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In Memoriam: Donald C. Ashmanskas

Judge Don Ashmanskas, or "Ash" as he liked to be called, suddenly passed away on July 18th of this year at age 75 after a long and fruitful career in the law and as a friend to everyone he encountered. Ash died as he had lived—doing those things he liked—working in a community garden, sharing jokes, anecdotes, and serious pieces by correspondence or over lunch, and pointing out how we can all do well if we don't take ourselves too seriously.

Ash went to Rutgers for his undergraduate degree and NYU for his law degree and never lost his Eastern Accent, even after coming to Oregon with his wife and love of his life, Joyce. Ash worked at the Bureau of Governmental Research at the University of Oregon before becoming the first full-time Beaverton City Attorney in 1970, where I first met him. He went on the bench as a Washington County District Judge, and then a Circuit Judge in 1975, and was a United States Magistrate since 1992. He was a justly proud father and grandfather, but was saddened by the passing of Joyce three years ago.

The degrees and offices in his biography tell us little about the man. He was valued by his family and many friends, admired by anyone who came into his court, and mourned by our whole community. Everyone has an "Ash story" to tell. Those of us who have seen him teaching a class or making a CLE presentation know his ability to use props to make a point; who hasn't heard of "Habeas Porpoise" or "Bucky the Beaver?" One of the more impressive recollections I have was his presentation to the first Bar Continuing Legal Education Program on Land Use in 1975. The bar put Ash on at the end of the program, at 4:30 PM for the last presentation that would end at 5 PM. He was so good that no one left early. He combined that power to entertain and delight with the ability to teach and enlighten. Ash fascinated students with his depth, persuaded litigants to settle their differences, and was a conscientious and hard-working judge respected by everyone, deciding important cases and setting out the law clearly.

For those who knew him, Ash was a *mensch*, a decent human being. He did a great deal of reading and shared ideas, new books and news clippings wherever he went. He was a deep man under all that camaraderie and truly suffered the loss of Joyce. His tastes were "catholic," with a small "c," enjoying sports, as well as Broadway plays, doting on his granddaughter, frequently relating little-known facts, but understanding "big picture" legal issues. It is difficult to say whether his family and friends or the community at large has sustained the greater loss. We all miss him.

Memorials may do more for the living than for the one being remembered. Judge Ash gave us his wisdom, his humanity, and above all, his way of living. No symbol in stone or bronze can match his memory in us. Goodbye my friend, I join the many who remember you and try to follow your example.

Edward J. Sullivan

■ LUBA'S DECISION IS JUSTICIABLE, BUT UNDERLYING DECISION IS DICTUM

In *Campers Cove Resort, LLC v. Jackson County*, 240 Or. App 782, 248 P.3d 435 (2011)), the Oregon Court of Appeals decided that (1) a justiciable issue exists where a citizens' group seeks review and reversal of a LUBA decision finding that a county decision was dictum with no legal effect; (2) a LUBA decision is not merely advisory where LUBA makes a decision about the legal correctness and effect of a county decision; and (3) a county hearings officer's decision regarding an issue not presented by a resort owner's request for land use approval is non-binding dictum.

Campers Cove Resort, LLC ("Campers Cove") owns and operates the Hyatt Lake Resort in Jackson County, including a lodge, bait shop, tent and RV sites, rental cabins, a dock, a sewage treatment plant, and other recreational uses. The resort contains thirty-five RV sites. Twenty-two of the RV sites are full-service sites, which provide full electric, water, and sewer hook-ups, while thirteen of the sites contain only water and electrical connections. In 2007, Campers Cove obtained building permits to install permanent, modular-home-style cabins (incongruously described as "park model" RV units) on the existing full-service RV sites. At that time, the county did not determine whether the park model units should be allowed as an expansion or alteration to a nonconforming use.

In 2008, Campers Cove submitted an application to the county to verify the nonconforming-use status of the resort's various recreational uses as of 1998, including the full-service RV sites. In addition, Campers Cove sought (in part) a determination of whether the placement of additional park model units would be an allowed alteration or expansion of a nonconforming use. County staff verified the full-service RV sites were a nonconforming use and approved the placement of thirteen additional park model units. Campers Cove did not seek review of the existing, permitted park model homes and the county staff did not conduct a review of the lawfulness of the units. Campers Cove and Southern Oregon Citizens for Responsible Land Use Planning ("Southern Oregon Citizens"), which opposes placement of the park model units at the resort, appealed the county staff's decision.

A Jackson County hearings officer determined that the proposed placement of the new park model units was not an expansion and alteration of a nonconforming use. The hearings officer decided that Campers Cove must seek and the county must grant an exception to statewide planning goals in order to establish the thirteen park model RV units as a lawful use. In addition, the hearings officer's order stated (in relevant part) that "[Campers Cove] must file for exceptions to [Statewide Planning] Goals 4 [Forest Lands], 11 [Public Facilities and Services], and 14 [Urbanization] for the 22 park model units that have already been installed at the Resort." As the court of appeals noted, "The parts of the hearings officer's decision captioned 'conclusion,' 'conclusions of law,' and 'order,' however, referenced only the 13 additional park model sites . . ." 240 Or. App. at 788.

Campers Cove appealed to LUBA and argued that the hearings officer lacked authority to order Campers Cove to obtain additional review of the existing park model units because Campers Cove had not sought a determination on the legality of the park model units. Jackson County argued that the part of the hearings officer's decision that referenced the need for additional review of the park model units was dictum without legal effect. Southern Oregon Citizens argued that the legality of the existing park model units was at issue before the county hearings officer and the hearings officer's decision required additional land use review of the existing units.

LUBA agreed with Southern Oregon Citizens that the nonconforming status of the twenty-two park model units was at issue before the land use hearings officer. In LUBA's view, the hearings officer had authority to distinguish between full-service site use in 1998 and the park model unit uses established later in 2007 and to conclude that the park model units were not part of the nonconforming use of the sites in 1998. LUBA concluded, however, that the hearings officer did not have authority to make any determination regarding the legality of the 2007 building permits for the park model units. Consequently, LUBA agreed with the county that the hearings officer's statement regarding the need for further review of the twenty-two park model units was dictum. Southern Oregon Citizens appealed LUBA's decision to the court of appeals.

Before the court of appeals, Southern Oregon Citizens argued that LUBA erred in finding that the hearings officer's statement regarding the park model units was dictum based on the fact that the statement did not come under the "order" section of the decision. In addition, Southern Oregon Citizens argued that (1) the hearings officer could not properly determine whether the full-service RV sites were a nonconforming use without first determining the legality of the park model units; (2) to determine the legal status of the park model units the hearings officer must consider what criteria must be met in order to establish the units as a lawful use; and (3) the hearings officer's statement regarding the need for additional review of the existing units could not be dicta because it was necessary to determine the units' status as a nonconforming use.

In response to Southern Oregon Citizen's arguments, Campers Cove, the county, and amici unit owners disputed that LUBA's decision was justiciable because (1) Southern Oregon Citizens received a decision in its favor which it cannot appeal, and (2) LUBA's decision was merely advisory and not appealable. In addition, Campers Cove argued that LUBA did not err in finding that the hearings officer's statement was dictum.

The court of appeals first addressed the argument that LUBA's decision was not justiciable. The court observed the primary issue before LUBA was the legal effect of the hearings officer's statement regarding the need for additional review of the existing park model units. Southern Oregon Citizens did not receive a favorable ruling on that issue because it argued that the hearings officer's statement had binding legal effect and LUBA ruled otherwise. Thus, the court held that LUBA's decision regarding the hearings officer's statement was justiciable.

Second, the court considered the argument that LUBA's opinion was merely advisory without legal effect and therefore not justiciable. Citing *1000 Friends of Oregon v. Clackamas County*, 194 Or. App 212, 216-17, 94 P.3d 160 (2004), the court noted that LUBA decisions that determine the "effect of law on future, potential application[s]" are not justiciable. 240 Or. App. at 792. However, the court determined that *1000 Friends* did not apply to LUBA's decision in *Campers Cove* because LUBA decided "a present dispute about whether the hearings officer's ruling was effective and correct." *Id.*

Third, the court agreed with LUBA that the hearings officer's statement that the existing park model units needed additional land use review was dictum because the statement was beyond the scope of Campers Cove's

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application to (1) verify the nonconforming use status of the resort's various uses in 1998 and (2) approve the alteration of nonconforming uses through placement of an additional park model units. The court stated, "That documentation of the legal uses in 1998 does not depend upon whether those historic uses were altered by the 2007 park model units authorization, the legal effect of the issued building permits, or how park model uses could be approved in the future." 240 Or. App. at 794. Consequently, the court affirmed LUBA's decision that the part of the hearings officer's statement at issue was dictum.

Glenn Fullilove

[Campers Cove Resort, LLC v. Jackson County](#), 240 Or. App. 782, 248 P.3d 435 (2011)

■ NUMERATORS, DENOMINATORS, AND THE VESTED RIGHTS EXPENDITURE RATIO

In *Department of Land Conservation and Development v. Crook County*, 242 Or. App. 580, ___ P.3d. ___ (2011), the property owner, Shelly Hudspeth ("Hudspeth"), had received Measure 37 waivers both from Crook County and the Department of Land Conservation and Development (DLCD) for a 59-lot subdivision (technically, a planned unit development) on her property. Hudspeth obtained a tentative approval from the county and spent, in her estimation, over \$5 million developing the property before Measure 49 became effective in 2007. At that point, she applied to the county for a determination that her Measure 37 rights had vested.

Measure 49 provides, in relevant part, that property owners who file a Measure 37 claim on or before June 28, 2007, would be entitled to just compensation if

the claimant's use of the property complies with the waiver and *the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.*

242 Or. App. at 593 n.4 (quoting Measure 49, Section 5(3)). The court listed the factors for determining whether a common law vested right exists:

(1) the ratio of development expenditures to the total project cost; 2) whether the landowner's expenditures were made in good faith; (3) whether the expenditures are related to the completed project or could apply to other uses of the property; and (4) the nature, location, and ultimate cost of the project.

Id. (citing *Clackamas Co. v. Holmes*, 265 Or. 193, 198-99, 508 P.2d 190 (1973)).

The county approved Hudspeth's request for a determination of vested rights, finding that she had spent \$502,300 and that the cost of the residences in the subdivision *should not* be included in the total cost of the. The county also excluded another \$300,000 for

(1) attorney, application, and administrative fees; (2) work related to uses that would be allowed under current zoning; (3) interest; and (4) costs incurred by individuals other than Hudspeth.

Id. n.5. The county's calculation of the ratio was \$502,300 to a total cost of \$5,081,946, or 9.88%. DLCD appealed to the Crook County Court, arguing that the county should have included the costs of the future residential structures in the projection of the subdivision's total cost.

Hudspeth argued that the ratio test was only one factor in determining vesting and that including the cost of construction was not required—especially where, as here, there was never an intention to build the homes. In the alternative, she argued, even if the costs of the houses had to be included, the ratio would still support a determination that she was vested based upon her (unsupported) suggestion that the houses might cost as little as \$100,000.

The county court determined that, while an additional \$395,000 should have been added to the total project cost, the \$502,300 expenditure was a "substantial" and "sufficient investment to constitute vesting" and thus no remand to the county for additional findings was required. *Id.* The county court further determined that it was *not* necessary to include the cost of residential construction in the project's total cost as it was "too speculative . . . , " and even if the cost should have been included, there was a "sufficient substantial investment directly related to the establishment of the residential subdivision . . . [and] made in good faith" *Id.* at 585.

DLCD appealed this decision to the county circuit court, which decided that the ratio test was not required in every instance. Even if it were, the court wrote, the county had determined that the investment was sufficient

for vesting. The court affirmed the county's approval of the waivers. DLCDCD appealed the circuit court's decision and Hudspeth moved to dismiss, challenging DLCDCD's standing to appeal. DLCDCD's response was that this matter concerned a vested right that "[arose] from a Measure 37 order issued by DLCDCD. . . ." and thus conferred standing. *Id.* at 586. Her motion was granted by the Appellate Commissioner partly due to ambiguous then-existing language in ORS 197.090(2)(a).

DLCDCD requested reconsideration and the court of appeals' Motions Department issued an order vacating the commissioner's order, allowing reconsideration, and "defer[ring] a ruling on Hudspeth's motion to dismiss to the department that decides the appeal on its merits." *Id.* at 587. Meanwhile, however, the statutory section at issue was amended in a manner that "completely undercut the Appellate Commissioner's conclusion . . ." *Id.* Upon review, the court of appeals held that DLCDCD had standing under the amended language in ORS 197.090(2)(a). *Id.* at 591.

The court determined that the vesting issue was not a land use decision under ORS 197.090(2)(a)(A): "A decision by a public entity that an owner qualifies for just compensation . . . and a decision by a public entity on the nature and extent of that compensation are not land use decisions." *Id.* at 589. The court then considered whether the case involved "[a]ny other matter within [DLCDCD's] statutory authority' pursuant to ORS 197.090(2)(a)(B). . . ." a decision which "requires an understanding of DLCDCD's statutory authority concerning the Measure 37 waiver . . . issued to Hudspeth." *Id.* at 589-90. The court reviewed the operation of Measure 37, the choice given to public entities to make payment or waive compliance with particular land use regulations, and the obligation of the property owner to make a demand for compensation to the "regulating entity." A "regulating entity" is "an Agency that has enacted or enforced, or has authority to remove, modify or not apply, the Land Use Regulation(s) identified in the Claim. . ." for compensation. *Id.* at 590 (quoting then-applicable OAR 125-145-0020(12) (2006)). Hudspeth's claim had thus been sent to DLCDCD "as the regulating entity."

The court found that the waiver issued by DLCDCD was significant and that DLCDCD was authorized to issue it. That authority, in turn, allowed DLCDCD to participate in and seek review of proceedings "concerning" the waiver it had issued, "*including a proceeding to determine whether Hudspeth had a vested right to complete and continue the [subdivision]. . . .*" *Id.* at 591 (emphasis added). The court denied Hudspeth's motion to dismiss with this summary: (1) DLCDCD participated at the local level; (2) DLCDCD appealed that decision and every decision since then; and (3) this participation gave DLCDCD standing to seek review of the county court's decision. *Id.* When the circuit court issued its ruling, DLCDCD had standing to appeal under ORS 34.100.

On the issue of whether Hudspeth's property rights had vested, DLCDCD argued that the circuit court had erred in sustaining the decision of the county court because (1) the county should have been required to take into account the cost of building the residences when calculating the ratio; and (2) the cost had to be determined from the record and not just assumed. Hudspeth disagreed. The court explained that it had addressed nearly identical facts in *Biggerstaff v. Board of County Commissioners*, 240 Or. App. 46, 54, 245 P.3d 688 (2010), and had summarized the law as follows:

[(1)] In determining whether a vested right exists in this context, consideration of the expenditure ratio is necessary. . . . [(2)] in all but the most exceptional case, a landowner's proof of substantial expenditures is the *sine qua non* of a vesting determination . . . [(3)] [f]or vesting purposes, we understand that the concept of substantial expenditures . . . requires an examination of both the absolute amount expended and the percentage yielded by the expenditure ratio. . . . [(4)] [c]onsideration of the expenditure ratio requires . . . that a landowner demonstrate the total project cost—that is, the *likely costs* of completing the particular development sought to be vested *based on construction costs as of December 6, 2007* [; and (5)] a cogent assessment of total project cost (and, concomitantly, the expenditure ratio) will . . . require particular identification of the development that the property owner sought to vest as of December 6, 2007. [The property owner must] establish the likely total project cost in relation to the size and character of the structures that the owner contemplated building in compliance with a Measure 37 waiver as of December 6, 2007.

Id. at 592-93 (emphasis in original) (internal quotation marks and citations omitted).

Based on its prior determinations, the court concluded that the circuit court should have remanded the matter to the county for additional findings regarding the "extent and general cost of the project" for which vesting was being claimed and to "give proper weight to the expenditure ratio factor in the totality of the circumstances." *Id.*

at 593. The court expressly found that the denominator of the ratio calculation should have included the cost of the residences that were sought to be developed, and that it was necessary to determine the denominator in the expenditure ratio. The matter was remanded to the county for further determinations consistent with the court's ruling.

Ruth Spetter

[Dept of Land Conservation & Dev. v. Crook County](#), 242 Or. App. 580, ___ P.3d. ___ (2011)

■ COURT OF APPEALS DETERMINES WHAT IS "NECESSARY" FOR ECONOMIC OPPORTUNITIES ANALYSES

In *Friends of Yamhill County v. City of Newberg*, 240 Or. App. 738, 247 P.3d 767 (2011), the Oregon Court of Appeals explored the upper and lower limits of what types of sites for expected employment growth must be identified within an economic opportunities analysis (EOA). Cities must adopt EOAs as part of their comprehensive plans pursuant to Statewide Planning Goal 9.

The case involved a dispute over how to interpret two LCDC rules pertaining to EOAs. The first provides that an EOA

must identify the number of sites by type reasonably expected to be needed to accommodate the expected employment growth based on the *site characteristics typical of expected uses*.

OAR 660-009-0015(2) (emphasis added). The second rule defines the term "site characteristics" in turn to mean

the attributes of a site *necessary* for a particular industrial or other employment use to operate. Site characteristics include, but are not limited to, a minimum acreage or site configuration including shape and topography, visibility, specific types or levels of public facilities, services or energy infrastructure, or proximity to a particular transportation or freight facility . . . and major transportation routes.

OAR 660-009-0005(11) (emphasis added).

The petitioners, in challenging the city's EOA, argued that the inclusion of the word "necessary" in the latter provision means that a site characteristic for an industrial or employment use must be indispensable—that the use simply could not exist or operate without the site characteristic. The city, on the other hand, argued that it could identify characteristics that it believed would give it a competitive advantage in attracting industrial and employment uses. LUBA rejected both sides' arguments and concluded instead that the proper scope of analysis is site characteristics that are (1) typical of an industrial or employment use and (2) have some meaningful connection with the use. LUBA remanded to the city for further analysis.

On appeal, the court of appeals first noted that its objective was to determine LCDC's intent by examining the text and context of the rule, and that the dispute centered on the use of the term "necessary" within the rule. Although the petitioners urged the court to rely on the *Webster's* dictionary definition of "necessary," the court noted that this word has "long proved more elastic in legal parlance." 240 Or. App. at 744. The court cited *Black's Law Dictionary* and a number of Oregon cases dating back to 1915 for the proposition that, when interpreting the meaning of the word "necessary," "context is critical." *Id.* at 745.

Here, the context included the implementing statute, which states in pertinent part that "[c]omprehensive plans and land use regulations shall provide for at least an *adequate supply* of sites of *suitable* sizes, types, locations and service levels for industrial and commercial uses consistent with plan policies." ORS 197.712(2)(c) (emphases added). The term "suitable" is defined by rule as "serviceable land designated for industrial or other employment use that provides, or can be expected to provide the appropriate site characteristics for the proposed use." OAR 660-009-0005(12). Given this context, the court agreed with LUBA that site characteristics analyzed in an EOA need not be *indispensable* to the economic uses. The court concluded by endorsing LUBA's articulation of the relevant test: a site characteristic must be typical of, and must have some meaningful connection to, an industrial or employment use. The court affirmed LUBA's remand. 240 Or. App. at 748.

Nathan Baker

[Friends of Yamhill County v. City of Newberg](#), 240 Or. App. 738, 247 P.3d 767 (2011)

■ COURT OF APPEALS RESOLVES JURISDICTIONAL ISSUE IN A RARE GOAL 15 CASE

The Oregon Court of Appeals recently reversed in part and remanded a LUBA decision involving Portland's attempt to regulate land and amend a Willamette River greenway boundary along the North Reach of the Willamette River. The case, *Gunderson, LLC v. City of Portland*, 243 Or. App. 612, ___ P.3d ___, 2011 WL 2463537 (2011), implicates Statewide Planning Goal 15, which seeks to "protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River." OAR 660-015-0005. In essence, the goal requires local jurisdictions to establish a greenway boundary and manage uses within the boundary to protect the river. Boundary amendments are subject to ORS Chapter 390 and ORS 390.322 grants LCDC the jurisdiction to approve or deny them.

With respect to the boundary amendment, LUBA ruled in pertinent part that it lacked jurisdiction to consider the petitioners' argument that the city failed to complete a necessary land inventory. LUBA characterized the petitioners' challenge as one to the boundary amendment's compliance with Goal 15. LUBA held that it "may not review challenges to the portion of the [city's decision] that amends the Greenway boundary, including [the petitioners'] challenge to the adequacy of the inventory required by Goal 15, Paragraph B." *Gunderson, LLC v. City of Portland*, LUBA No. 2010-041, slip op. at *39 (Jan. 21, 2011).

The court disagreed with LUBA's conclusion. After an exhaustive review of the parties' briefs before LUBA, the court concluded that LUBA characterized the petitioners' arguments too narrowly relative to the inventory issue. Although the petitioners primarily focused on the inventory for the purposes of amending the greenway boundary, the court noted that the petitioners also asserted that an examination of the inventory was necessary to determine whether the city complied with Goal 15 for amendments within the *existing* boundary. Because the inventory's connection to land within the existing boundary is an issue that is separate from the inventory's relationship to the boundary amendment, and because LUBA has exclusive jurisdiction to review land use decisions unless otherwise provided by statute, the court held that LUBA erred by not reviewing the adequacy of the city's inventory apart from any challenge to the proposed boundary amendment. 2011 WL 2463537, slip op. at *14. The court remanded the decision to resolve the remaining inventory adequacy issue.

David Doughman

[*Gunderson, LLC v. City of Portland*](#), 243 Or. App. 612, ___ P.3d ___, 2011 WL 2463537 (2011)

■ MORE SCRUTINY FOR VESTED RIGHTS EXPENDITURE RATIO

In *Oregon Shores Conservation Coalition v. Board of Commissioners of Clatsop County*, 243 Or. App. 298, ___ P.3d ___, 2011 WL 2138164 (2011), the Oregon Court of Appeals continued the recent line of opinions examining vested rights for Measure 37 claimants that started in *Friends of Yamhill County v. Board of Commissioners of Yamhill County*, 237 Or. App. 149, 238 P.3d 1016 (2010), *rev. allowed*, 349 Or. 602, 249 P.3d 123 (2011) (RELU Digest, Vol. 32, No. 5 (2011)). In this case, as in *Biggerstaff v. Board of Commissioners of Yamhill County*, 240 Or. App. 46, 245 P.3d 688 (2010), and *Kleikamp v. Board of County Commissioners*, 240 Or. App. 57, 246 P.3d 56 (2010) (RELU Digest, April 2011), the central issue involved the ratio of development expenditures to the total project cost, which is the first factor for determining vested rights followed by the court in *Friends of Yamhill County*.

In 1995, the claimants in this case obtained state and county waivers for a thirty-lot residential development. They subsequently obtained preliminary subdivision approval and spent significant funds developing the property before Measure 49 became effective in December 2007. After the board of commissioners of Clatsop County found that the claimants had a vested right to continue the development, the Oregon Shores Conservation Coalition (OSCC) challenged the board's decision by writ of review, but the reviewing court affirmed the decision. OSCC appealed the decisions of both the board of commissioners and the reviewing court, arguing they had misconstrued the applicable law for determining the expenditure ratio factor.

The court first emphasized the importance of expenditure evidence in determining the ratio factor of development expenditures to total project cost, referring to *Friends of Yamhill County* and *Kleikamp*: "[A] landowner's proof of 'substantial expenditures' is the *sine qua non* of a vesting determination." *Oregon Shores Conservation Coalition*, 2011 WL 2138164, slip op. at *5 (quoting *Kleikamp*, 240 Or. App. at 66). The expenditures had to be based on the "likely costs of completing the particular development sought to be vested

based on construction costs as of” the date Measure 49 became effective. *Id.* The approved project for which the claimants obtained a waiver was to build 3,000-square-foot houses. While seeking a vested rights determination before the county, the claimants for the first time described the project as involving the placement of 1,800 -square-foot manufactured homes on the subdivision lots at a significantly lower total project cost. The court found that the board’s decision was not based on the total project cost of the development sought to be vested back in December 2007 or on construction costs as of that date. The court concluded that the reviewing court should have remanded the matter to the county to “determine the extent and general cost of the project to be vested and to give proper weight to the expenditure ratio factor in the totality of the circumstances of this case.” *Id.* (quoting *Friends of Yamhill County*, 237 Or. App. at 178). Consequently, the court reversed the decision of the reviewing court.

Appellant also challenged the board’s finding on the adaptability factor (another factor for determining a vested right from *Friends of Yamhill County*). Appellant asserted that the board’s finding that the claimant’s expenditures were not adaptable to an alternative lawful use was not supported by substantial evidence. Citing *Davis v. Jefferson County*, 239 Or. App. 564, 245 P.3d 665 (2010), the court noted that the applicable review is whether the court applied the correct legal test. However, the court found it could not determine from the reviewing court’s decision whether or not the board’s finding regarding the adaptability factor was reviewed for substantial evidence. Again quoting from *Davis*, the court concluded, “A remand is necessary to allow the reviewing court to address the evidentiary support for [the] finding.” 2011 WL 2138164, slip op. at *6 (quoting *Davis*, 239 Or. App. at 573).

The long list of cases addressing these issues make clear that in the review proceedings practitioners need to request the specific findings needed to support the client’s claim.

Raymond Greycloud

[*Oregon Shores Conservation Coalition v. Bd. of Comm’rs of Clatsop County*](#), 243 Or. App. 298, ___ P.3d ___, 2011 WL 2138164 (2011)

Cases From Other Jurisdictions

■ WASHINGTON APPELLATE COURT UPHOLDS CITY OF VANCOUVER RIPARIAN PERMITS

Julian v. City of Vancouver, 161 Wash. App. 614, ___ P.3d ___, 2011 WL 1652202 (2011), involved a “short plat” land division of a one-acre parcel into four lots. The land carried a riparian zone designation, which fixed additional development requirements but allowed for some relief if the remaining water bodies were “completely functionally isolated.” Vancouver, Wa. Municipal Code § 20.740.110. Petitioner-neighbor filed a trial court proceeding under Washington’s Land Use Petition Act, Revised Code of Washington (“RCW”) chapter 36.70C (“LUPA”). The trial court denied relief so petitioner appealed, but only on the issue of whether the “completely functionally isolated” test had been met.

The court commenced its analysis by reviewing the account of the city’s hearings examiner decision on a *de novo* basis with regard to facts for substantial evidence to support the local decision. Petitioner had the burden of demonstrating that the hearings examiner erred.

The court easily disposed of petitioner’s initial contention that the hearings examiner used an improper procedure. Petitioner’s principal contention was that a 2005 version of the riparian ordinance, which would have limited certain riparian development, applied. However, the court agreed with the hearings examiner that a 2007 version of the ordinance applied, finding that the Washington doctrine of “vesting” applied to land divisions. Under that doctrine, a fully completed development application “vests” the same under the regulations in place at that time.

In this case, the completed application was filed under the 2007 version of the ordinance, which utilized the “completely functionally isolated” test. Under that test there must be “no net loss” of critical area functions. In

this case, the development would improve water flow and habitat functions. The hearings examiner applied the test even though areas on the site had some limited riparian function. However, the hearings examiner found that these were small and physically isolated from other riparian areas, which were distinguished from riparian areas on the site to which stricter regulations were applied. The court concluded:

The evidence suggests that the habitat value of this watercourse was at best very limited. Where, as here, discrepancies in the evidence concern differences in expert opinions over whether the watercourse's habitat value was little or practically nil, it is particularly appropriate to defer to the agency fact finder

2011 WL 1652202, slip op. at *7. Given this deference rule, the court found that the hearings examiner did not incorrectly apply the ordinance.

Finally, the court found that attorney fees were appropriate against the petitioner under RCW 4.84.370(1) and Appellate Rule RAP 18.1 if the petitioner were unsuccessful in both local appellate proceedings. This is the case even though not all issues were covered by the attorney fee statute. Because the applicants received approval of their short plat application and survived two appeals, they were entitled to attorney fees. The applicants "substantially prevailed" under the statute even though the hearings examiner imposed additional conditions on the same (which the applicants did not appeal).

This case deals with interpretation and deference in a review of a discretionary land division decision and implements an attorney fee award statute which allows fees if a challenger of a land use decision fails to prevail at both the local and state court level.

Edward J. Sullivan

Julian v. City of Vancouver, 161 Wash. App. 614, ___ P3d ___, 2011 WL 1652202 (2011)

■ TEXAS SUPREME COURT FINDS TAKING IN BEACH AVULSION

In *Severance v. Patterson*, ___ Tex. ___, ___ S.W. 3d ___, 2010 WL 4371438 (2010), the Texas Supreme Court responded to certified questions from the Fifth Circuit on a possible public beachfront access and the impact of the Texas Open Beaches Act (OBA). The court said the nature of any original public easement was detailed in case law—the public has rights to "wet beach" areas, which belong to the state and move with changes to the coastal landscape. The question in this case was whether any public right beyond that area survives an avulsive change to the coastline.

In this area of Galveston Island, land patents had been granted by the Republic of Texas and were not encumbered by any express public easement, custom, or public trust. In 1959, the OBA provided a means by which public access to the wet beach areas could be enforced. However, with respect to other areas, the OBA only dealt with public rights that had been acquired or recognized, creating no new property rights.

In this case, there was no public easement beyond the wet beach except as had been obtained on land seaward of plaintiff's property by a 1975 judgment. However, Hurricane Rita moved the beach so that plaintiff's rental house was now seaward of the vegetation line. The state claimed some of the property as being within a public easement for that reason and claimed that the house interfered with public use of the beach. Plaintiff sued in federal court, claiming civil rights violations under the 4th, 5th and 14th Amendments. The federal trial court decided that the public had a right to a "rolling" easement along the beach whenever changes to the coastal landscape occurred. Plaintiff appealed the dismissal of her 4th and 5th Amendment claims, but the Fifth Circuit found her 5th Amendment claim unripe and certified questions regarding the 4th Amendment to the Texas Supreme Court to determine whether plaintiff had suffered an unreasonable search and seizure.

The court noted that Texas property law governed with regard to the 4th and 5th Amendments and looked to Texas property law in determining whether plaintiff had suffered an unreasonable search and seizure. While the public's rights to the original beach were established by custom, the court decided that those rights did not shift to new beachfront property created by avulsion. The state owns all wet beach areas, while the OBA only deals with dry land access interests that the public already has. In this case, it was clear that the state granted all other rights to private land owners in the 1840s, but could not have done so with respect to wet beach areas or those lying under water. The court found it important that these grants did not reserve public access rights. Thus, the

OBA was an attempt to settle the law by reaffirming public rights to wet beach areas and providing a means for dealing with dry sand areas in which the public had a property interest without establishing new property rights.

When plaintiff purchased her property, she received a disclosure statement that portions or all of it could be located on public lands and that the structure could be required to be moved. With subsequent hurricanes, the shoreline changed and plaintiff received notice to remove her house. The Fifth Circuit asked if the public beach easement “rolled” with changes in the coastal shoreline in the absence of the proof of an independent property right such as custom, prescription, or dedication. In this case, given the legal history of the property, the court answered the question in the negative. Using traditional Texas property law principles of easement, particularly regarding the specific and static nature of easements, the court concluded that the public’s rights to dry sand areas must be reestablished whenever the coast moves by avulsion, while recognizing the property boundaries affected by accretion or erosion were dynamic and moved automatically. The court concluded:

Property along the Gulf of Mexico is subjected to seasonal hurricanes and tropical storms, on top of the every-day natural forces of wind, rain, and tidal ebbs and flows that affect coastal properties and shift sand and the vegetation line. This is an ordinary hazard of owning littoral property. And, while losing property to the public trust as it becomes part of the wet beach or submerged under the ocean is an ordinary hazard of ownership for coastal property owners, it is far less reasonable to hold that a public easement can suddenly encumber an entirely new portion of a landowner’s property that was not previously subject to that right of use. . . .

Like littoral property boundaries along the Gulf Coast, the boundaries of corresponding public easements are also dynamic. The easements’ boundaries may move according to gradual and imperceptible changes in the mean high tide and vegetation lines. However, if an avulsive event moves the mean high tide line and vegetation line suddenly and perceptibly causing the former dry beach to become part of State-owned wet beach or completely submerged, the private property owner is not automatically deprived of her right to exclude the public from the new dry beach. In those situations, when changes occur suddenly and perceptibly to materially alter littoral boundaries, the land encumbered by the easement is lost to the public trust, along with the easement attached to that land. Then, the State may seek to establish another easement as permitted by law on the newly created dry beach to enforce an asserted public right to use private land.

2010 WL 4371438, slip op. at *10.

The court also said it was unnecessary and a waste of time to obtain a new judgment with every minor change of coastal lands and that these boundaries are usually described in terms of vegetation line and mean high tide line. However, when the changes are sudden and perceptible, Texas law requires a new easement for lands outside wet sand areas or otherwise in the public trust.

The court noted that other states have different real property regimes that may allow for the movement of public easements as the shoreline moves, noting in particular Hawaii, Oregon, and New Jersey. In this case of first impression before the Texas Supreme Court, though, the court joined states such as Idaho and New Hampshire.

The dissent said that, since the majority recognized that easements move as actual boundaries move through accretion and erosion, which are governed by the dynamics of the earth, its refusal to allow such easements to change in the case of avulsion was difficult to understand. The dissent would have recognized a changing (“rolling”) easement in favor of the public—otherwise easements are fixed while the shorelines change. To require the state to obtain new title destroys the right to beach access in those areas where avulsion is frequent. The dissent believed that there was an implied easement for public use and enjoyment of the beach in the 1840s when the original grants were made.

The Texas Attorney General filed motions with the court in late June alleging the case is moot, since plaintiff sold her property to the public as part of a buyout program. No action has been taken on the motion.

This case pits a property theory that opts for precision in cases of avulsion while recognizing changes when erosion or accretion are involved against a competing theory that both kinds of changes require reformulation of property interests. The result of this decision is to wreck the Texas beach access program and to provide less incentive for protecting shorelines and perhaps even less certainty of property ownership than before, given the lack of a clear distinction between accretion and erosion, on the one hand, and avulsion on the other. At least

when this claimant's house is engulfed by another hurricane, she will have the comfort of knowing who owns the underlying property.

Edward J. Sullivan

Severance v. Patterson, ___ Tex. ___, ___ S.W. 3d ___, 2010 WL 4371438 (2010)

Land Use Board of Appeals

■ *STATUTORY INTERPRETATION - NOISE STANDARDS FOR WIND TURBINES*

Morrow County adopted the noise standard for wind turbines contained in OAR 340-035-0035(1)(b)(B), which allows a maximum 10 decibel (dBA) increase in the ambient noise level for more than 30 minutes in any hour. Under the rule, the ambient noise level may be either an assumed 26 dBA or the actual ambient noise level. This means wind turbines may not exceed a maximum of 36 dBA (26 + 10) under the assumed noise level standard or the measured actual background ambient noise level plus 10 dBA under the actual noise level standard. Under the latter standard, the permissible noise level could exceed 36 dBA maximum if the actual ambient noise level was measured at more than 26 dBA. Exceptions for “unusual and/or infrequent events” may be allowed on the request of a wind facility owner. The issue LUBA addressed in *Mingo v. Morrow County*, LUBA Nos. 2011-014//016/017 (June 1, 2011), was whether adequate findings supported the county's determination that only the assumed noise level standard applied to intervenor Invenergy, LLC's 48-turbine wind energy facility and that the facility violated this standard.

The county approved Invenergy's facility in 2005 subject to a condition requiring compliance with OAR 340, Division 35's noise level standards for wind facilities. The facility, dubbed the Willow Creek Wind Energy Center, began operating in 2008 and the county received noise complaints. Following proceedings on the noise complaints before the planning commission and county court, the county court found Invenergy violated the 36 dBA assumed noise level standard at one residence (Williams), but not at three other residences (Mingo, Eaton, and Wade), and required Invenergy to come into compliance with the assumed noise standard within six months. Specifically, the county adopted a condition “X” stating: “Compliance will be achieved when the data indicates that the facility does not exceed 36 dBA.” LUBA Nos. 2011-014//016/017, slip op. at 8. Both the owners of the four residences and Invenergy appealed the county's decision to LUBA.

A key legal issue LUBA confronted was whether the correct noise standard established in the county's decision was 36 dBA (the assumed noise level standard) or the actual noise level standard. Under the state administrative rules the county adopted, Invenergy argued it used the assumed noise level standard as its baseline standard, but retained the right to demonstrate compliance with either standard at all times. Petitioners argued that when Invenergy adopted the 36 dBA assumed noise level standard as its baseline, it lost the right to demonstrate compliance with the actual noise level standard as well if measured noise exceeds the 36 dBA standard. Petitioners cited the county's Condition X in support of their argument. Invenergy argued the county erred by failing to adopt findings interpreting OAR Chapter 340, Division 35 and explaining why it adopted Condition X.

LUBA noted the text of OAR 340-035-0035(1)(b)(B) gives Invenergy a choice and phrases the assumed and actual noise level standards in the alternative. In LUBA's view, this language “does not necessarily mean that [the rule] must be interpreted to give Invenergy a unilateral right to move back and forth between ‘assumed’ and ‘actual’ background ambient noise levels at individual measurement points, depending on circumstances” *Id.*, slip op. at 21. However, LUBA also opined that the rule's language did not necessarily suggest that Invenergy must select only one of the noise level standards and that standard must be applied uniformly throughout a wind energy facility's operating life. Since Invenergy raised the issue of how the rule's language should be interpreted before the county, LUBA concluded the county erred by failing to address this issue in its decision. In a break from past precedent, LUBA took the unusual step of interpreting the rule as follows:

We conclude that under [the rule] an applicant may select either the assumed background ambient noise level or the actual background ambient noise level at individual measurement points when seeking approval

for the proposal and if required to prove that its operating facility complies with [the rule] requirement that the wind energy facility increase background ambient noise levels by no more than 10 dBA. In sum, we agree with Invenergy that where the evidence shows that combined ambient noise levels with the wind turbines in operation exceeds 36 dBA at a measurement point, Invenergy nevertheless complies with [the rule] if Invenergy can establish that its wind energy facility contributes no more than 10 dBA to the actual background ambient noise level at the measurement point.

Id., slip op. at 23. LUBA remanded the decision to allow the county to determine whether, based on the evidence in the record, Invenergy complied with the noise standard as interpreted with respect to the four residences.

■ SIGN REGULATIONS - SEVERABILITY CLAUSE

One of the key issues LUBA addressed in *Onsite Advertising Services, LLC v. Washington County*, LUBA No. 2010-113 (June 22, 2011), was how broadly to apply a severability clause in the county's sign ordinance when portions of the sign regulations were admittedly unconstitutional. At the time Onsite Advertising Services, LLC ("Onsite") sought approval for sixteen free-standing, double-sided billboards, Section 414-5.9 of the county's sign regulations exempted "[d]anger signs, trespassing signs, warning signs, traffic signs, memorial plaques, signs of historical interest, holiday signs, public and service information signs such as restrooms, mailbox identification, newspaper container identification." LUBA No. 2010-113, slip op. at 6. Onsite argued that even though its proposed freestanding billboards exceeded the sign regulations' size limits, Section 414-4.9 was unconstitutional and, as a result, the sign regulations as a whole could not be applied to its billboards. The planning director denied all of Onsite's sign permit applications and Onsite appealed to the hearings officer. Shortly after the planning director made his decision, the county board adopted Ordinance 735. This ordinance amended the sign regulations to eliminate all content-based distinctions and specified that the amendments applied to all applications pending as of January 1, 2010, which included Onsite's applications. Several months later, the hearings officer heard Onsite's appeal and also denied the billboard permit applications.

On appeal to LUBA, Onsite and the county disputed how to apply the severability clause contained in the county's zoning code. This clause stated that in the event any part of the code is declared unconstitutional, "such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this code." The parties agreed that at least some of the exemptions in Section 414-5.9 are content based and unconstitutional. Onsite argued the zoning code's severability clause should be applied to sever *all* of the sign regulations from the code and, as a result, the hearings officer erred in denying its billboard applications for failure to comply with the applicable size limits. The county contended the hearings officer correctly concluded that in adopting Ordinance 735, the county board intended to sever only Section 414-5.9 and to leave the remainder of the sign regulations in effect.

In resolving this dispute, LUBA relied on the Oregon Court of Appeals' recent decision in *Clear Channel Outdoor, Inc. v. City of Portland*, 243 Or. App. 133, ___ P.3d ___ (2011). There the court stated the relevant inquiry as, "whether an unconstitutional legislative provision should be severed is a matter of legislative intent of the enacting body." 243 Or. App. at 147. LUBA concluded that the hearings officer properly considered Ordinance 735 in determining the county board would have chosen to sever only Section 414-5.9 had it known this exemption provision was unconstitutional, rather than severing all of the sign regulations. As a result, LUBA held the hearings officer did not err in denying the billboard permits for failure to comply with portions of the remaining valid sign regulations and affirmed the county's decision.

Kathryn S. Beaumont
