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Appellate Cases -- Land Use

■ OREGON SUPREME COURT REVISES DEFERENCE TEST

In a long-awaited decision, *Siporen v. City of Medford*, 349 Or. 247, 243 P.3d 776 (2010), the Oregon Supreme Court construed ORS 197.829. That statute codified the court's previous decision in *Clark v. Jackson County*, 313 Or. 508, 836 P.2d 710 (1992), and gave the court a further opportunity to discuss deference to local governing body interpretation of local plans and regulations. Aside from *Gage v. City of Portland*, 319 Or. 308, 877 P.2d 1187 (1994), the Supreme Court has left most of the development of the law of deference and interpretation to the Court of Appeals and LUBA. *Siporen* provided the vehicle for the Supreme Court to weigh in on these issues. Appropriately, it was Justice Gillette who wrote for the court in what may be the last administrative law decision of a long and distinguished career with the Department of Justice and both appellate courts.

This case arose out of an appeal from a city decision to grant site plan and architectural review approval for a Wal-Mart store and not to require a detailed transportation impact analysis at that stage. LUBA construed the city's code as requiring such a plan, but the Court of Appeals reversed, finding the city's interpretation to be "plausible." The Supreme Court granted review.

Petitioner-neighbors cited three sections of the Medford Land Development Code ("MLDC") that related to development standards for public improvements and a fourth that required compliance with the "applicable provisions of all city ordinances." The city council found the three sections, which were only applied by the city's planning commission when considering zone changes, were not "applicable" in these proceedings. LUBA had agreed with petitioners that these provisions were "applicable" and remanded. The Court of Appeals reversed, saying the test was whether the city's interpretation was plausible (rather than correct) under the rules of interpretation set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993). If the analysis of the criteria was plausible, the interpretation must be sustained. The Court of Appeals found no controlling ordinance provision, neither party fully harmonized the cited code provisions, and both parties presented plausible interpretations. Under those circumstances, the court affirmed the city's interpretation.

The Supreme Court agreed with this position, whether the interpretation related to a single term or sought to harmonize apparent conflicts among code provisions. The court saw ORS 197.829 as giving deference to a local governing body's interpretation because that body enacted the plan or regulation and presumably had a better understanding of it than did LUBA or the courts. The court then discussed deference in the face of interpreting conflicting parts of a code or plan in the face of a charge that the interpretation was "inconsistent with the express language" of that provision. 349 Or. at 258 (citing ORS 197.829(1)(a)). In such a circumstance, the court said it was the duty of the local government to confront the apparent inconsistencies in its interpretation. If that interpretation was "plausible," it must be affirmed unless it is inconsistent with all of the relevant express language or the underlying purposes or policies.

Petitioners argued for a more wide-ranging LUBA review under ORS 197.835(9)(a)(D), by which local decisions could be reviewed for improper construction of the applicable law, but the court noted that the later-enacted and specific provisions of ORS 197.829 govern. The court also rejected petitioners' views on the construction of ORS 197.850(9), regarding appellate review of LUBA decisions under the "unlawful in substance or procedure" standard. Petitioners argued that, because the courts only examined LUBA's review of the local decision, those courts could only decide whether LUBA correctly applied the deference and "improper application of the applicable law" standards. A court, according to petitioners, could not make its own determination as to whether the local decision was plausible.

The Supreme Court explained that a court does not exceed its standard of review by determining whether LUBA exceeded *its* jurisdiction. If only one plan or ordinance provision is at issue, that judicial determination requires the

reviewing court to determine whether the local interpretation underpinning its decision is inconsistent with the express language of a plan or regulation provision. However, if multiple provisions are at issue, judicial review requires that the local interpretation plausibly harmonize the conflicting provisions or identify those provisions that are to be given full effect, and it must comport with the express language of the relevant provisions.

In this case, the city's governing body determined that certain code provisions militating towards a full traffic impact analysis were not "applicable." Only "applicable" provisions of the code need be met in the site and design review process because of the governing body's views on the city's development process and the responsibilities of various city agencies during that process, as well as its description of the function of that process (i.e., focusing on the site at issue and the streets that border it, as opposed to broader transportation issues which are within the purview of the city planning commission). The Supreme Court found the city's explanation of this allocation of regulatory responsibilities plausible; thus LUBA and the appellate courts were obliged to affirm that determination. The decision of the Court of Appeals was affirmed and that of LUBA was reversed.

This case reconciles ORS 197.829 and 197.850(9) and provides a new aspect of deference. The task for local governments now is to explain their interpretations; for LUBA, it is to review the consistency of those interpretations against the express language of a plan or code provision or, in the case of apparently conflicting plan or code provisions, and assess whether the overall interpretation is plausible; and for the appellate courts, it is to determine whether LUBA confined itself to that consistency or plausibility determination.

Edward J. Sullivan

[Siporen v. City of Medford, 349 Or. 247, 243 P.3d 776 \(2010\)](#)

■ COURT DEFERS TO LUBA'S INTERPRETATION OF ITS OWN DECISION IN ANOTHER LUBA CASE AND DECLINES TO ADDRESS ARGUMENTS NOT RAISED BEFORE LUBA

In *Estremado v. Jackson County*, 238 Or. App. 93, 241 P.3d 748 (2010), petitioner applied to build a dwelling on a parcel of forest property. The county approved the application. Respondent neighboring property owner appealed to LUBA. LUBA issued a final opinion and order remanding to the county for evaluation of whether the parcel met certain access requirements imposed by the county ordinance. Petitioner sought judicial review of that order. The Oregon Court of Appeals affirmed, deferring to LUBA's interpretation of its own decision in another LUBA case, and the court declined to address petitioner's other argument because petitioner had failed to preserve the argument before LUBA.

The facts were not in dispute. The subject parcel is a five-acre parcel zoned Woodland Resource that was created by a minor partition in 1980, at which time the county

land use ordinance required a showing that the parcel had "legal access." Failing that, the parcel could not be used for residential purposes until legal access was provided. The parcel had an existing private nonexclusive easement that served multiple properties, but the county did not recognize that easement as "legal access." Therefore, the partition application specified that the parcels would be used for forestry and agricultural purposes only.

Several years later the private nonexclusive easement agreement was the subject of litigation, and in 1998 the circuit court held that the scope of the easement allowed access for residential use, although it did not determine whether there was "legal access" under the county land use ordinance. In 2009 petitioner filed for approval of a residence, based on a new showing that there was now "legal access." The county hearing officer noted that, under a 2004 county ordinance, county-recognized access could only be provided by an abutting road or an exclusive easement. Nevertheless, the hearing officer held that petitioner's nonexclusive easement had to be recognized by the county as "legal access" to the parcel under LUBA's decision in *Curtin v. Jackson County*, 55 Or. LUBA 79 (2007).

The neighbor appealed to LUBA, which held that the county hearing officer did not explain why the 1980 use limitation to farm or forest use could be lifted or ignored based on an easement road that did not qualify as "legal access." LUBA also found that *Curtin* was not determinative because it dealt with road design standards, not access standards.

On appeal, petitioner asserted that the nonexclusive easement now qualified as "legal access" based on *Curtin* and on an argument that the 2004 ordinance effectively superseded the 1980 "abutting road" requirement and only required "access," not "legal access."

The Court of Appeals affirmed LUBA. First, the Court deferred to LUBA's interpretation of the meaning or scope of its own decision that *Curtin* was not determinative because access was not an issue in the case. Second, the court declined to address petitioner's argument that the 2004 ordinance superseded the 1980 ordinance requirement because petitioner failed to raise that argument before LUBA.

John Pinkstaff

[Estremado v. Jackson County, 238 Or. App. 93, 214 P.3d 748 \(2010\)](#)

■ LCDC ORDER IN WOODBURN UGB EXPANSION INADEQUATE FOR JUDICIAL REVIEW

At issue in *1000 Friends of Oregon v. Land Conservation and Development Commission*, 237 Or. App. 213, 239 P.3d 272 (2010), was the City of Woodburn's amendment of its urban growth boundary to include an additional 409 acres for industrial uses. Petitioners' objections to the city's decision were eventually heard by the Land Conservation and Development Commission (LCDC), which approved the city's UGB amendment. Petitioners appealed to the Court of Appeals.

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Editor

Kathryn S. Beaumont

Assistant Editor

Eric Shaffner

Associate Editors

Alan K. Brickley

Edward J. Sullivan

Contributors

Nathan Baker	Peter Livingston
Richard S. Bailey	Marisol R. McAllister
Gretchen S. Barnes	Nicholas P. Merrill
Jennifer M. Bragar	J. Christopher Minor
Alan K. Brickley	Steve Morasch
Robert A. Browning	Tod Northman
Craig M. Chisholm	David J. Petersen
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Lisa Knight Davies	Carrie A. Richter
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Jeff Litwak	Ty K. Wyman

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The city's UGB amendment implicated Oregon's Statewide Planning Goals 9 (economic development) and 14 (urbanization). Goal 9 mandates that comprehensive plans "[p]rovide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses consistent with plan policies" Goal 14 is concerned with the orderly transition from rural to urban land use. It requires that changes to the UGB be based on two "need factors": (1) the need "to accommodate long range urban population" and (2) the "need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination" thereof. The court recognized that Goal 14 does not permit a local government "to establish an urban growth boundary containing more land than the locality 'needs' for future growth." *1000 Friends*, 237 Or. App. at 218 (quoting *City of Salem v. Families For Responsible Gov't*, 64 Or. App. 238, 668 P.2d 395 (1983), *rev'd and rem'd on other grounds*, 298 Or. 574, 694 P.2d 965 (1985)).

The court noted the tension between the differing policies promoted by Goals 9 and 14 but reiterated its holding in *Benjfran Development v. Metropolitan Service District*, 95 Or. App. 22, 767 P.2d 467 (1989), that Goal 9's policy of economic development does not preempt Goal 14, and that compliance with Goal 9 does not equate to compliance with Goal 14. *1000 Friends*, 237 Or. App. at 218-19.

The city's decision to expand its UGB to include additional industrial property was based on an economic development strategy under which it targeted thirteen specific high-wage industries that the city determined it had a comparative advantage in attracting. *Id.* at 220-21. The city then identified the land needs for those industries. However, in identifying industrial property, the city looked beyond what was minimally necessary. It decided it needed to provide some choice among various identified sites. The city recognized that not all the sites identified for inclusion within the UGB would be developed within the planning period, either because a portion of the site would be held for future development or because a particular site would not be selected by a particular industry. *Id.* As a consequence, the city included more industrial land than was strictly needed for industrial uses within the twenty-year planning period.

Petitioners filed objections with DLCDC arguing, in part, that the city's targeted industries approach inflated the number of acres to be included in the UGB expansion without a demonstrated need as required by Goal 14. The DLCDC director forwarded petitioners' objections to LCDC for a decision. *Id.* at 221-22.

LCDC's order focused on Goal 9 compliance, finding that the city's goal of providing "market choice among sites . . . is a key component of a successful industrial strategy, and is required by OAR 660-009-0025 [which implements Goal 9]." *Id.* at 222 (quoting LCDC's order). But, as the court noted,

although LCDC discusses Goal 9 and its implementing rules and concludes that the UGB amendment complies with both Goals 9 and 14, LCDC provided essentially no reasoning as to that

conclusion with respect to Goal 14. In particular, LCDC offered no explanation concerning the reasons that the need factors of Goal 14 are satisfied under the circumstances of this case.

Id. at 223.

LCDC ultimately approved the city's decision, prompting petitioners' appeal. The court defined the petitioners' first assignment of error as raising the core issue of "whether the city included more industrial land in the UGB than it would need over the 20-year planning period in violation of Goals 9 and 14." *Id.* at 223-24.

Petitioners argued that, while not inherently illegitimate, the city's targeted industries approach, as applied in this situation, resulted in a UGB expansion that included far more industrial land than necessary to meet the twenty-year planning period.

The court ultimately determined it could not reach the substance of petitioners' arguments because the LCDC order did not adequately explain LCDC's reasoning underlying its determination that the city had satisfied the requirements of Goals 9 and 14. *Id.* at 224.

With respect to Goal 9 compliance, the court found that LCDC's order did not adequately define the term "market choice" and did not explain what degree of market choice in the context of the UGB expansion is consistent with the requirements of Goal 9 and its implementing rule, OAR 660-009-0025. *Id.* at 225-26. As the court explained,

'market choice' without amplification is a label without reasoning. Here, given the variety of the industries that the city targeted and the diversity and multiplicity of the sites that the city designated, it is incumbent on LCDC to cogently explain the reasons that the degree of market choice employed by the city in this case is consistent with the requirements of Goal 9 and OAR 660-009-0025.

Id. at 226.

With respect to Goal 14, the court found that LCDC failed to explain how a UGB expansion that included more industrial land than would be developed within the twenty-year planning period is nevertheless consistent with Goal 14 and satisfies the need factors of the goal. Specifically, the court ruled that even if Goal 9 had been satisfied, that would not, without more, demonstrate compliance with Goal 14. *Id.* at 226.

Because LCDC did not explain its reasoning and failed to respond to petitioners' objections, the court was unable to conclude that LCDC's order was adequate for judicial review. Accordingly, the court reversed and remanded the order for reconsideration. *Id.* at 226-27.

H. Andrew Clark

[1000 Friends of Oregon v. Land Conservation and Dev. Comm'n](#), 237 Or. App. 213, 239 P.3d 272 (2010)

■ COURT OF APPEALS ADDS TO SIpOREN'S PROGENY

The Court of Appeals once again used the analysis from *Siporen v. City of Medford*, 231 Or. App. 585, 220 P.3d 427

(2009), *aff'd*, 349 Or. 247, ___ P.3d ___ (2010), to affirm LUBA's deference to a county's interpretation of its own code.

Hoffman v. Deschutes County, 237 Or. App. 531, 240 P.3d 79 (2010), involved a request for site plan review and conditional use approval to operate a surface mine on an eighty-acre parcel in Deschutes County. A neighbor to the north opposed the operation, citing a number of objections—most importantly, setbacks from noise- and dust-sensitive units. The Deschutes County Code required a 250-foot setback from such units. The critical question before both LUBA and the Court of Appeals was whether the setbacks were measured from the property line, as the neighbor argued, or from the neighbor's actual residence, as the applicant argued.

The neighbor prevailed before the county hearings officer and both parties appealed to the county's board of commissioners, which sided with the applicant. On appeal, LUBA found the ordinance ambiguous and deferred to the board of commissioner's conclusion. LUBA's opinion relied on *Siporen* and found that the county's interpretation was "plausible."

The Court of Appeals also looked to *Siporen* and explained once again that, in "reviewing a local government's interpretation of its own code, '[the court's] task is to determine whether, based on the express language of the code, the [local government's] interpretation concerning the applicability [of the code] is 'plausible'" *Hoffman*, 237 Or. App. at 539 (quoting *Siporen*, 231 Or. App. at 598-99). Neither the court nor LUBA determines whether a particular decision is correct "in some absolute sense" *Id.*

Using that analysis, the Court of Appeals reviewed the text of the provision, as well as a variety of other sources within the county's code, and determined that LUBA had properly concluded the county's interpretation was plausible. Petitioners also argued that *Siporen* was wrongly decided, but the Oregon Supreme Court recently disagreed. See *Siporen v. City of Medford*, 349 Or. 247, ___ P.3d ___, 2010 WL 4643841 (2010) (summarized in this issue of the Digest).

William K. Kabeiseman

[Hoffman V. Deschutes County](#), 237 Or. App. 531, 240 P.3d 79 (2010)

■ COURT INTERPRETS "NEEDED HOUSING" EXCEPTION FOR CITIES UNDER 2,500

Montgomery v. City of Dunes City, 236 Or. App. 194, 236 P.3d 750 (2010), focuses on a narrow issue of statutory interpretation: whether an exception to the requirement for "clear and objective" approval standards for needed housing in ORS 197.303(2)(a) applies to single-family housing if identified as "needed housing" in its comprehensive plan by a city of fewer than 2,500 inhabitants. The Court of Appeals determined the statutory exception had been eliminated as a result of legislative amendments. While some small cities may need to re-examine their comprehensive plans for consistency with this opinion, the significance of the decision may lie in the court's discussion of legislative amendments over time as context for interpreting the current statutory version under the principles established

in *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), and *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009).

The facts are straightforward, although the procedural history at LUBA is lengthy. Montgomery submitted to the City of Dunes City applications for a twenty-lot subdivision and a variance from city block length standards. The city denied the subdivision application on the basis of insufficient information to impose reasonable conditions of approval. The city did not consider the variance application. The city council's order denying the application for insufficient information on certain standards, including traffic impact study requirements, reasoned: "Dunes City has a population of less than 2,500 [P]er ORS 197.303(2)(a), clear and objective approval standards for 'needed housing' do not apply; but, rather, standards that are discretionary can apply." *Montgomery*, 236 Or. App. at 196. ORS 197.307(6) provides that "approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect . . . of discouraging 'needed housing'" ORS 197.303 defines "needed housing," and includes exceptions to ORS 197.307(6) for cities with populations under 2,500.

Montgomery appealed the city's decision to LUBA. LUBA No. 2008-135 (Jan. 7, 2010). Before LUBA, Dunes City relied on the decision of the Court of Appeals in *City of Happy Valley v. LCDC*, 66 Or. App. 795, 677 P.2d 43 (1984), finding that cities with a population fewer than 2,500 were exempt from the first sentence of ORS 197.303(1) when the statute was first enacted in 1981. That sentence reads as follows: "As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, 'needed housing' means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels."

Invoking the principle of statutory interpretation that prior versions of a statute provide context, Dunes City took the position that the text of the first sentence of the statute had not changed; consequently the city continued to be exempt from the requirement to apply clear and objective approval standards to single-family housing identified as "needed housing" in its comprehensive plan. LUBA agreed with the city, specifically finding the Court of Appeals had rejected respondent's interpretation in *Shelter Resources, Inc. v. City of Cannon Beach*, 129 Or. App. 433, 879 P.2d 1313 (1994). LUBA remanded the city's decision so the city council could consider application evidence that had been omitted from the record as well as from the variance application.

Dunes City appealed LUBA's decision. Montgomery filed a cross-petition, renewing its position below and contending that "because the city's comprehensive plan identified single-family housing as 'needed housing' and because [Montgomery] had sought approval for such housing (i.e., a 20-lot subdivision), the first sentence of ORS 197.303(1) applied and the exception for small cities in ORS 197.303(2)(a), which applies only to housing types identified in the statutory list, did not. For that reason, according to respondent, the city was required to apply 'clear and objective' standards under ORS 197.307(6)." *Montgomery*, 236 Or. App. at 196.

The court's responsibility, it explained, was to follow the

principles established in *PGE v. BOLI* and *States v. Gaines* to attempt to determine the meaning of the statute most likely intended by the legislature. To assist in its determination, the court could examine the text of the statute in context, along with any legislative history offered and, if necessary, canons of statutory construction. Serial amendments are part of the context of the present version of a statute.

Citing to *City of Happy Valley*, Dunes City relied on the principle that prior versions of the statute provide context for interpretation of the current version, asserting that since the text of the first paragraph had not changed, cities continued to be exempt from the requirement to establish clear and objective approval standards for needed housing. In examining the 1981 version of ORS 197.303 discussed in *City of Happy Valley*, the court found the statute identified two types of housing: those identified in the comprehensive plan and those identified in the statute. It noted that the case relied on by Dunes City was consistent with that version.

However, when the court examined the text of the statute as amended after the version at issue in *City of Happy Valley*, it found the legislature made significant amendments in 1983 including structural changes to the statute, with the intent to limit the scope of the exception by referring only to particular types of housing in the statutory list. The court also reasoned that if the subsection (1) exception applied to all housing types identified in the comprehensive plan as "needed housing," it would nullify the legislature's intention not to apply clear and objective approval standards to the specific statutory types listed in subsection (2). The court concluded the exception in ORS 197.303(2) refers to housing types identified in the statutory list and not the entire definition of "needed housing" in subsection (1). It also noted the decision in *Shelter Resources* was not controlling because in that case the court did not address the issue of whether structural changes to ORS 197.303 affected its meaning.

In a footnote, the court noted the parties offered no pertinent legislative history. However, the court has previously explained that it is not prevented from obtaining that history on its own. As it turned out, Dunes City filed a motion for reconsideration and used that means to place legislative history before the court. The court appears to have relied on the text and textual amendments and did not have need of any additional legislative history.

The impact of the decision is that some small cities may need to revisit their standards for single-family housing if that housing type is identified in the comprehensive plan as needed housing. For land use practitioners, the case highlights the need to compare the text of a statute at issue in a prior court decision with the current statutory text. The decision may also be helpful in outlining statutory interpretation that focuses on a current version of a statute amended at least once by a prior legislature.

Joan S. Kelsey

[Montgomery v. City of Dunes City](#), 236 Or. App. 194, 236 P.3d 750 (2010)

■ COURT OF APPEALS WEIGHS IN ON CLATSOP COUNTY LNG PROPOSAL

On November 3, 2010, the Oregon Court of Appeals issued a decision in the most recent appeal of Clatsop County's attempt to approve a liquefied natural gas ("LNG") terminal along the Columbia River approximately twenty miles east of Astoria at the "Bradwood" site. *Columbia Riverkeeper v. Clatsop County*, 238 Or. App. 439, 243 P.3d 82 (2010). The Land Use Board of Appeals ("LUBA") had previously remanded the decision to the county. The county's decision on remand is the subject of the court's decision in this case. The court ultimately affirmed LUBA's order remanding the county's decision for a second time.

The issues before the court related to Clatsop County's Comprehensive Plan ("CCCP"), the county's interpretation of relevant CCCP provisions, and whether LUBA properly deferred to those interpretations under ORS 197.829. The court summarized those issues as whether zone changes and related development proposed by the applicants and approved by the county complied with two sets of CCCP policies: "(1) a group of policies that limit development 'at Bradwood' to that which is 'small or moderate' in scale; and (2) two policies that 'protect' 'traditional fishing areas' from 'dredging . . . [and] other potentially disruptive activities' and '[e]ndangered or threatened species habitat . . . from incompatible development.'" *Id.* at 443-44.

LUBA, in its first remand ("*Bradwood I*"), required the county to make more specific findings regarding the meaning of "development activities at Bradwood," as that term is used in the CCCP, and how it related to "small to moderate" industrial uses that the CCCP permitted at the site. LUBA held that the county erred when it interpreted that phrase to mean only the forty acres that would contain the LNG facility itself and not the acreage necessary for related uses such as power lines, gas pipelines, and the acres in the estuary that would need to be dredged in order to import the LNG to the terminal.

On remand, the county reaffirmed its initial interpretation that "small to moderate" industrial development under the CCCP is development that encompasses less than 100 acres of land. It also concluded that the LNG proposal at the Bradwood site would only disturb roughly fifty acres of land—forty acres for the facility and another ten for "inwater structures." On appeal of the remanded decision ("*Bradwood II*"), LUBA concluded, based on relevant CCCP policies governing development, that the county's interpretation regarding the size of the affected area was not "plausible" under *Siporen v. City of Medford*, 231 Or. App. 585, 220 P.3d 427 (2009), *aff'd*, 349 Or. 247, ___ P.3d ___ (2010).

The petitioners (the developers of the proposed LNG facility) urged the court to reverse LUBA's rejection of the county's interpretation regarding how much acreage would be affected by the Bradwood facility. They argued that LUBA did not properly defer to the county's interpretation of its comprehensive plan under ORS 197.829(1)(a). The court disagreed, primarily on the basis of the issue preclusion principles articulated in *Beck v. City of Tillamook*, 313 Or. 148, 831 P.2d 678 (1992). Because LUBA held in *Bradwood I* that the county erred when it limited the scope

of development activities to the forty acres covered by the facility, and because neither petitioner nor the county appealed that ruling, it could not be challenged now in an appeal of *Bradwood II*.

In *Bradwood I*, LUBA also reviewed CCCP sections governing the protection of the estuary in and around the Bradwood site. These policies seek to "protect" traditional fishing areas and endangered or threatened species from incompatible development. In its initial approval, the county relied on a dictionary definition of the word "protect" and found the relevant CCCP provisions satisfied. LUBA rejected this interpretation in *Bradwood I*, and instructed the county on remand "to apply [Goal 16's] definition of 'protect.'"

The county on remand interpreted that term as used in the goal and as it appeared in the CCCP. It found that protection is achieved by avoiding sensitive areas to the extent possible and by maintaining the estuary where development does occur. It further found that the estuary would be protected if the facility were approved because conditions and other mitigation measures would shield fishing areas and habitat from significant adverse effects. In *Bradwood II*, LUBA again rejected the county's interpretation of "protect" as being too weak relative to what the goal requires. It held that any development permitted in the Bradwood area could have no more than a *de minimis* impact on the resources that the CCCP and Goal 16 seek to protect.

In their appeal to the court, the petitioners challenged LUBA's conclusion that only the goal's definition of "protect" was relevant to the county's interpretation of CCCP policies requiring estuary protection. However, the court rejected it for the same reason it rejected petitioners' challenge regarding the acreage issue. The court noted that LUBA had specifically instructed the county in *Bradwood I* to apply the goal definition on remand and that *Bradwood I* was not appealed.

The petitioners also argued that LUBA's interpretation of the meaning of "protect" in the goal was inconsistent with the term's text and context as used in the goal. After exhaustively reviewing Goal 16's text and its related administrative rules, the court also rejected petitioners' arguments in this regard. It noted that the goal and the related rules assign specific and separate meanings to the terms "protect," "maintain," and "conserve" and that because Clatsop County made a policy choice to "protect" certain estuarine resources—as opposed to "maintaining" or "conserving" them—those policies could necessarily restrict petitioners' planned river dredging and still permit lower-impact development. Ultimately, the court agreed with LUBA that "protect" in this context does not mean mitigating adverse development impacts on fishing and habitat resources but prohibiting the development that would create those impacts in the first instance.

David Doughman

[Columbia Riverkeeper v. Clatsop County](#), 238 Or. App. 439, 243 P.3d 82 (2010)

■ LOCAL ORDINANCE INTERPRETATION

How should a local government interpret its ordinance when a use is specifically identified as permitted in one zone and also falls within a broader use category permitted in a different zone, but is not specifically listed? In *Sarti v. City of Lake Oswego*, 20 Or. 387, *rev'd*, 106 Or. App. 594, 809 P.2d 701 (1991), LUBA concluded this gives rise to an inference that the specific use is not allowed under the broader use category. In reversing LUBA's decision in *Sarti*, the court of appeals held that a broad use category in one zone can include a more narrow use category in a different zone, unless the text or context of the local ordinance indicates otherwise. LUBA has adhered to the "*Sarti* inference" it articulated in subsequent cases, although it is unclear whether it applied this inference as an independent interpretational rule or as a shorthand for the court of appeals' text and context analysis.

In *Devin Oil Company, Inc. v. Morrow County*, ___ Or. LUBA ___, LUBA Nos. 2010-044/2010-046 (Nov. 19, 2010), LUBA concluded that recent appellate rulings governing review of local ordinance interpretations have effectively undermined the *Sarti* inference and it has no continuing vitality. Petitioners in *Devin Oil* challenged the county's approval of comprehensive plan and zoning amendments and a conditional use to allow a travel center to be built on twelve acres of the applicant's forty-nine-acre property. The new commercial zone applied to the site allows a variety of auto-oriented uses, including a truck stop, as outright permitted uses. The site is also within the county's Airport Approach (AA) zone, which allows airport-related uses as permitted uses and allows several non-airport-related uses as conditional uses, including "retail and wholesale trade facilities." A truck stop is not included in the list of permitted or conditional uses in the AA zone. The county approved a conditional use application for the proposed travel center as a retail trade facility in the AA zone.

Before LUBA, petitioners argued the travel center is best categorized as a truck stop and, since a truck stop is not identified as either a permitted or conditional use in the AA zone, the county erred in approving the travel center as a retail trade facility. After reviewing its decision in *Sarti v. City of Lake Oswego* and later decisions applying the *Sarti* inference, LUBA observed that it reached the opposite result from *Sarti* in a factually and legally similar case, *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or. LUBA 295, *aff'd*, 230 Or. App. 202, 214 P.3d 68 (2009). There, the county's ordinance allowed "automobile service stations" and "similar" uses in a commercial zone, but not truck stops. Truck stops were specifically permitted in a different zone. LUBA upheld the county's approval of the travel center under the catchall "similar use" category in the commercial zone, observing that "providing broadly for unlisted uses as 'similar uses' does not suggest that the county was concerned with maintaining bright lines between use categories" and characterizing the *Sarti* inference as "particularly weak." LUBA Nos. 2010-044/2010-046, slip op. at 6-7.

In affirming LUBA's decision in *Western Land & Cattle, Inc.*, the court of appeals agreed the analysis under ORS 197.829(1)(a) is properly focused on the express language of the zoning ordinance without resorting to inferences about how use categories are described elsewhere in the zoning code. Turning to the language of the county's code in *Devin Oil*, the county explained that the purpose of allowing broad use categories, such as "retail and wholesale trade facilities," as conditional uses in the AA zone is to provide for review of individual uses to assure they will not conflict with airport operations. That is, the code "is not intended to finely distinguish between categories and subcategories of related uses." *Id.*, slip op. at 8. Since the petitioners failed to identify anything in the text or context of the AA zone that suggests "retail and wholesale trade facilities" should be construed narrowly, LUBA concluded the county's approval of the travel center as a retail trade facility is consistent with the county's code.

The county fared less well on a second interpretational issue the petitioners raised. As part of the approved comprehensive plan and zone change, the challenged decision also adopted a "reasons" exception to Statewide Planning Goals 3 (Agricultural Lands) and 14 (Urbanization). As required by OAR 660-004-0018(4), the county has adopted a Limited Use (LU) overlay zone which expressly limits allowed uses to those expressly approved as part of a "reasons" goal exception statement. At the final hearing on the comprehensive plan/zone change, the county imposed a condition of approval limited the use of the site to a travel center, but declined to apply the LU overlay zone. The county court rejected arguments that it must apply the LU overlay, concluding that it may use other methods to limit uses on a site to those allowed by an approved reasons exception.

LUBA agreed with the petitioners that the county's interpretation of its code is not consistent with the text or context of the LU overlay zone. Although the code contains no explicit statement that the LU overlay is the exclusive method for complying with OAR 660-004-0018(4), the language of the LU overlay makes clear that it is the only zone intended for that purpose. The text of the LU overlay identifies three requirements that must be satisfied before the overlay is applied, none of which suggest that imposing a condition of approval is a potential alternative. Where the primary zone does not allow a desired use as an outright permitted use, LUBA concluded the only acceptable way to comply with the administrative rule is to apply the LU overlay zone. Accordingly, LUBA held the county's interpretation that conditional zoning is permissible under the circumstances is not consistent with the language or purpose of the LU overlay.

A third notable issue concerned the procedural timing of decisions on the comprehensive plan/zone change and the conditional use permit. The comprehensive plan/zone change application was filed first; after a belated determination the travel center site is in the AA overlay zone, a conditional use application was also submitted. Although the two applications were processed together, for procedural reasons the county granted conditional use approval a week before it approved the zone change. Petitioners argued the county violated the "no changing the goal post" statute

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Oregon State Bar
Section on Real Estate and Land Use
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(ORS 215.427(3)) because the comprehensive plan/zone change had not been approved on the date the conditional use application was filed. LUBA disagreed, stating:

The general purpose of the goal post rule is to prevent local governments from enacting and applying new legislation to development applications after those applications have been filed and timely completed. . . . That concern is not implicated in circumstances where the applicant is contemporaneously seeking both (1) permit approval and (2) a zone change, and the only “new” legislation being applied to the permit are the standards under the requested new zone.

Id., slip op. at 12-13. Even though the applications were not explicitly consolidated, LUBA cited *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or. App.

277, *aff’d*, 214 Or. App. 46, 162 P.3d 1059 (2007), for the proposition that the consolidation statute (ORS 215.416(2)) does not require that multiple permit applications “be filed on the same date in order to be ‘consolidated’ and gain protection from the goal post rule” *Id.* Here, the county processed the two applications on the same timeline as much as possible and made approval of the conditional use expressly contingent on completion and approval of the comprehensive plan/zone change. LUBA agreed with the county that these actions were sufficient to consider the applications consolidated and the county did not violate the goal post rule.

Kathryn S. Beaumont
