested rights recognized by the county were greater than the development rights permitted under the Measure 37 waivers.

In response, claimant argued that home construction was not necessary to establish a vested right to complete the proposed subdivision and residential development. Moreover, claimant asserted that the county's vested rights certification was supported by substantial evidence regardless of the vesting officer's failure to compare claimant's expenditures to the total project cost during his vested rights analysis.

The Oregon Court of Appeals focused its inquiry on section 5(3) of Measure 49, which requires that the "claimant's use of the property compl[y] with the [Measure 37] waiver and that the claimant ha[ve] a common law vested right on the effective date of...[the] Act to complete and continue the use described in the waiver." ORS 195.305 Sec. 5(3).

First, the court considered whether the reviewing court correctly construed the meaning of the term "use of the property" in section 5(3), as the term relates to compliance with the Measure 37 waiver. The court rejected Friends' argument that claimant must first obtain a building permit to establish a use of the property that complies with the Measure 37 waiver. Rather, the court held that the plain meaning of the term "use of the property" means "the actual employment of the land for residential purposes," and the court noted that nothing in the state or county waivers precluded claimant's use of the property for residential development. 237 Or. App. at 167.

Friends achieved more traction with its argument that the state's waiver required a determination by the vesting officer that the use proposed by claimant was an allowed use on December 3, 1970, the date that claimant purchased the subject property. Friends asserted that claimant's subdivision proposal was inconsistent with the applicable zoning laws at that time and, consequently, did not comply with the state waiver. That waiver stated that claimant's proposed subdivision development was permitted "only to the extent that use was permitted when he acquired the property on December 3, 1970." *Id*. at 154 (quoting Final Order Claim No. M129384).

Claimant responded by arguing that Friends' argument should

be precluded because the county had determined that the subdivision was consistent with the acquisition zoning regulations. The court rejected that theory because ORS 92.090(3)(c) only requires that a subdivision plat comply with then-applicable zoning ordinances and regulations. In addition, the court noted that the county's tentative subdivision plat approval was a "limited land use decision" requiring notice and an opportunity for comment, neither of which was provided to Friends. Consequently, the court found that the reviewing court erred by not remanding to the county for further findings on the proposed subdivision development's consistency with the acquisition zoning regulations.

Next, the court addressed Friends' argument that the reviewing court should have remanded the vested rights certification decision for further findings on the expenditure ratio factor. The court, after reviewing the applicable case law, concluded that a vested right is established in Oregon using a balancing test premised on fairness to both the property owner and the general public. The court then looked to the Oregon Supreme Court's decision in Clackamas *County v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973), which set out four "essential factors" to determine whether a right has vested: "(1) the ratio of prior expenditures to the total cost of the project, (2) the good faith of the landowner in making the prior expenditures, (3) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost." *Friends of Yamhill County*, 237 Or. App. 149, 162 (quoting *Eklund v. Clackamas County*, 36 Or. App. 73, 583 P.2d 567 (1978)).

Because the *Holmes* factors must be considered to determine both (1) whether the claimant's use is consistent with the waiver and (2) whether the claimant has a common law vested right, the court explained that some *Holmes* factors are more probative to the common law vested right analysis under section 5(3) than others in order to ensure that these separate determinations are not redundant. Specifically, the court found that the *Holmes* factors of good faith, expenditures on a waived use, and the particular timing of expenditures are less important to the analysis than are the expenditure cost ratio, total cost, and location of the project. 237 Or. App. at 177-78.The court noted that, according to *Holmes*, the ratio of expenditures to the total cost of the project is not the only factor a court must consider in determining whether development rights have vested, although some courts have given this "ratio test" more weight than others.

The court then explained that the cases applying the *Holmes* factors instruct that, while mere preparation for development might not result in vested rights, it is also true that failure to obtain a building permit before a zone change is not fatal to a vested rights claim. According to the court, then, the distinction between a claimant with a vested right and a claimant without one "must lie in the differences about the individual degree of progress made to complete the development." *Id*.

The court explained that "all of the *Holmes* factors are material . . . and . . . interrelated," *id*. at 165, and the court agreed with Friends that the county's vesting decision lacked substantial evidentiary suppport because it did not correctly apply the *Holmes* factors to determine whether claimant's development rights had vested. However, the court rejected Friends' argument that claimant's expenditures after the legislature referred Measure 49 to the voters was evidence of bad faith or that the vesting officer erred in giving weight to those expenditures in his expenditure ratio analysis.

Finally, while noting that the vesting officer had concluded that the total amount of expenditures was equivalent to the total cost of establishing the vacant home sites, the court pointed out that there were no specific figures for total construction costs, including houses. The court said these factors must be considered because they might affect the vested rights decision. Thus, the court ordered the reviewing court to remand the case to the county for further findings of fact relevant to the ratio test.

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The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

Glenn Fullilove

Friends of Yamhill County, Inc. v. Bd. of Comm'rs of Yamhill County, 237 Or. App. 149, 238 P.3d 1016 (2010)

■ COURT OF APPEALS AFFIRMS CONVERSION OF BROUGHTON LUMBER MILL SITE TO RECREATION RESORT

In *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 236 Or. App. 479, 238 P.3d 378 (2010), petitioners sought judicial review of a final order of the Columbia River Gorge Commission (Commission) amending the Columbia River Gorge National Scenic Area Management Plan (Management Plan) to make it possible to convert a former lumber mill site located in the Columbia River Gorge National Scenic Area (Scenic Area) in Skamania County, Washington, to a recreation resort. Petitioners made three assignments of error: 1) the Commission lacked authority to amend the Management Plan because conditions in the Scenic Area had not significantly changed; 2) the amendment is inconsistent with the purposes and standards of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1986) (Act); and 3) the Commission inappropriately determined that the mill site contains an existing industrial use. The Court of Appeals affirmed, holding that: 1) the Commission's findings that significant changes had occurred in the Scenic Area were supported by substantial evidence in the record; 2) the amendment was consistent with the purposes and standards of the Act given the conditions existing at the time of the amendment; and 3) the Commission did not make a legal determination as to the existing use of the mill site.

The Commission is a bi-state agency that administers the land use rules for the Scenic Area, a 300,000-acre region encompassing lands in Hood River, Multnomah and Wasco counties in the state of Oregon, and Klickitat and Skamania counties in the state of Washington. Congress created the Scenic Area in 1986 to protect both the scenic, cultural, recreational, and natural resources of the Columbia River Gorge and the economy of the area by encouraging growth to occur in urban areas and allowing economic development consistent with resource protection. 16 U.S.C. § 544a (1986). The Act requires the Commission to conduct studies, develop land use designations and adopt a Management Plan for the Scenic Area. *Id*. § 544d(a)-(c).

The Management Plan, adopted in 1991, is subject to periodic review and revision. The Act requires the Commission to review the Management Plan at least every ten years to determine whether revisions are necessary or appropriate. *Id*. § 544d(g). The Act also permits the Commission to amend the Management Plan at any time in response to changes in the Scenic Area. *Id*. § 544d(h). To approve an amendment, the Commission must find that: 1) conditions in the Scenic Area have significantly changed, such as new information or inventory data regarding land uses or resources that could result in a change of a plan designation, classification or other plan provision, or changes in legal, social, or economic conditions not anticipated in the Management Plan; 2) the amendment is consistent with the Act's purposes and standards; and 3) no practicable alternative to the amendment exists that is more consistent with the Act's purposes and standards. OAR 350-050-0030.

In 2006, Broughton Lumber Company, owner of the fifty-acre mill site, proposed to develop the site into a recreation resort. The site was zoned Commercial Recreation, and recreation use there could include an RV campground with up to 175 spaces and thirty-five overnight accommodation units. The director of the Commission determined that the development would require a "legislative" (as opposed to "quasi-judicial") amendment to the Management Plan. The Commission approved a plan amendment in 2008 allowing a new "recreation resort" review use on Commercial Recreation-designated property that contains "an existing industrial complex," adding new policies, guidelines, and definitions to the Management Plan.

The Commission determined that there had been significant changes in conditions in the Scenic Area, specifically: 1) the decline in the timber industry; 2) changes in the orientation of the gorge economy from the wood products industry to travel and tourism; 3) the decline in the use and condition of the industrial site and possible contamination and cleanup cost issues; 4) a change in legal conditions; and 5) trends in recreation uses and resort development. The Commission also determined that the plan amendment was consistent with the purposes and standards of the Scenic Act, concluding that the amendment provides an incentive to bring a site with scenic impacts into conformance with the Management Plan's scenic standards, an increase in protection for existing adjacent recreation resources over existing Management Plan provisions, and enhancement of scenic, cultural, natural, and recreation resources, thus satisfying the first purpose of the Act. It further concluded that the plan amendment was consistent with the Act's second purpose, reasoning that development of the site as a recreation resort limited to short-term occupancy encourages other economic development in nearby urban areas, commercial uses at the resort would be limited to further support the economies of nearby urban areas, and the plan amendment would enhance Gorge resources on-site and off-site.

Petitioners subsequently petitioned for judicial review, challenging each of the findings on which the Commission based its determination that there had been significant changes in the Scenic Area. In its order allowing the amendment, the Commission observed that one of the most significant changes in the Gorge since the Management Plan was adopted in 1991 has been the socio-economic change triggered by a reduction in timber harvest on private, public, and federal lands. The Commission determined that the change qualified as a significant change under OAR 360-050-0030(1)(c), because while the decline in timber harvest had begun before adoption of the Management Plan, the magnitude, severity and accompanying effects were not known in 1991. Petitioners argued the Commission erred in concluding that the decline in the timber industry was a change not anticipated in the Management Plan, because it was universally known at the time of plan adoption that timber jobs were on the decline, injunctions barring timber harvests on national forest land within the range of the northern spotted owl were in place in 1989, and timber harvests had already begun to decrease considerably by 1991.

Courts defer to the Commission's interpretation of its own rule unless no reasonable reading of the rule will sustain the interpretation. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or. 415, 212 P.3d 1243 (2009). Applying that standard of review, the court found that the Commission's interpretation of its rule to include changes in the degree and duration of the decline in the timber industry was plausible. Reviewing the Commission's findings of fact for substantial evidence under ORS 196.115(3)(e), the court also found that a reasonable person could conclude that the decline in the timber industry was more severe than anticipated in 1991, and that the Commission could consider evidence of changes outside the Scenic Area, such as logging rates and mills that had closed in the Gorge region, as circumstantial evidence of changes within the Scenic Area.

The second significant change identified by the Commission is the shift in the Gorge economy from natural resource extraction to tourism. Given the dramatic changes in the growth of the travel and tourism industry since the mid-1990s, the Commission reasoned that conversion of the Broughton site to a resort would be consistent with and respond to changes that have occurred in Skamania County and elsewhere in the Scenic Area. Petitioners made a strong case that the increase in tourism was anticipated in the Management Plan. However, the court concluded the

Commission's finding of a greater-than-anticipated need to shift from an economy based on timber to one based on tourism was supported by substantial evidence, and the Commission did not err in determining the change was a significant one under OAR 350-050-0030(1)(c).

Under OAR 350-050-0030(1)(b), new information or inventory data regarding land uses or resources that could result in a change of plan designation, classification, or plan provision constitute a significant change for purposes of amending the Management Plan. The Commission identified the potential costs of decommissioning the mill and hazardous waste cleanup at the Broughton site as new information because the Commission had not considered such information in 1991. Petitioners argued there was not substantial evidence that the Broughton site is in fact contaminated. While true, the court pointed out the Commission found only that there was a high likelihood of contamination and substantial evidence there would be significant costs associated with the cleanup. Further, while the Commission was aware when it adopted the Management Plan that a mill operated at the site and that such sites can be contaminated, the court held that information need not be newly-created or newly-available to constitute new information under OAR 350-050-0030(1)(b) and can simply be information the Commission has not considered before. Thus, information regarding costs of decommissioning the mill and cleaning up the site qualify as new information.

Petitioners challenged the fourth significant change identified by the Commission, a change in legal conditions in the area pursuant to the court's ruling in ***Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission***, 215 Or. App. 557, 605-606, 171 P.3d 942 (2007), ***rev'd on other grounds***, 346 Or. 366, 213 P.3d 1164 (2009). There the court held that expansion of "existing industrial uses" in the General Management Area contradicted the Act's requirement that the Management Plan prohibit industrial development in the Scenic Area outside urban areas. There was no evidence Broughton had attempted or intended to expand its industrial operations. Deferring to the Commission's interpretation of its own rule, the court held that expansion of industrial uses at the Broughton site was a possibility until its decision in ***Friends***. ***Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n***, 236 Or. App. 479, 505, 238 P.3d 378 (2010). Thus, the Commission did not err in concluding there had been a change in legal conditions within the meaning of OAR 350-050-0030(1)(c).

Finally, petitioners challenged the Commission's findings with respect to trends in recreation uses and resort development since adoption of the Management Plan, because the Commission relied on information outside the Scenic Area. The court held that nothing in the Act precludes the Commission from considering such information. ***Id.*** at 494. Petitioners also argued substantial evidence did not support the basis for the Commission's findings that there has been a significant change in recreation uses in the area, indicating development of an RV campground at the Broughton site may not be economically viable and may compete with struggling private campgrounds. The court found that the Commission heard conflicting evidence on RV campground occupancy rates and economic viability but, reviewing the record as a whole, held a reasonable person would have made the same findings. ***Id.***

Petitioners also contended that the plan amendment was inconsistent with the purposes and standards of the Act because it failed to comply with the Commission's 1990 decision that a smaller scale resort proposed by Broughton on the same site violated the Act. The court disagreed with petitioners' argument that a level of development less than what was rejected in Broughton's previous application is necessary to be consistent with the Act's second purpose of promoting economic growth in existing urban areas. The court noted Congress envisioned the Management Plan would evolve, so it follows that the Commission's understanding as to the type and level of development that would meet the purposes and standards of the Act may also change. Thus, the appropriate inquiry under OAR 350-050-0030(2) is whether the amendment is consistent given the conditions existing at the time of the amendment. Here, the Commission explained that, because of short-term restrictions on the lodging units, the contemplated recreation resort will draw an influx of short-term visitors to commercial establishments in existing urban areas, consistent with the Act's second purpose.

Lastly, the court ruled that the Commission did not make a legal determination as to the nature of existing use of the mill site, finding that the Commission's use of the descriptive term "existing industrial site" was simply for planning purposes.

Lisa Knight Davies

Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 236 Or. App. 479, 238 P.3d 378 (2010)

Appellate Cases – Washington

■ *VESTING RIGHTS: TIMING REMAINS THE NAME OF THE GAME*

In ***Deer Creek Developers, LLC v. Spokane County***, 236 P.3d 906 (Wash. App. 2010), Division III was called upon to determine how Washington's vested rights doctrine applies to phased developments that are halted by intervening prohibitory zoning amendments. Phase I of Deer Creek's project was approved, and although Phase I rights had vested, the lower court held that the developer's failure to file building permit applications prior to the zoning amendment was fatal to its vested rights claim for Phase II. Deer Creek appealed.

The Deer Creek development contemplated the construction of 23 buildings containing 280 residential units in two phases. Prior to the zoning amendment, Deer Creek filed for and received building and grading permits for Phase I, completed a State Environmental Policy Act (SEPA) checklist and a unified site plan for both phases, and began construction of Phase I and the infrastructure for Phase II. However, in October 2006 Spokane County adopted a zoning amendment that prohibited the planned Phase II residential uses.

Deer Creek contended that Phase II had vested in the Phase I development process. Deer Creek relied on the Washington Supreme Court's decision in ***Noble Manner Company, v. Pierce County***, 943 P.2d 1378 (Wash. 1997), which extended the vested rights doctrine to the subdivision process and provided an entitlement to complete the proposed land uses disclosed in the preliminary plat application. However, ***Noble Manor*** concerned vested rights in the subdivision process, which did not apply to Deer Creek's situation.

Outside of the subdivision process, Washington law provides that development rights vest at the time a completed development application is filed:

> A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

RCW 19.27.095(1). Deer Creek argued that Phase II rights vested

when the initial development documents were submitted. The appellate court rejected the argument and held that development rights vest under RCW 19.27.095(1) only when a building permit has been filed. A building permit was not filed for Phase II, and therefore the development rights did not vest prior to the date of the amendment.

Deer Creek asked that the court expand the Washington vested rights doctrine to include site plan applications, arguing (1) that the cost of a site plan application indicates a level of commitment; (2) that the delays of the permit process result in delays that will interfere with large projects; and (3) that an expansion of the doctrine "would harmonize the common law vesting doctrine, provide certainty to developers, protect developers' expectations against fluctuating land use policies, and update a doctrine that has failed to keep pace with increasingly complex changes in the land development process." ***Deer Creek***, 236 P.3d 906, 910-11. The court, though, decided the expansion of the doctrine of vested rights was better left to the legislature. Further, the court found nothing in RCW 19.27.095(1) to restrict a developer from vesting a development plan by filing a site plan and a building permit application together. Deer Creek had simply chosen not to file a building permit application for Phase II.

Finally, Deer Creek pointed out that Spokane County had legislatively modified the standards for vesting: the county code permits a complete application for a site plan review to vest development rights. Deer Creek argued that its unified site plan for both phases should have triggered its vested rights under the code. The court rejected this argument because Deer Creek had not completed the application process. The Spokane County code requires a public hearing for site plan review and Deer Creek never requested such a hearing.

Charles Gottlieb

Deer Creek Developers, LLC v. Spokane County, 236 P.3d 906 (Wash. App. 2010)

Cases From Other Jurisdictions

■ PENNSYLVANIA SUPREME COURT INVALIDATES STATE WAY OF NECESSITY STATUTES

In the Matter of Opening a Private Road for the Benefit of Timothy P. O'Reilly, 5 A.3d 246 (Pa. 2010), involved a claim that the application of the Pennsylvania Private Road Act, 36 PA. CONST. STAT. §§ 2731-2891 (the Act), effected an unconstitutional taking. The Act allows a landlocked property owner to petition the court of common pleas for appointment of a board of road viewers to evaluate the necessity of a private road to connect that property to the nearest public thoroughfare. The board is also charged with laying out that road so as to cause the least damage to private property. Upon payment of damages assessed, the petitioning landlocked property owner is then provided private access.

Plaintiff's property was landlocked as a result of the state's use of eminent domain to build an interstate highway and he applied to open a public road connection to his property under the Act. However, some of the adjacent landowners over whose land the road would run objected, claiming the Act allowed a taking of property for private use in violation of the Fifth Amendment. Both the trial court and the Commonwealth Court, the intermediate appellate court for Pennsylvania, upheld the Act. The Commonwealth Court referred to certain old Pennsylvania decisions that held all lands in Pennsylvania are burdened by a 6% allowance for roads and further found that a public interest was served because landlocked lands would otherwise be fallow and unproductive.

The opponents of the private road focused on the private use issue, noting the observation of the majority in the ***United States Supreme Court decision of Kelo v. City of New London***, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), that the Fifth Amendment cannot allow the transfer of private lands from one property owner to another. Moreover, the Pennsylvania court found that the ruling allowing a percentage of the land to be taken for public roads was limited geographically in its application and was neither a statute nor a court decision of universal application.

The court also rejected the notion that the creation of the private road was not a taking but a reasonable regulation of land use under the police power, noting that the effect of the action was a physical invasion and permanent occupation of land—a taking. O'Reilly, 5 A.3d at 257 (citing ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419, 421, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Further, the court characterized the Act as an eminent domain exercise that must meet the public use test required by the state constitution. As such, the public must be the primary and paramount beneficiary of the taking. The Commonwealth Court failed to assure this in the case appealed from, and thus the matter was remanded.

This case was decided by a 4-3 vote, with a short dissent filed by Justice Eakin decrying the invalidation of a 173-year old statute that the state legislature appears to have reaffirmed as meeting the *Kelo* standard for public use. The justice also noted that the landowner who lost access to his land is now without a remedy.

This is an interesting case that may have implications for Oregon in the application of this state's way of necessity statutes, ORS 376.150-.200.

Edward J. Sullivan

In the Matter of Opening a Private Road for the Benefit of Timothy P. O'Reilly, 5 A.3d 246 (Pa. 2010)

Land Use Board of Appeals

■ LOCAL PROCEDURE

Withdrawal of Application

LUBA's order in ***Jacobsen v. Douglas County***, LUBA No. 2007-023 (Aug. 12, 2010), clarifies the procedures available to a local government when an applicant belatedly seeks to withdraw the land use application that led to the appealed decision before LUBA. After a period of suspension, the appeal in ***Jacobsen*** was reactivated at the petitioner's request and the county subsequently moved to dismiss the appeal, arguing it was moot because the intervenor-respondent had withdrawn the underlying land use application. LUBA denied the motion to dismiss, citing ***McKay Creek Valley Association v. Washington County***, 16 Or. LUBA 1028 (1987), for the proposition that an applicant's withdrawal of an application after a final local decision was rendered and appealed to LUBA

did not moot the LUBA appeal unless the local ordinance stated a belated withdrawal would have that effect. The county's ordinance contained no such provision.

LUBA issued a subsequent order to clarify its ruling on the county's motion to dismiss. In its order denying the county's motion, LUBA cited ***Standard Insurance Company v. Washington County***, 17 Or. LUBA 647, ***rev'd on other grounds***, 97 Or. App. 687, 776 P.2d 1315 (1989), and suggested the county lacked jurisdiction to take any action to void the application while the county's decision was on appeal. LUBA clarified that the facts presented here represent a limited exception to ***Standard Insurance***. Since the applicant has withdrawn its local application, LUBA concluded the county could adopt a new land use decision that revoked the decision appealed to LUBA. Once the appeal period for this new local decision expired, the county could move to dismiss the original appeal. This, in LUBA's view, would "almost certainly have the effect of rendering the present appeal moot." LUBA No. 2007-023 at 2.

The other alternative available to the county is to ask LUBA for a voluntary remand of its decision for the purpose of allowing the applicant to withdraw its application. In general, a local government seeking a voluntary remand over the petitioner's objections must agree to address all of the issues raised by the petitioner before LUBA will grant the remand. Again, the circumstances presented here offered LUBA a chance to articulate an exception to this requirement. "We now clarify that when a motion for voluntary remand is filed either for the purpose of allowing an applicant to withdraw its application or after an applicant has withdrawn the application, a local government need not represent that it will address all of the issues presented by a petitioner in order for the motion to be granted." ***Id***. at 3.

LUBA left it to the county to select one of these options to dispose of this appeal.

■ *LOCAL RECORD*

As local governments make increasing use of websites to post information about local proceedings and provide information about pending land use projects, this practice raises potential issues about whether these materials are part of the record of a local land use proceeding. In resolving a record objection in ***Gunderson, LLC v. City of Portland***, LUBA Nos. 2010-039, 2010-040, and 2010-041 (Sept. 21, 2010), LUBA offers some guidance about when website materials will and will not be considered part of a local land use record.

Petitioners in ***Gunderson*** argued the record should have included three years worth of advisory committee and task force materials that were available to the public on a website created to inform the public about the River Plan, the legislative land use plan on appeal to LUBA. Petitioners asserted that by posting links to these materials on the River Plan website, the city effectively placed them before the city council and made them part of the record of the proceedings leading to adoption of the River Plan. Petitioners also pointed to an appendix in the plan that listed "Related Publications and Documents" and, in an introductory paragraph, explained that the documents were background material, were available on the River Plan website, and listed the website address. The city contended the advisory committee and task force materials were created for the purpose of advising and assisting staff in the preparation of the River Plan, as the plan's website made clear. They were never physically placed before either the planning commission or the city council, nor did the record demonstrate any intent to include these materials as part of the record.

In denying the petitioners' record objection, LUBA distinguished the facts in this appeal from those in ***Graser-Lindsey v. City of Oregon City***, 58 Or. LUBA 703 (2009), where LUBA concluded materials listed on the city's website concerning the appealed concept plan were part of the record. There the city council expressed its intent to make documents on the city's website part of the local legislative record and, as a result, LUBA held these documents were "placed before the local decision makers" within the meaning of OAR 661-010-0025(1)(b). In ***Gunderson***, LUBA found no such expressed intent, leading LUBA to conclude: "Absent an express indication that the city intended the documents on a city's website would become part of the record of this land use proceeding, the mere act of making documents available on a website is not sufficient to place the documents before a decision maker, just as making documents in a physical folder in the planning department's central files available to the public is not sufficient to place those documents before the decision maker." LUBA Nos. 2010-039, 2010-040, and 2010-041 at 7. While the introductory statement and reference to the River Plan website in a plan appendix presented a closer question, LUBA ruled these elements simply identified background material that staff relied on and did not express an intent to include the materials on the website as part of the record.

LUBA's ruling in ***Gunderson*** suggests that local government planning staff, local officials and lawyers advising local governments should clearly consider and identify the implications of placing documents pertaining to land use matters on local government websites. If the local government does not intend that materials posted on such websites are to be placed before local decision makers or become part of the record, the local government needs to be clear and consistent in expressing that intent.

■ *LUBA PROCEDURE*

Petitioner in ***Stewart v. City of Salem*** represented himself in appealing the city's denial of his partition application to LUBA and sought representation by an attorney only for purposes of defending LUBA's favorable decision in the city's appeal of LUBA's decision to the Court of Appeals. 58 Or. LUBA 605, ***aff'd***, 231 Or. App. 356, 219 P.3d 46 (2009). Before LUBA, petitioner signed his petition for review as "Mel Stewart, Pro Se," but also stated on the signature page that he prepared his petition for review "with the advice and assistance" of an attorney. At the conclusion of the LUBA appeal, the attorney who represented the petitioner at the Court of Appeals filed a cost bill and motion for an award of attorney fees on petitioner's behalf. The city opposed the motion, arguing that petitioner was not entitled to an award of attorney fees because he represented himself in the LUBA appeal proceedings.

LUBA declined to award attorney fees, noting its rules of procedure clearly require a party to either represent himself or be represented by an attorney. In this case, petitioner clearly filed all pleadings and appeared on his own behalf at LUBA. The fact that petitioner may have obtained an attorney's advice about how to represent himself at LUBA did not entitle him to an award of attorney fees. LUBA noted that "recoverable attorney fees at LUBA are limited to efforts spent representing a party before LUBA, and not other matters that may fall within an attorney/client relationship."

Following the successful defense of LUBA's decision at the Court of Appeals, petitioner's attorney filed a motion for attorney fees with the court, which the court denied. Petitioner subsequently filed a supplemental motion pro se with LUBA seeking an award of the fees he paid his attorney to represent him at the Court of Appeals. In denying his attorney fees motion, which was based on ORS 19.440, the appellate court observed that this statute allows fees only in an appeal of a "civil action or proceeding" and does not apply to a proceeding seeking judicial review of an agency order. LUBA agreed, noting it lacks any statutory authority to award attorney fees incurred at the Court of Appeals on appeal of a final LUBA opinion and order. ***Stewart v. City of Salem***, LUBA No. 2009-09 (Aug.12, 2010).

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