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■ *ANTICIPATORY MITIGATION OF POLICE POWER TAKINGS RULED COMPENSABLE*

Tri-County Metropolitan Transportation District of Oregon v. Posh Ventures, LLC, 244 Or. App. 425, 261 P.3d 33 (2011), called upon the Oregon Court of Appeals to interpret ORS 105.855. In doing so, the court affirmed a Multnomah County jury award for the difference between the fair market value of Posh's Hotel Modera property before and after the City of Portland exercised its police power to close private vehicle access to the hotel along a new light rail line on SW 6th Avenue. The jury decided that the diminution of value was $756,000. The court also affirmed the lower court's ruling limiting recovery of Posh's attorney fees to $45,000.

ORS 105.855 states:

> Whenever . . . a city or mass transit district . . . restricts use of the street traffic lane immediately adjacent to a sidewalk abutting commercial property to public conveyances and the existing access to that property by the general public by means of private conveyances is thereby prohibited . . . , the city or mass transit district shall be liable for and shall pay the difference between the fair market value of the property prior to the restriction and the fair market value of the property subsequent to the restriction, taking into account any special benefits to the property resulting from improvements made by the city or mass transit district in connection with the restriction. The fact that other access to the property from a public way is available shall relieve the city or mass transit district from liability if the other access is reasonably equal to the access prohibited or materially restricted.

The interesting wrinkle in this case is the fact that Posh took anticipatory measures to remedy the City's impact on Posh's business. TriMet argued that the statute should be narrowly construed such that the city or mass transit district's liability is limited to the difference between fair market value the day before and the day after the restriction goes into effect. The court disagreed.

Posh purchased the property from Starwood Hotels & Resorts Worldwide, Inc. (Starwood) in June 2007. Prior to the transaction closing, TriMet informed Posh that the decision to close private vehicle access to the property from SW 6th Avenue was final. Posh then set about to reconfigure the property to provide its customers with sufficient access from SW Clay Street. The hotel remodel began in November 2007 and was substantially completed by May 1, 2008. One month later, Hotel Modera opened to the public.

Meanwhile, TriMet initiated a condemnation action in December 2007 alleging in its complaint that the true value of the property to be condemned was $21,625. Posh filed an answer and third-party complaint against the City of Portland alleging that the true value of the property to be condemned was at least $1,250,000. TriMet and the City of Portland were represented by the same counsel on appeal.

In April 2008, at TriMet's request, the City exercised its police powers to prohibit private vehicular access to the hotel from SW 6th Avenue effective May 1, 2008. This obviated TriMet's condemnation action (and Trimet amended its complaint before trial to withdraw the relevant claim), but left open the question of value reduction: How much less was the property worth without access from SW 6th Avenue? Another question even more essential to the dispute also required answering: Does ORS 105.855 allow for anticipatory mitigation of a taking's fiscal impact on business operations?

At trial, Posh presented an appraisal and testimony from a commercial appraiser who ultimately concluded the reduction in value before and after the access restriction amounted to $2,108,000 based on a cost-to-cure approach. To reach that conclusion, the appraiser assumed that the costs incurred by Posh happened after the restriction became effective. The appraiser also testified that if Posh had done nothing to fix the access problem, the reduction in value would have been much more significant.

Looking to the plain language of ORS 105.855, TriMet argued that the trial court must exclude any evidence not related to the value of the property as it physically existed the day before and the day after the access restriction went into effect. Because by May 1, 2008 Posh had significantly remodeled its property and constructed new access features to mitigate the lack of access from SW 6th Avenue, TriMet argued, the difference between the value of the property on April 30, 2008 and May 1, 2008 was much less than Posh asserted.

The court of appeals refused to limit the jury's purview, noting that nothing in the statute precludes a jury from considering anticipatory measures taken to limit the impact of an access restriction. The court emphasized the fact that it is for the jury to determine whether the evidence presented to support a party's theory of diminution of value is appropriate. In this case, the evidence was not so speculative as to be precluded by operation of law.

Moreover, while TriMet had also argued that the cost-to-cure methodology was improper as a matter of law, the court found that a party's choice of valuation methodologies in condemnation cases is a fact-based inquiry rather than a question of law, unless some fixed principle of law demands otherwise. It is the triers of fact, then, who determine whether the approach an appraiser takes in analyzing diminution of value is appropriate.

Finally, the court of appeals affirmed the trial court's ruling as to attorney fees. ORS 105.855 does not address the issue. The parties and the court analyzed pertinent case law, and on this point the court agreed with TriMet: Posh was only entitled to attorney fees up to the point that TriMet withdrew its condemnation claim after the City of Portland restricted private vehicular access to the hotel from SW 6th Avenue using its police power. The cases relevant to the attorney fees determination had a common thread not present in this case, the court found. Those cases (see opinion for citations) applied ORS 20.085 to proceedings based on Article I, section 18 of the Oregon Constitution. Since the city's police power is not rooted in Art. I, §18, the reasoning from the cited cases proved inapposite to the recovery of attorney fees in police power takings. It would not surprise the author of this case summary if we see this issue litigated again.

Nick Merrill

Tri-County Metro. Transp. Dist. of Oregon v. Posh Ventures, LLC, 244 Or. App. 425, 261 P.3d 33 (2011)

■ GOAL-POST RULE DOES NOT APPLY TO ZONE CHANGES OR PERMIT APPLICATIONS CONSOLIDATED WITH A COMPREHENSIVE PLAN AMENDMENT

In *Setniker v. Polk County*, 244 Or. App. 618, 260 P.3d 800 (2011), the Oregon Court of Appeals affirmed LUBA's latest decision in part, reversed it in part, and remanded it for reconsideration of the Transportation Planning Rule's (TPR) mitigation requirements. The case stems from CPM Development Corporation's (CPM) 2001 application to Polk County for a sand and gravel extraction and processing facility, as well as a cement- and asphalt-processing plant, on part of a parcel zoned exclusive farm use (EFU). The application involved a comprehensive plan amendment to add the site to the county's inventory of significant mineral and aggregate resources; a zoning map amendment to add a mineral and aggregate overlay to the mining site; and a conditional use permit to mine the site. The Setnikers own property adjacent to the site.

The transportation facility at issue in this case is the intersection of Oregon State Highway 51, which runs north to south, with Oregon State Highway 22, which runs east and west.

Polk County approved the application in 2006. That approval was appealed to LUBA, which remanded the decision to the county for failure to apply county procedures and code standards applicable to the comprehensive plan text amendment and failure to comply with the TPR set forth in OAR 660-012-0060. *Rickreall Community Water Assoc. v. Polk County,* 53 Or. LUBA 76 (2006). On remand the applications were revised and the county board approved them. The Setnikers again appealed to LUBA, which rejected all of their assignments of error except misapplication of the TPR, which LUBA sustained in part. The Setnikers and CPM both sought judicial review.

CPM argued that LUBA erred in evaluating its application based on laws and rules that were in effect at the time the county ruled on the application, instead of when it originally submitted its application. This argument deals with the interaction between the TPR and the goal-post rule under ORS 215.427(3)(a). Under the TPR, if an amendment to a comprehensive plan or land use regulation would "significantly affect" a transportation facility, the local government may only approve if it adopts one or more mitigation measures under the TPR. OAR 660-012-0060(1). An amendment would "significantly affect" a transportation facility if it would degrade the facility "as measured at the end of the planning period

identified in the adopted transportation system plan . . . ." *Id.* § (1)(c). In essence, the goal-post rule provides that the rules in existence when an application is complete are the rules that govern the approval or rejection of the application. ORS 215.427(3)(a).

The county concluded that the goal-post rule applied to CPM's application and applied the 2020 planning horizon. On appeal to LUBA, the Setnikers had argued that the goal-post rule does not apply to a zone change that is consolidated with and dependent on a simultaneous comprehensive plan amendment. LUBA agreed, concluding the county was required to determine whether the plan and zoning amendments significantly affect transportation facilities as measured at the end of the planning period in the adopted 2009 TSP, which has a planning period of 2030.

The court agreed with LUBA, citing ***Rutigliano v. Jackson County***, 40 Or. LUBA 565, 572 (2002), in which LUBA discussed how the goal-post rule applies to consolidated applications where a zone change is dependent on a plan amendment. The court agreed with LUBA's analysis that where a county has a unified zoning and comprehensive map, such that the map cannot be changed without the amendment being both a comprehensive plan change and a zone change, the fixed goal-post rule does not apply. In a nutshell, when the standards the rule required to remain fixed are themselves bound up in the application, the goal-post rule does not apply. Accordingly, the court rejected CPM's cross-petition and found the relevant date for determining whether the proposed comprehensive plan amendment would significantly affect the intersection is 2030.

The Setnikers argued in their first assignment of error that LUBA misapplied the TPR by not requiring the county to put in place more measures to mitigate the effects of CPM's proposed operation. Because the county found that CPM's proposal would significantly affect a transportation facility, it imposed conditions of approval to ensure traffic from the development would not render the intersection inconsistent with its identified function, capacity, and performance standards. The first condition rerouted CPM employees and contract haulers on an alternate route during the hours of 4:00 to 6:00 p.m. The second required CPM to erect a gate or chain across the entrance to the haul road to make entry more difficult from Highway 51. The Setnikers argued these conditions were insufficient under the TPR, and that the TPR in fact required the conditions not only mitigate the intersection's failures caused by CPM's proposed development, but also eliminate any failures that the intersection already has that are caused by existing and background traffic.

LUBA rejected the Setnikers' reading of the TPR. The court, despite noting that LUBA's reading may make more sense and may, in fact, correct a flaw that the rule's drafters apparently overlooked, could not reconcile LUBA's interpretation with the TSP's unambiguous language and found that LUBA erred in ruling that the county could

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comply with the TSP by mitigating only CPM's significant adverse effects. The court held that, as the rule is written, if LUBA decided on remand that the intersection was consistent with relevant function, capacity, and performance standards when CPM filed its application, and that the intersection will become inconsistent by 2030 due to the effect of the amendments or due to independent growth or background traffic, then the county must put in place measures that will not only mitigate the inconsistencies caused by the amendments but also the inconsistencies resulting independently.

The Setnikers argued in their second assignment of error that LUBA's treatment of the re-routing measure failed to address all of the extra trips created by the proposed development, instead focusing solely on CPM's employees and contractors. They argued that LUBA was required to address their argument pursuant to ORS 197.835(11)(a), which provides that whenever the findings, order, or record are sufficient to allow review, the board shall decide all issues presented to it when reversing or remanding a land use decision. The court disagreed, noting the county's order plainly took into consideration suppliers, customers and visitors.

The Setnikers next argued that the county erred in allowing aggregate that is extracted off-site to be processed at the subject property. They focused on a subsection of the county's ordinance that provides that the sale of products extracted and processed on-site from a mineral and aggregate operation may be permitted in the on-site subject to site plan approval. The Setnikers argued the necessary implication of the ordinance is that, because sales permitted on-site are limited to products that are extracted and processed on site, no processing of products extracted off-site is permitted. The court noted that the logical flaw in this argument was apparent: the ordinance neither says nor implies anything about products that are extracted off-site, hauled to the site, processed on-site, then hauled and sold off-site. Further, in light of a subsection of the ordinance that expressly authorized on-site processing, the Setnikers' argument was not plausible.

Lisa Knight Davies

Setniker v. Polk County, 244 Or. App. 618, 260 P.3d 800 (2011)

Appellate Cases -- Land Use

■ TRIMET SHOWS HOW TO TERMINATE A CONTRACT

In *Butler Block, LLC v. Tri-County Metropolitan Transportation District of Oregon*, 242 Or. App. 395, 255 P.3d 665 (2011), the Oregon Court of Appeals upheld the trial court's ruling that, as a matter of law, TriMet did not anticipatorily repudiate its development agreement with developer Butler Block, LLC ("Butler Block") by refusing to agree to Butler Block's interpretation of the agreement's material adverse change provision (the "MAC Provision"). The dispute arose from a large real estate development contemplated for the Goose Hollow neighborhood of Portland. The parties signed the development agreement in November 2004 and, by fall 2007, had extended the closing date to February 2008.

In fall 2007, in the context of the economic meltdown, Butler Block notified TriMet that it was asserting its right to extend the closing date based on a contractual provision that included delays caused by "any other cause beyond the control . . . of the party claiming an extension of time . . . ." 242 Or. App. at 399. The development agreement required the notice to be given by the party asserting the delay within 30 days of learning of the cause of the delay. Butler Block noted that the condition of the financial markets in general, the combination of the escalating cost of construction, and the surplus of high rise condominium units in the Portland marketplace were all beyond its control. Butler Block interpreted the development agreement as providing a right to an extension of the closing date until such factors were resolved.

TriMet responded by agreeing to discuss an extension but contesting Butler Block's interpretation of the MAC Provision. Specifically, TriMet contended that the provision did not cover changed market conditions or terms of financing; TriMet also noted that the asserted circumstances did not occur within the previous thirty days. In the same response, TriMet requested that Butler Block provide various financial documents related to its ability to obtain construction financing. TriMet was entitled to receive the information under the terms of the development agreement and requested it be provided before the meeting to discuss the extension. When Butler Block did not provide the information before the meeting, TriMet issued a second request after the meeting, stating that it was "prepared to consider a request for an extension on receipt of the requested [financial] information . . . ." *Id.* at 401. TriMet also reiterated that Butler Block did not have a contractual right to the extension based on force majeure.

When Butler Block didn't provide the requested information, TriMet issued a thirty-day notice to cure or have the development agreement terminated. Meanwhile the parties continued negotiations regarding a "meaningful" extension. They agreed to interim extensions but couldn't agree on a long-term extension. Butler Block also provided to TriMet a description of its proposed capitalization and financing and the steps it had taken to arrange financing and offered to

make certain other financial records available for TriMet's review. Butler Block reiterated its commitment to complete the purchase and stated that it was ready to close escrow.

Butler Block did not provide audited or reviewed financial statements or other information demanded by TriMet. TriMet's chief financial officer reviewed the information submitted by Butler Block and determined that it was unsatisfactory. Consequently, TriMet filed an action for declaratory relief in U.S. District Court, seeking a determination that TriMet no longer had any obligations under the development agreement and was entitled to terminate the development agreement. A month later, Butler Block filed an action in state court, alleging that TriMet had breached the development agreement by anticipatorily repudiating it, and had breached its obligation of good faith and fair dealing. Although it suggested several theories to the trial court, on appeal Butler Block's argument was that TriMet had acted wrongfully in refusing to grant the extension under the MAC Provision. Butler Block argued that, as a matter of law, TriMet's refusal to grant an extension under the MAC Provision constituted anticipatory repudiation of the development agreement.

The appellate court held that it was unnecessary to decide whether TriMet was obligated to grant an extension under the force majeure clause, because its actions did not "positively, unconditionally, unequivocally, distinctly and absolutely" communicate that TriMet would refuse to perform its obligations under the development agreement. *Id.* at 410. The court noted that TriMet negotiated with Butler Block regarding an extension for months before seeking to terminate the development agreement based on Butler Block's failure to provide the requested financial information, which TriMet had made a condition of granting an extension. In that light, the appellate court affirmed the trial court's determination that, in explicitly rejecting Butler Block's interpretation of the MAC Provision, TriMet did not definitely, absolutely, unconditionally and unequivocally refuse to perform its obligations under the development agreement.

Tod Northman

Butler Block, LLC v. Tri-County Metropolitan Transp. Dist. of Oregon, 242 Or. App. 395, 255 P.3d 665 (2011)

■ *SEARCHING FOR A WORKABLE UGB PROCESS*

Within the urban growth boundary (UGB) expansion process, the "location" half of the equation has bedeviled the land use bar for the better part of two decades. Much local process has been rendered for naught. *See, e.g.*, *1000 Friends of Oregon v. City of North Plains*, 27 Or. LUBA 372 (1994) (negating that city's attempt to double its size); *D.S. Parklane v. Metro*, 35 Or. LUBA 516 (1999) (throwing out Metro's first attempt to designate urban reserves). In *1000 Friends of Oregon v. Land Conservation and Development Commission*, 244 Or. App. 239, 259 P.3d 1021 (2011), the Oregon Court of Appeals presents a serious attempt to find cogency within the governing statutes.

Pursuant to a long periodic review process, McMinnville planned its urban expansion around "neighborhood activity centers" that would facilitate relatively high development densities. Much of the expansion was designated for "prime agricultural land." 244 Or. App. at 248. Proposing UGB expansion onto resource land placed the city on the horns of a familiar legal dilemma. Adopted in the 1970s, Goal 14 (with some reference to the Goal 2 Exception rules) sets forth five factors that guide the location of any UGB expansion. ORS 197.298, passed in 1991, augmented the goal by setting forth a priority list by which land was to be included in the boundary. Resource areas sit at the bottom of that list, below urban reserves, exception land, and marginal land. The statute includes an exception process for its priority list. ORS 197.298(1) allows inclusion of resource land over available higher priority land only where the latter "is inadequate to accommodate the amount of land needed." Subsection (3) of the statute, meanwhile, sets forth the allowable bases for finding such inadequacy.

In this case, the court does not shy from identifying the dilemma. "So, which scheme ultimately controls the choice of where to expand a UGB—the flexible Goal 14 or the more rigid ORS 197.298?" *Id.* at 259. "Th[e] relationship between the overlapping policies in Goal 14 and ORS 197.298—that the policies are to be applied separately as well as together—creates, at the very least, some awkwardness in their application. . . ." *Id.* at 261. The court concludes its analysis with the sort of shorthand, bullet-point explanation that clients crave: "ORS 197.298 operates, in short, to identify land that ***could*** be added to the UGB to accommodate a needed type of land use. Thereafter, Goal 14 works to qualify land that, having been identified under ORS 197.298, ***should*** be added to the boundary. . . ." *Id.* at 265 (emphases in original). The analysis leading to this shorthand description, however, describes a process that seems arcane.

As to "candidate land" for UGB inclusion, the court asserts the Goal 14 analysis in ORS 197.298(1) is not confined "to the selection of land within a single priority class of lands . . . ." *Id.* at 262. Rather, the Goal 14 location factors are used for a "limited sorting . . . that leaves land available for the potential application of 197.298(3). . . ." *Id.* As to the court's application of Goal 14 factors in ORS 197.298(1), the immediate question is "what sorting and how limited?" The court answers this quite directly. Inadequacy of higher priority land to meet the identified land need is determined with reference only to those factors other than unavailability of public facilities and services and land use efficiency. The court refers to

the factors applicable at the subsection (1) stage of ORS 197.298 as the "consequences and compatibility factors . . . ." *Id.* at 265. A city may not factor in the cost of extending infrastructure as part of its subsection (1) analysis of land adequacy. In the instant case, the court found that the city had improperly "resort[ed] to lower-priority land because of the relatively higher costs of providing a particular public facility or service to the higher-priority area." *Id.* Accordingly, it reversed the Land Conservation and Development's acknowledgement of the city's decision.

At its core, a decision to expand a UGB requires a massive alternative-sites analysis, *i.e.*, evidence disproving the ability of sites other than the subject site to accommodate the identified land need. The rub, in turn, in any such analysis has always been how narrowly one may define the type of land needed. Regardless of how accurately it interpreted the applicable law, whether the court here has set forth a process more workable than what we have tried before remains to be seen.

Ty K. Wyman

1000 Friends of Oregon v. Land Conservation and Dev. Comm'n, 244 Or. App. 239, 259 P.3d 1021 (2011)

Appellate Cases -- Washington

■ WASHINGTON APPELLATE COURT UPHOLDS CITY OF VANCOUVER RIPARIAN PERMITS

Julian v. City of Vancouver, 161 Wash. App. 614, 255 P.3d 763 (2011), involved a "short plat" land division of a one-acre parcel into four lots. The land was in a riparian zone designation, which fixed additional development requirements but allowed for some relief if the remaining water body was "completely functionally isolated," as required by Vancouver Municipal Code section 20.740.110. Petitioner-neighbors Julian and Brooks (collectively, "Julian") filed a trial court proceeding under Washington's Land Use Petition Act ("LUPA") but the trial court denied relief. Julian appealed, but only on the issue of whether the "completely functionally isolated" test had been met.

The court commenced its analysis by stating it reviewed the account of the city's hearings examiner decision as if standing in the shoes of the trial court. Alleged errors of law are reviewed on a de novo basis and challenges to the factual support for the local decision are reviewed for substantial evidence. Julian 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. Julian's principal contention was that a 2005 version of the riparian ordinance applied, which would have limited certain riparian development. The court agreed with the hearings examiner that a 2007 version of the ordinance applied, finding that the Washington doctrine of "vesting" applies to land divisions, so that a fully completed development application would "vest" the proposed development 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 have some limited-area function. However, the hearings examiner found that these were small and physically isolated from other riparian areas, which were distinguished from still other 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. . . .

161 Wash. App. at 630, 255 P.3d at 772. 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 some issues were not covered by the attorney fees statute. Because the applicant received approval of their short plat application and survived two appeals, the applicant is entitled to attorney fees as having "substantially prevailed" under the statute even though the Hearings Examiner imposed additional conditions on the same (which the applicant 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 that 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, 255 P.3d 763 (2011)

■ FINAL DECISION IN LAND USE MATTER NOT RENDERED UNTIL DECISION ON LOCAL MOTION FOR RECONSIDERATION ISSUES

In *Mellish v. Frog Mountain Pet Care*, 172 Wash. 2d 208, 257 P.3d 641 (2011), the Washington Supreme Court considered whether a local motion for reconsideration of a final land use decision tolled the twenty-one-day period to file a petition for review under LUPA. The Jefferson County hearings examiner issued his original decision on June 18, 2007, which approved a conditional use permit and variance to expand Frog Mountain, a dog and cat boarding facility. As permitted by the local code, Mellish, an opponent, filed a motion for reconsideration of the hearings examiner's decision without providing notice to the applicant. On July 20th, the hearings examiner denied Mellish's motion and again approved the application.

On August 10, Mellish filed a land use petition in the Clallam County Superior Court pursuant to the Land Use Petition Act (LUPA), chapter 36.70C Revised Code of Washington (RCW). This filing occurred twenty days after the county mailed notice of the hearing examiner's decision denying his motion for reconsideration, and fifty days after entry of the hearing examiner's original decision granting Frog Mountain's application. Frog Mountain then moved to dismiss the land use petition as untimely, asserting that the twenty-one-day time limit on filing the petition ran from the date of the hearings examiner's original decision. Frog Mountain's appeal to the state supreme court assigned error only to the court of appeals' denial of its motion to dismiss.

The court considered whether the examiner's decision on reconsideration was a "final determination." The court recognized the case is governed by LUPA, which favors timely judicial review. LUPA defines a land use decision as "a final determination by a local jurisdiction's body or officer with the highest level authority to make the determination." RCW 36.70C.020(2). The court held that the decision on the motion for reconsideration was a final determination because prior to that decision there was a dispute whether the hearings examiner should or could reconsider its decision. Thus, upon Mellish's filing his motion for reconsideration, Frog Mountain's entitlement to the permit was once again open to dispute.

Further, the court relied on LUPA's standing provision to conclude that the motion for reconsideration tolled the time to file a petition for review because a party does not have standing to seek judicial review until all administrative remedies are exhausted. Although Mellish had the option to file for reconsideration before he had filed in court, LUPA supports local jurisdiction over land use matters. Therefore, Mellish did not lose his opportunity to seek judicial review by virtue of first seeking a local remedy.

As a result of the facts of this case, in 2010 the legislature passed House Bill 2740. The bill changed the definition of "land use decision" in RCW 36.70C.020(2)(c) and now includes this proviso:

> Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

This legislation answers the question raised in ***Mellish*** for future decisions. Nonetheless, the due process question of whether local codes allowing motions for reconsideration should also require notice of such motion to the applicant will be saved for another day because Frog Mountain did not preserve this argument on appeal.

Jennifer Bragar

Mellish v. Frog Mountain Pet Care, 172 Wash. 2d 208, 257 P.3d 641 (2011)

■ HOW NOT TO "ISSUE" A LAND USE DECISION IN WASHINGTON

In *Vogel v. City of Richland*, 161 Wash. App. 770, 255 P.3d 805 (2011), the Vogels appealed the trial court's dismissal of their petition under the Land Use Petition Act (LUPA) as untimely under LUPA's 21-day time period for appeal. Division III of the Washington Court of Appeals reversed the dismissal because the decision had not been "issued" and remanded the case for further proceedings.

The Vogels reside in the Crested Hills development in the city of Richland. As part of the preliminary plat of the development, Meadow Hills Drive was classified as a local city street in 2001 and additionally was identified as a route that in the future would alleviate traffic volumes on Morency Drive, where the couple lives. Because he wanted this reduction in traffic volumes, Mr. Vogel became concerned when he noticed construction of a retaining wall on Meadow Hills Drive and subsequently discovered that the developer of Crested Hills, Bauder, had received verbal approval in February 2008 to construct 1,100 feet of Meadow Hills Drive as a private street that would be gated at both ends.

When residents (including the Vogels) attended a city council meeting on June 10, 2008 to express their concerns, the city issued a memorandum that generally stated Bauder's request and that the city was reviewing the construction plans and would approve the request after it verified the plans were consistent with the city's development standards. On June 17, a second memorandum supported the city staff's decision that the request was only a minor amendment to the plat, not a major one. On July 9 the city's public works department approved a request to construct the access as a gated private road, and on July 10th the city council signed a construction permit showing Meadow Hills Drive as a private street.

The Vogels filed a LUPA petition on July 29 challenging the reclassification of the street from public to private. The superior court dismissed the petition as untimely under LUPA's 21-day period, finding the roadway reclassification was issued on June 10 when it became known to the Vogels and made public via memorandum.

LUPA is the exclusive means of judicial review of land use decisions of local jurisdictions, and the classification issue at hand falls within its scope. ***Chelan County v. Nykreim***, 52 P.3d 1 (Wash. 2002). There is a strict 21-day statute of limitations that accrues when the land use decision is issued. RCW 36.70C.040(3). In order to be "issued," a decision must be the final resolution of the local jurisdiction and memorialized in the public record. By the court's definition, a final determination is "one which leaves nothing open to further dispute and which sets at rest cause of action between parties." 255 P.3d at 808. ***See, e.g., Samuel's Furniture, Inc. v. State, Department of Ecology***, 54 P.3d 1194 (Wash. 2002), amended by 63 P.3d 764 (Wash. 2002). In this case, some type of decision was referenced in the public record on June 10th, yet the court of appeals found that non-final terms of the memorandum, combined with the lack of tangible and accessible terms of the agreement, did not constitute issuance of a decision. The court concluded the earliest a final decision challengeable under LUPA was issued was on July 10th when the council signed the right-of-way permit. As a result, the court considered the Vogels' petition timely under LUPA and reversed the trial court's dismissal of the petition. With this determination, the Vogels' petition was considered timely under LUPA and the dismissal was reversed.

Erika Hauser

Vogel v. City of Richland, 161 Wash. App. 770, 255 P.3d 805 (2011)

■ *LOCAL FIRE DEPARTMENT EXTINGUISHES NEW DEVELOPMENT PLANS IN WASHINGTON*

In *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wash.2d 421, 256 P.3d 295 (2011), the Washington Supreme Court granted the fire district's petition for review under the Land Use Petition Act (LUPA), Chapter 36.70C Revised Code of Washington (RCW), and reversed the county's approval of three land use applications for developments in the Birch Bay Urban Growth Area. The court found that the county had assigned responsibility for assessing the adequacy of fire protection services to the fire district, and that the fire district's objections were therefore essential elements in the land use review process.

This controversy involves Whatcom County's approval of three development applications over the "concurrency" objections of the fire district. (As the court explained, "'Concurrency' is the concept that an adequate level of service should be available concurrently with the impacts of the development or within a reasonable time thereafter." 171 Wash.2d at 427, 256 P.3d at 298 (internal quotation marks and citations omitted).) The county's code precluded approval of any subdivision, commercial development or conditional use in the absence of a letter from certain service providers, including those providing fire protection, "that adequate capacity exists or arrangements have been made to provide adequate services for the development." During the land use review process, the fire district refused to issue letters for the developments to indicate adequate capacity of fire protection services. Despite this refusal, the county hearing examiner recommended approval of the applications based on his hypothesis that the fire district "more likely than not" would be able to provide adequate services to the developments, a recommendation that was adopted by the county council. The hearing examiner also found that any concurrency authority that might lie in the district had essentially been waived or otherwise performed in the comprehensive plan's finding that property tax revenues would be sufficient to maintain services during the county's growth.

In order to set aside a land use decision under Washington law, the party seeking relief must establish one of the standards set forth in RCW 36.70C.130(1). In the present case, the fire district demonstrated that "[t]he land use decision

is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise . . . ." RCW 36.70C.130(1)(b). An application satisfies the condition of being "clearly erroneous" when the reviewing court determines that a mistake has been committed. *Norway Hill Preservation & Protection Association v. King County Council*, 87 Wash.2d 267, 552 P.2d 674 (1976).

The Washington Growth Management Act (GMA), Chapter 36.70A RCW, requires planning cities and counties to craft a comprehensive plan supported by implementing development regulations. In the GMA scheme, the comprehensive plan serves as a type of blueprint that is used to guide land use decisions and resolve land use controversies. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 947 P.2d 1208 (1997). Here, the county's comprehensive plan did establish a desired level of service for fire protection and identified property taxes as funding sources in its capital facilities financing plan. Yet, the plan did not specifically account for all capital facilities financing needs, and as such, the Court held that, "[a]bsent provision for necessary funding, the comprehensive plan cannot be considered determinative of the availability of fire protection services."

The court also recognized that Whatcom County regulations make obtaining fire protection services concurrency a land use prerequisite. By the plain language of the Whatcom County code, approval of developments is prohibited without a letter from the fire district assuring adequate capacity. This concurrency regulation is based on the idea that adequate levels of service should "be available concurrently with the impacts of the development or within a reasonable time thereafter," an idea that is a cornerstone of Growth Management Acts. *See, e.g.*, Thomas M. Walsh & Roger A. Pearce, *The Concurrency Requirement of the Washington State Growth Management Act*, 16 U. Puget Sound L. Rev. 1025, 1026 (1993). Although it was raised by the fire district, the court did not decide whether the Washington Subdivision Act, Chapter 58.17 RCW also requires a concurrency finding.

Concurrency regulations are often reserved for transportation services (which is required in the GMA). However, in adopting WCC 20.80.212, Whatcom County has incorporated a concurrency requirement for water, sewage disposal, schools, and for fire protection services, thus expanding requirements for growth and development. At least as to fire services, the county code vests public service providers with the authority to determine whether to allow growth. Having established this authority, the court found that the fire district's refusal to issue approval letters ended the development application and that any decision of the county to the contrary was clear error.

Erika Hauser

Whatcom County Fire District No. 21 v. Whatcom County, 171 Wash.2d 421, 256 P.3d 295 (Wash. 2011)

Land Use Board of Appeals

■ GOAL 14

In *Hawskworth v. City of Roseburg*, ___ Or. LUBA ___, LUBA No. 2011-033 (Sept. 26, 2011), LUBA reaffirmed the principle that a city's interrelated urban growth boundary (UGB) and comprehensive plan map amendments must be based on population projections and a buildable land inventory (BLI) that first have been adopted as part of a comprehensive plan. Petitioner appealed the city's decision adding 4.45 acres to its UGB and designating it for low-density residential use under its comprehensive plan. The city based its decision on a draft Douglas County comprehensive plan amendment that contains updated population figures and a draft BLI for the city's UGB that is based on the revised population projections. The city adopted neither draft as part of its comprehensive plan before approving the challenged UGB expansion. The city attempted to justify its decision in part based on data supporting a previous 1982 UGB expansion, arguing little had changed since that expansion. However, LUBA concluded the findings indicated the city relied in significant part on the unadopted draft population update and draft BLI in violation of Statewide Planning Goal 14 and its implementing rules. Based on this error, LUBA remanded the decision to the city.

■ LUBA JURISDICTION

The jurisdictional question presented in *Devereux v. Douglas County*, 2011 Or. LUBA 059, LUBA No. 2011-059 (Sept. 29, 2011), is whether the county's approval of an outdoor concert under the county's definition of "outdoor gathering" is exempt from LUBA review under ORS 197.015(10)(d). That statute excludes from the definition of "land use decision" the "authorization of an outdoor mass gathering, as defined in ORS 433.735 . . . ." Subsection (1) of the statute states that "***unless otherwise defined by county ordinance***," the term "outdoor mass gathering" means "an actual or reasonably

anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure" (emphasis added). The jurisdictional question turns on whether the phraseology of ORS 433.735(1) ("unless otherwise defined by county ordinance") incorporates a separate—and more expansive—county definition of "outdoor gathering" into the exemption from LUBA's review jurisdiction.

Acknowledging some ambiguity in both ORS 197.015(10)(d) and ORS 433.735(1), LUBA concluded the relevant statutory scheme and applicable legislative history indicate the LUBA review exemption includes outdoor gatherings as defined by the county. The statutes governing these gatherings, ORS 433.767, explicitly state that outdoor mass gatherings defined by county ordinance are subject to the same procedures as those governing outdoor mass gatherings as defined in ORS 433.735(1). These procedures give the circuit court exclusive jurisdiction to review a county decision on a mass gathering application. Additionally, the legislative history of the LUBA review exemption indicates "the legislature understood and intended that county-defined gatherings be treated as a subspecies of 'outdoor mass gatherings as defined in ORS 433.735,' subject to the same regulatory and jurisdictional consequences." LUBA No. 2011-059, slip op. at 9. For these reasons and in the absence of a motion to transfer, LUBA concluded it lacked jurisdiction to review the county's decision and dismissed the appeal.

■ *REVIEW OF LOCAL ORDINANCE INTERPRETATIONS*

In ***Keep Keizer Livable v. City of Keizer***, 2011 Or. LUBA 041, LUBA No. 2011-043 (Aug. 19, 2011), petitioners challenged the city's approval of a master plan for one part (Area C) of a larger mixed-use development known as Keizer Station. The development proposed within Area C included a 116,000-square-foot, large-format store as well as non-retail and multi-family uses. Under the city's code, the intervenor-developer was required to provide an additional amount of mixed-use development in order to exceed the otherwise applicable 80,000-square-foot size limitation for large-format retail stores. To ensure the mixed-use development is actually built, a "concurrency" requirement in the city's code states the mixed-use development must "be constructed before or concurrently with the Large Format Store."

The city approved the proposed development in Area C subject to a condition (Condition 57) that requires the intervenor to begin construction of the mixed-use development and complete foundation work before the certificate of occupancy is issued for the large-format store. It did not require actual completion of the mixed-use development before occupancy is approved for the store. In findings supporting its decision, the city council explained the concurrency requirement could be satisfied by either building the mixed-use development before the store was completed or by building the mixed-use development at the same time as the proposed large-format store. The council adopted the later interpretation, reasoning the code does not require identical development timetables for both types of development.

The primary issue raised at LUBA concerned the city's interpretation of the concurrency requirement. Petitioners argued the council misinterpreted the code by failing to require the mixed-use development to be completed before occupancy of the large-format store could be approved. In a grammatical tour de force, LUBA analyzed the city council's interpretation of various text fragments, prepositions, compound prepositional phrases, the verb "construct," and the grammatical structure of the concurrency requirement. Applying the standard for reviewing local ordinance interpretations the Oregon Supreme Court clarified in *Siporen v. City of Medford*, 349 Or. 247, 243 P.3d 776 (2010), LUBA ultimately agreed with the petitioners, concluding: "the only plausible interpretation of the whole text of KDC 2.107.05(d)(3), with its key words given their plain and ordinary meaning, is that the required mixed use development must be 'constructed' (made into a composite whole) before or at the same time the Large Format Store is constructed (made into a composite whole)." LUBA No. 2011-043, slip op. at 9. As petitioners contended, LUBA found Condition 57 is inconsistent with the language and purpose of the concurrency requirement because it provides no assurance the approved mixed-use development will ever be completed. Since both the council's decision and Condition 57 allow the result the concurrency requirement is designed to prevent, LUBA remanded the decision.

In a concurring opinion, Board Member Holstun disagreed with the majority that the city's code requires the large-format store and mixed-use development to be completed at the same time. Noting the complicated nature of large construction projects and the potential uncertainty about the actual completion date for construction of such projects, he expressed skepticism that the city's code requires "construction of the mixed use development must be completed on the same day, week, or even the same month as the completion date of the Large Format Store." *Id.*, slip op. at 16. However, he agreed with the majority that, at a minimum, the code requires the mixed-use development to be finished before occupancy of the store may be approved and the city's decision does not assure that result.

■ TAKINGS

In *Tonquin Holdings, LLC, v. Clackamas County*, 2011 Or. LUBA ___, LUBA Nos. 2011-025/2011-026 (Aug. 26, 2011), LUBA concluded the county erred by failing to apply the rough proportionality analysis articulated in *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), to its exaction of a conservation easement and imposition of mining prohibitions on the petitioner's property. The county approved petitioner's conditional use application to establish a new surface mining aggregate operation on its 35.5-acre property subject to conditions of approval. Two of the conditions prohibited petitioner from mining portions of wetlands on its property, known as Wetlands B and C, and required petitioner to grant a conservation easement over all unmined wetlands to the Surface Water Management Agency of Clackamas County (SWMACC).

On appeal to LUBA, petitioner argued the conditions applied to Wetland C violated the Fifth Amendment of the United States Constitution because they constituted an unconstitutional exaction of its property without payment of just compensation. Under the United States Supreme Court's decision in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), and the Oregon Supreme Court's decision in *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or. 58, 81, 240 P.3d 29 (2010), a condition exacting a property interest that otherwise would be considered a *per se* physical taking may be imposed only if it satisfies *Dolan's* rough proportionality analysis. Applying that test here, LUBA ruled the condition requiring petitioner to grant an uncompensated conservation easement to SWMACC would constitute a *per se* physical taking outside of the exaction context because it transfers some of petitioner's property rights to SWMACC and makes Wetland C part of SWMACC's surface water management system. The hearings officer made no rough proportionality findings to support the conditions and LUBA remanded the decision with directions that the county must demonstrate "the exaction of the easement for Wetland C is roughly proportional to the effect of the proposed development." LUBA Nos. 2011-025/2011-026, slip op. at 22.

Kathryn S. Beaumont

OSB Legislative Summaries

Editor's Note: Below are summaries of real estate and land use legislation passed in 2011 by the Oregon Legislative Assembly. The Real Estate and Land Use Section thanks the Oregon State Bar and the authors for granting permission to reprint these summaries, which are also published in *2011 Oregon Legislation Highlights* (OSB CLE 2011). If you are interested in purchasing this book, please call the Bar at (503) 620-0222 or visit www.osbar.org.

■ LAND USE

I. GENERAL PROVISIONS

A.	HB 2129	(Ch. 280)	Procedure for Post-Acknowledgment Change to Local Land Use Plans
B.	HB 2130	(Ch. 469)	Periodic Review
C.	HB 2131	(Ch. 354)	Needed Housing Criteria
D.	HB 2132	(Ch. 144)	Transfer of Development Rights Pilot Projects
E.	HB 2688	(Ch. 150)	Local Government Land Reserve Designations
F.	HB 3166	(Ch. 483)	Ultimate Repose for Appeal to the Land Use Board of Appeals
G.	HB 3620	(Ch. 612)	Ballot Measure 49 Amendments
H.	SB 48	(Ch. 26)	Boundary Changes of Special Districts
I.	SB 535	(Ch. 87)	Armories
J.	SB 639	(Ch. 562)	Outdoor Advertising Signs
K.	SB 640	(Ch. 135)	Division of Land for Fire Service Facilities
L.	SB 766	(Ch. 564)	Siting of Industrial Uses
M.	SB 795	(Ch. 432)	Transportation Planning

II. SPECIAL USES OF LAND

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B.	HB 3280	(Ch. 679)	Winery and Winery Sales and Services in EFU Zone
C.	HB 3465	(Ch. 686)	Guest Ranches
D.	HB 3572	(Ch. 404)	Small Scale Recreation Facilities
E.	SB 960	(Ch. 567)	Events on EFU Land

III. REMOVAL AND FILL PROVISIONS

A.	HB 2189	(Ch. 16)	Exemptions from Certain Removal or Fill Permitting Requirements
B.	HB 2700	(Ch. 370)	Removal and Fill Permit

Unless otherwise noted, all bills take effect on January 1, 2012.

I. GENERAL PROVISIONS

A. HB 2129 (Ch. 280) Procedure for Post-Acknowledgment Change to Local Land Use Plans

HB 2129 modifies the process for a local government to make post-acknowledgment changes to comprehensive plans and land use regulations by amending ORS 197.610.

HB 2129 §1 shortens from 45 days to no earlier than 35 or later than 20 days the notice required to be sent to the Department of Land Conservation and Development prior to the initial hearing on the adoption of a change to an acknowledged comprehensive plan or a land use regulation. This section also allows the local government to submit the notice to DLCD after the deadline if the local government determines that an emergency circumstance exists. DLCD can then provide notice of the proposed change to interested persons via electronic mail, electronic bulletin board, electronic mailing list server or similar electronic method.

HB 2129 §2 amends ORS 197.615 to require a local government to provide notice of the adopted change to DLCD within 20 days of the decision.

HB 2129 §3 amends ORS 197.620 to prohibit DLCD from appealing a local government's decision on the grounds that the local government failed to timely submit its materials to DLCD if the local government cures the untimely submission. The local government may cure by "postponing the date for the final evidentiary hearing by the greater of 10 days or the number of days by which the submission was late"; or "holding the evidentiary record open for an additional period of time equal to 10 days or the number of days by which the submission was late, whichever is greater."

HB 2129 §4 amends ORS 197.625 to clarify that a local decision to adopt a change to an acknowledged comprehensive plan or land use regulation is deemed acknowledged if the local government complies with all the requirements for notice to DLCD and either 21 days have passed and no appeal has been filed or LUBA has affirmed the local government's decision. This section also clarifies that the local government must apply an effective change prior to acknowledgement if the local government adopts findings of compliance with land use statutes, statewide land use planning goals and administrative rules. If the change fails to gain acknowledgement, the effective change "does not justify retention of the improvements that were authorized by the permit or zone change."

B. HB 2130 (Ch. 469) Periodic Review

HB 2130 §1 modifies provisions regulating periodic review of comprehensive plans and regional framework plans. The bill modifies provisions regulating judicial review of orders of Land Conservation and Development Commission.

The following must be submitted to LCDC in accordance with periodic review:

1. Expansion of an urban growth boundary (UGB) of 100 acres or more by a Metropolitan Service District (MSD);
2. Expansion of a UGB of 50 acres or more for a city of a population of 2500 or more;
3. Expansion of urban reserves by a city of a population of 2500 or more or by an MSD;
4. Expansion of rural reserves by a county in cooperation with an MSD.

LCDC must adopt rules for review of those decisions. The standards of review are to be essentially the same as for LUBA.

(a) For evidentiary issues, the standard is whether there is substantial evidence in record as a whole to support the local government's decision.

(b) For procedural issues, the standard is whether the local government failed to follow the procedures applicable to the matter before the local government in a manner that prejudiced the substantial rights of a party to the proceeding.

(c) For issues concerning compliance with applicable laws, the standard is whether the local government's decision on the whole complies with applicable statutes, statewide land use planning goals, administrative rules, the comprehensive plan, the regional framework plan, the functional plan and land use regulations.

LCDC must give deference to the local government's interpretation of its own comprehensive plan or land use regulations. This bill was deemed an emergency and took effect on June 23, 2011.

C. HB 2131 (Ch. 354) Needed Housing Criteria

HB 2131 adds farmworker housing to the definition of "needed housing" in ORS 197.303. The bill also allows a local government to adopt alternative standards for appearance or aesthetics of needed housing, that are not clear and objective, under certain conditions. The bill includes other reorganization and clarification provisions.

D. HB 2132 (Ch. 144) Transfer of Development Rights Pilot Projects

In the late 1990's, the state adopted a statute allowing for the transfer of development rights (TDRs). In 2010, the legislature amended the transferable development credit statute to create pilot projects to protect lands "planned and zoned for forest use". HB 2132 added resort communities, rural service centers and areas adjacent to urban unincorporated communities as eligible for TDRs. This bill also prescribes the density of dwellings allowed depending on the level of priority for the land.

This bill was deemed an emergency and took effect on May 27, 2011.

E. HB 2688 (Ch. 150) Local Government Land Reserve Designations

HB 2688 adds ORS 197.626 to the list of statutes to which a local government must adhere to designate urban reserves. This bill was enacted in order to correct a statutory reference that was inadvertently not updated when ORS 197.626 was enacted.

F. HB 3166 (Ch. 483) Ultimate Repose for Appeal to the Land Use Board of Appeals

HB 3166 establishes statutory limit of 10 years after the date of a decision for a person to file a request with Land Use Board of Appeals for review of a land use decision or limited land use decision in cases where the local government failed to provide the required notice, or failed to give notice to the surrounding area and state agencies.

This bill was deemed an emergency and took effect on June 23, 2011.

G. HB 3620 (Ch. 612) Ballot Measure 49 Amendments

HB 3620 allows a person to file a request for reconsideration of a claim under Ballot Measure 49 (2007) if a person's date of acquisition of the property was affected by a conveyance of the property and the person reacquired the property within 10 days after the conveyance. This bill will affect a very limited number of owners who conveyed the property to a third party to correct a defect in the title.

H. SB 48 (Ch. 26) Boundary Changes of Special Districts

SB 48 limits the types of special districts within a metropolitan service district over which the metropolitan service district exercises jurisdiction for boundary changes. That jurisdiction is limited to:

a. Domestic water supply districts organized under ORS chapter 264
b. Park and recreation districts organized under ORS 266
c. Metropolitan service districts organized under ORS chapter 268
d. Sanitary districts organized under ORS 450.005 to 450.245
e. Sanitary authorities, water authorities or joint water and sanitary authorities organized under ORS 450.600 to 450.989
f. Districts formed under ORS 451.410 to 451.610 to provide water or sanitary service.

I. SB 535 (Ch. 87) Armories

Current law limiting the construction of armories makes reference to "cities" that do not already have an armory. SB 535 eliminates the reference to "cities" and provides that armories may be constructed anywhere there is not already an armory, or anywhere where existing armories are deemed "inadequate". The bill is intended to provide additional flexibility for armories to be built in locations where they are needed.

The bill was deemed an emergency and took effect on May 19, 2011.

J. SB 639 (Ch. 562) Outdoor Advertising Signs

SB 630 provides a definition for digital billboards and specifies that digital billboards meeting certain criteria are exempt from normal prohibitions on illuminated signs along interstate and state highways.

This bill took effect on September 29, 2011.

K. SB 640 (Ch. 135) Division of Land for Fire Service Facilities

Notwithstanding the minimum lot or parcel size described in ORS 215.780 (1) or (2), SB 640 allows the governing body of a county or its designee to approve a proposed division of land in an exclusive farm use zone for the nonfarm uses set out in ORS 215.213 (1)(v) or 215.283 (1)(s) for fire service facilities providing rural fire protection services if it finds that the parcel for the nonfarm use is not larger than the minimum size necessary for the use. The governing body may establish other criteria as it considers necessary.

This bill was deemed an emergency and took effect May 24, 2011.

L. SB 766 (Ch. 564) Siting of Industrial Uses

SB 766 requires designation of at least five and not more than 15 regionally significant industrial areas. The bill also allows for the expedited permitting of industrial uses in regionally significant industrial areas. To approve these sites, the bill establishes and funds the Economic Recovery Review Council. The council is authorized to perform expedited site reviews for proposed industrial development projects that have state significance. The council, its funding and its authority for expedited site reviews of these proposed industrial development projects sunset on January 2 of first even-numbered year after notification that annual average unemployment rate for most recent calendar year in Oregon is less than six percent.

This bill was deemed an emergency and took effect June 28, 2011.

M. SB 795 (Ch. 432) Transportation Planning

SB 795 requires the Land Conservation and Development Commission to adopt revisions to the transportation planning rule, Statewide Planning Goal 12, on or before January 1, 2012. The revisions are for purposes of streamlining, simplifying and clarifying certain aspects of rule. The bill likewise requires the Oregon Transportation Commission to adopt revisions to Oregon Highway Plan for purposes of streamlining, simplifying and clarifying certain aspects of plan before January 1, 2012. The purpose of the review of the rules is "to better balance economic development and the efficiency of urban development with consideration of development of the transportation infrastructure in consultation with local governments and transportation and economic development stakeholders." Both commissions are to report to the Legislative Assembly on actions taken before February 1, 2012.

This bill was deemed an emergency and took effect June 17, 2011.

II. SPECIAL USES OF LAND

A. HB 3225 (Ch. 726) Establishment of Transportation Facilities in Urban Reserves

HB 3225 authorizes a county to take an exception to a statewide planning goal to allow the establishment of a transportation facility in an area designated as an urban reserve.

This bill took effect on August 5, 2011.

B. HB 3280 (Ch. 679) Winery and Winery Sales and Services in EFU Zone

In the 2010 special session, the legislature adopted SB 1055. That bill allowed wineries as a use permitted outright in the Exclusive Farm Use zone when certain conditions are established. It also allowed the wineries to have up to 25 private events so long as the gross income from the events and the sale of incidental items did not exceed 25 percent of the total gross income from the on-site retail sale of wine produced in conjunction with the winery.

HB 3280 expands the types of activities allowed at wineries to include marketing and selling wine produced in conjunction with the winery, including the following activities: (A) Wine tours; (B) Wine tastings in the tasting room or other locations at the winery; (C) Wine clubs; and (D) Similar activities conducted for the primary purpose of promoting wine produced in conjunction with the winery. HB 3280 also allows outdoor concerts in addition to the private events allowed under SB 1055 in the 2010 session.

This bill was deemed an emergency and took effect on August 2, 2011.

C. HB 3465 (Ch. 686) Guest Ranches

HB 3465 authorizes the expansion of existing guest ranches to include 575 units of overnight accommodations and commercial uses at a specific site in Grant County. HB 3465 also exempts this new development from statutes relating to

guest ranches and other specified land use and land division statutes, statewide land use planning goals and provisions of Grant County's acknowledged comprehensive plan and use regulations.

This bill was deemed an emergency and took effect on August 2, 2011.

D. HB 3572 (Ch. 404) Small Scale Recreation Facilities

HB 3572 changes the time frame within which the owner of the Metolius resort site may apply to the county to develop a small-scale recreation community. It allows the owner of the site until June 29, 2015 to make the application. HB 3572 also sets June 29, 2009 as the date for the application of seasonally adjusted unemployment rate for the county as a basis for application for the small scale recreation community.

E. SB 960 (Ch. 567) Events on EFU Land

SB 960 creates processes by which a county may conditionally approve agri-tourism and other commercial events or activities related to and supportive of agriculture in areas zoned for exclusive farm use, including areas designated as rural reserves or as urban reserves. A county can authorize agri-tourism or other commercial events so long as the event is incidental and subordinate to an existing farm use. The event permits fall into three categories.

A county can authorize a single event that does not exceed 500 people and meets other criteria. The permit is personal to the applicant and is non-transferable. The permit can be expedited and will not be a land use decision if the event does not exceed 100 people and meets other criteria.

A county can authorize up to six events per year so long as it meets certain criteria, including any additional county standards. The permit is personal to the applicant and is non-transferable. The permit is issued for up two calendar years.

A county can authorize up to 18 events per year for events that occur on a lot or parcel that complies with the acknowledged minimum lot or parcel size. The holder of such a permit must request a review of the permit every four years, and the county must provide a public notice and comment period.

This bill was deemed an emergency and took effect June 17, 2011.

III. REMOVAL AND FILL PROVISIONS

A. HB 2189 (Ch. 16) Exemptions from Certain Removal or Fill Permitting Requirements

ORS 196.795 to 196.990 require people who plan to remove or fill material in waters of the state to obtain a permit from the Department of State Lands. This bill allows authorized water users to change the point of water diversion of surface waters without obtaining a permit. The exemption applies if the person has a valid water right from the Water Resources Department and if changing the point of water diversion is necessary to adjust for movement of the waterway.

For additional information, please refer to the Energy and Environment Chapter, Section III.

B. HB 2700 (Ch. 370) Removal and Fill Permit

HB 2700 allows a person who proposes removal or fill activity for construction or maintenance of a linear facility to apply for a removal or fill permit but restricts the use of the permit. An applicant for a railway, highway, road, pipeline, water or sewer line, communication line, overhead or underground electrical transmission or distribution line or similar facility may not be issued a fill or removal permit if the applicant is not the landowner unless the applicant obtains landowner consent, an interest in the property or a court order. This bill was deemed an emergency and took effect on June 16, 2011.

For additional information, please refer to the Energy and Environment Chapter, Section III.

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■ *REAL PROPERTY*

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Unless otherwise noted, all bills take effect on January 1, 2012.

I. PROPERTY TRANSFER AND REAL ESTATE ACTIVITY

A. HB 2499 (Ch. 447) Appraisal Management Companies

Appraisal management companies are companies that oversee appraisal panels of more than 15 appraisers in Oregon and at least 25 appraisers in the United States, and that recruit, select, contract with and manage appraisers. An appraisal management company does not include an entity that employs real estate appraisers exclusively as employees.

HB 2499 shifts appraisal management companies from the jurisdiction of the Department of Consumer and Business Services to the Appraiser Certification and Licensure Board. Rules of the Department of Consumer and Business Services continue in effect until superseded or repealed by the rules of the Board.

The bill imposes additional prohibitions on appraisal management companies in their dealings with appraisers. A company cannot require an appraiser to indemnify the appraisal management company against liability or damages that do not arise out of the services performed by the appraiser, nor can a company prohibit an appraiser from reporting its fee in the appraisal report. If an employee of an appraisal management company has reason to believe that an appraiser is failing to comply with the Uniform Standards of Professional Appraisal Practice, is violating the law or is otherwise engaging in unethical or unprofessional conduct, the employee must notify the Board if the appraiser's conduct is likely to have a material effect on the value assigned to the real estate being appraised.

House Bill 2546 took effect on June 21, 2011, but some of the provisions of the bill do not become operative until January 1, 2012.

For additional information, please refer to the Commerical, Consumer and Landlord-Tenant Law Chapter, Section VI.

B. HB 2916 (Ch. 480) Short Sales – Option to Borrower

This bill prohibits lenders or their assignees from bringing an action or otherwise seeking payment for residual debt following a short sale if the lender reports to the Internal Revenue Service that, for specified reasons, the lender has canceled all or a portion of the borrower's debt under the real estate loan agreement and if the lender provides the borrower with written evidence of the report. The bill should eliminate uncertainty by preventing further collection on deficiencies when a 1099-C is issued in connection with a short sale of residential property. The lender or its assignee may not bring an action or otherwise seek payment for the residual debt following the short sale if lender has reported the cancelled debt to the IRS.

Under the bill, "residential real property" means real property upon which is situated four or fewer improvements designed for residential use, one of which a borrower occupies as the borrower's residence. "Short sale" means a sale of residential property that is subject to foreclosure under ORS 86.705 to 86.795 or ORS Chapter 88 for an amount that is less than the remaining amount due on the loan that the residential property secures.

HB 2916 took effect on June 23, 2011.

For additional information, please refer to the Commercial, Consumer, and Landlord-Tenant Law Chapter, Section II.

C. HB 3195 (Ch. 386) Electronic Signature Recordings

This bill resolves an uncertainty between the Uniform Electronic Transactions Act (ORS Chapter 84) and ORS 93.804 which requires original signatures on documents to be presented to the County Clerk for recording. This uncertainty has precluded electronic recording of documents in Oregon. The statutory change permits electronic recording.

The change requires certification by the person submitting electronic documents that the submission contains an original signature. In addition, the change validates any previously submitted electronically recorded documents.

HB 3195 took effect on June 16, 2011.

D. SB 485 (Ch. 557) Engaging in Professional Real Estate Activity Without a License

Senate Bill 485 grants additional authority to the Real Estate Agency to enforce the statutory restraint on engaging in professional real estate activity without a license. The Agency may issue a cease and desist order to such a person, who has a right to a contested case hearing under the Administrative Procedures Act. If no hearing is sought, the order becomes effective 30 days after the date of the order. The order may be recorded in the County Clerk Lien Record and enforce under ORS 205.126. Additionally, the Attorney General, the prosecuting attorney of the county or the Agency may maintain an action for an injunction.

SB 485 took effect on June 28, 2011.

E. SB 491 (Ch. 510) Nonjudicial Trust Deed Foreclosure and Tenants' Rights

Senate Bill 491 once again modifies the requirements for notice of foreclosure and termination of tenancies of residential dwellings following foreclosure. It conforms the notice periods after which tenants must vacate following a foreclosure to the requirements in federal law, allowing the tenant 90 days from the date the tenant is given the vacation notice before vacating the premises. The notices to be provided are changed from notices required by the 2009 and 2010 statutes, so new foreclosure forms will be required on or after September 21, 2011, the effective date of the statute. The notice periods in the previously existing statutes will once again take effect on January 1, 2015, when the federal law sunsets.

SB 491 took effect on September 21, 2011.

For additional information, please refer to the Business Law Chapter, Section X; and the Commercial, Consumer, and Landlord-Tenant Law Chapter, Section II.

F. SB 519 (Ch. 712) Affordable Housing Covenants

This bill provides that if residential property is subject to an affordable housing covenant, the sale of that property is subject to the right of the eligible covenant holder to purchase the property for the total sum of the obligations secured by the trust deed or mortgage on the property or the highest bid received for the property other than a bid from the eligible covenant holder. It requires that a notice of sale and judgment of foreclosure and sale must include notice as to the rights of eligible covenant holders. The bill amends ORS 86.705, 86.755, 130.005, and 456.280

As a practical matter, this gives the covenant holder a right of first refusal, or the opportunity to make a bid on the property to be foreclosed superior to other claimants. However, this right does not supersede the right of prior claimants.

"Affordable housing covenant" is statutorily defined by ORS 456.270 as a non-possessory interest in real property imposing limitations, restrictions or affirmative obligations that encourage development or that ensure continued availability of affordable rental and owner-occupied housing for low or moderate income individuals.

For additional information, please refer to the Commercial, Consumer, and Landlord-Tenant Law Chapter, Section II.

G. SB 740 (Ch. 429) Writs of Execution

This change in law requires that real property sold by a sheriff pursuant to a writ of execution contain both the legal description and street address, if any. It applies to any documents prepared on or after January 1, 2012.

H. SB 815 (Ch. 212) Uniform Real Property Transfer on Death Act

SB 815 authorizes the owner of real property to use a transfer on death deed to pass real property outside of probate at the owner's death. The bill creates a new form of deed transferring title only upon death of transferor and only in certain circumstances.

This bill allows a grantor to create additional liens against property without consent of transferee, and it allows a grantor to revoke the deed by declaration or to terminate it by transfer of all or a portion of the property to a third party. The bill also requires the transfer on death deed to be recorded prior to death, and requires that the beneficiary / grantee be a named party and not just a class of parties. Alternate beneficiaries may be designated if primary ones do not survive the grantor.

The bill allows for the inclusion of the property subject to the deed in a probated estate if there are not adequate other assets to pay claims and taxes. Further, the bill allows 18 months to contest capacity or claim fraud, duress or undue influence or to claim an interest in the property in a probate proceeding. The bill allows for survivorship interests to take priority over TOD grantees. No notice to the transferee is required, and a transferee may disclaim all or part of the interest.

A transfer to a former spouse is void unless provided otherwise upon dissolution of a marriage or domestic partnership. Provisions in the law that prohibit inheritance are also applied to a transfer on death deed.

If a borrower dies during a foreclosure and a transfer on death deed is of record, notice must be given to the transferee.

For additional information, please refer to the Estate Planning Chapter, Section I.

II. TAXATION

A. HB 2543 (Ch. 723) Interest on Deferred Taxes – Homestead Property Tax Deferral Revision

HB 2543 revises the homestead property tax deferral in several ways. It imposes a maximum net worth limit and minimum homestead residence requirement on claimants and a maximum real market value limit on the homestead value. It also denies a deferral if any claimant has delinquent homestead taxes or has had them canceled. Specifically the bill requires:

1. The real market value of the residence must be below 100 to 200 percent of the county median real market value depending on the length of time the resident has lived in and owned the home. At 5 years in residence the limit is 100% with a graduated increase up to 200% after 25 years of residence. (Multnomah County $280,800, Oregon $257,400 in 2009)
2. The claimant must live in home for five years before participating in the program.
3. The net worth of all claimant must not exceed $500,000 (not including the homestead value, life insurance cash value or tangible personal property).

The bill establishes the maximum number of new claims that may be granted in a given year starting in 2012. For 2012, the limit of new claims is 105% of the number of new claims granted in 2011. There were about 1500 new deferral accounts in 2010 state-wide. Additionally, the bill changes the interest on unpaid deferred taxes from 6% per year simple interest to 6% interest compounded annually beginning July 1, 2011.

The bill discontinues the deferral for the assessment year if a disqualifying circumstance occurs before September 1. It requires claimants to certify eligibility every second year. It eliminates gradual reduction when income exceeds eligibility limits. It eliminates gradual repayment when deferred taxes are due. It makes transferees of a homestead jointly and severally liable for deferred taxes on the homestead.

The bill requires that the homestead be insured for fire and other casualty, and it prohibits a reverse mortgage on residences where deferred amounts remain outstanding. Claims must be filed after January 1 and before April 15 of the year for which deferral is claimed. Deferred taxes must be paid by August 15 of the calendar year after the property owner dies or the property is sold. The deferral program sunsets on July 1, 2021.

The bill took effect on September 29, 2011

For additional information, please refer to the Taxation Chapter, Section II.

B. HB 2546 (Ch. 655) Property Tax Exemptions – Late Filing

This bill provides additional protection for a first time filer which is a tax-exempt entity or a public entity described in ORS 307.090 that fails to claim a property tax exemption by April 1 preceding the tax year for which the exemption is claimed. Such an entity may file a claim for the five tax years prior to the current tax year. The amendments apply to property tax years beginning on or after July 1, 2011.

HB 2546 took effect on September 29, 2011.

For additional information, please refer to the Taxation Chapter, Section II.

VI. CONDOMINIUMS AND PLANNED COMMUNITIES

A. HB 3317 (Ch. 532) Condominium and Planned Community Statutory Updates

HB 3317 is this year's legislation addressing condominium and planned community issues.

The bill corrects imprecise terminology regarding special declarant rights in planned communities to avoid confusion with special declarant rights in condominiums, which are much less extensive. It establishes additional procedural requirements related to the removal of condominium and planned community board members, providing for notice and an opportunity for the directors subject to the removal attempt to be heard, regardless of the provisions of the association's

documents. HB 3317 also prescribes a procedure to obtain lender approval when the lender's consent is required for actions proposed by the owners unless another procedure is required by statute or project documents. The procedure conforms to that currently required by Fannie Mae and the FHA.

The legislature rejected a provision that would have allowed the association's board to prohibit the video and audio recording of their meetings.

For condominiums, the bill establishes a procedure for granting easements over limited common elements when the use of the limited common element is reserved for five or more units. When the action is for more than two years, the bill requires the consent or approval of the owners of 75 percent of the units to which the common element is reserved. When the action is for two years or less, the consent or approval of a majority of the affected units is required. Condominium associations were also granted the authority to impose conditions of approval on permits allowing changing the appearance of the structure in the course of combining units, notwithstanding other provisions of the declaration or the bylaws.

The bill allows boards of directors to meet in executive session to consult with legal counsel on any issue, as well as to consider the three specific issues in the statute currently. HB 3317 corrects the quorum requirement when the quorum is reduced: the requirement is for persons holding 20 percent of the total votes.

VII. GOVERNMENT PROPERTY, CONDEMNATION AND FORFEITURE

A. HB 2370 (Ch. 446) Notice to ODOT Required for Local Governments Selling Property Near Railroad Infrastructure

HB 2370 imposes a new notification requirement on local governments preparing to sell property they own within 100 feet of a railroad right of way or within 500 feet of a rail crossing. In order to facilitate the acquisition of property for railroad operations, the local government must provide a 30 day notice to the Oregon Department of Transportation whenever it intends to sell such property. This notification requirement does not apply to light rail facilities.

B. SB 619 (Ch. 426) Extension of 10 year Rights of Repurchase to Properties Acquired under Threat of Condemnation

SB 619 expands the right of an owner subject to condemnation to repurchase their property if all or a part of it is not used for the intended governmental purpose within ten years after its condemnation. This bill applies to owners who sell property to the government after a condemnation resolution is adopted by a government. The legislation exempts ODOT property.

This bill took effect on June 17, 2011.

VIII. MANUFACTURED DWELLINGS, HOUSEBOATS & LANDLORD TENANT LAW

A. SB 293 (Ch. 42) Landlord Tenant Law Statutory Update

SB 293 arose from an on-going landlord-tenant work group, and reflects the following negotiated changes to the landlord-tenant law:

- The bill simplifies the disclosures that landlords must make to tenants and prospective tenants about deposits, fees and rent.
- Current law (ORS 90.385) prohibits a landlord from retaliating against a tenant after the tenant has engaged in certain protected activities, as long as the tenant is not in default in rent. SB 293 clarifies that the landlord's defense that the tenant is in default in rent applies only if the tenant was in default at the time of the retaliatory action.
- ORS 90.449 prohibits a landlord from retaliating against a tenant who is a victim of domestic or sexual violence or stalking. SB 293 makes the language of this section consistent with the general retaliation provisions about what constitutes a retaliatory action.
- Current law provides remedies for a tenant if a landlord fails to comply with statutes regulating applicant screening fees and reservation deposits. SB 293 increases the amounts the tenant can recover if the landlord violates these provisions.
- The bill makes the landlord tenant statute concerning carbon monoxide alarms consistent with the rules of the Fire Marshal.
- Under current law, a landlord may dispose of property abandoned by the tenant with a fair market value under $500 after giving the tenant notice and an opportunity to claim the property. SB 293 increases the value of the personal property the landlord may dispose of to $1,000.
- In 2009 the Legislature passed a bill allowing a tenant whose rental unit is foreclosed upon to apply any prepaid

rent or security deposit against accruing or accrued rent owing to the defaulting landlord prior to the foreclosure sale. This bill refines this law in several respects. The tenant must give the landlord notice of intent to apply the deposits to the rent prior to expiration of a non-payment of rent notice. A landlord who provides the tenant with evidence that the unit is no longer in foreclosure may reinstate the deposit by requiring the tenant to pay a new deposit within two months. The bill makes several other technical changes, including clarification that the landlord may not consider a tenant's use of the deposits as a termination of the tenancy.

- Victims of domestic or sexual violence or stalking may terminate a rental agreement for safety reasons on 14 days notice, but this right does not include adult family members living with the victim. SB 293 clarifies that all immediate family members are covered in the termination.

B. SB 294 (Ch. 503) Manufactured Dwelling Park Management and Conversion

SB 294 refines and works from SB 929(2009), which required manufactured dwelling parks with 200 or more spaces to cease charging tenants pro rata for water and convert to sub-metering by December 31, 2012. SB 294 allows these landlords to use a "super-conservation pro rata billing plan" as an alternative to sub-metering, and further allows landlords to amend rental agreements unilaterally when switching to the new super-conservation plan. The bill allows the landlord to add a pro rata charge for storm water and waste water, if the utility does not bill the landlord for these charges as a percentage of the charge for water.

SB 294 also modifies the statutes that regulate the conversion of manufactured dwelling parks into subdivisions. See ORS 92.830 to 92.845.

This bill took effect June 23, 2011.

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