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Appellate Cases -- Real Estate

■ COURT OF APPEALS HOLDS RESERVED EASEMENT CREATES NO THIRD-PARTY RIGHTS

In *Fischer v. Walker*, 246 Or. App. 589, 266 P.3d 178 (2011), plaintiff, the trustee of a trust, brought suit against adjoining landowners for interference with an easement, alleging that defendants impeded plaintiff's use of a dirt access road. The Circuit Court for Clackamas County granted summary judgment in favor of defendants. Plaintiff appealed and the Court of Appeals affirmed the trial court ruling.

Plaintiff owns Tax Lot 500, a 35.56-acre parcel. Defendants own Tax Lot 900, a 3.2-acre parcel bordering Tax Lot 500 on the south. Prior to 1961, the parcels were both owned by the Thayers.

In April 1961, the Thayers recorded an easement in favor of the owners (the Lelands) of an adjacent parcel, Tax Lot 600. The easement gave the Lelands the right to use a dirt access road across Tax Lot 900 to access the Lelands' property. The road crossed the southwest corner of Tax Lot 500. The easement also provided that the grantors (Thayers) reserved "the right to use said road for the purpose of access to any of grantors' lands..." and that title to the 20-foot easement strip would remain in the name of the grantors "subject only to the uses herein granted to the grantees."

In June 1961, two months after the easement was created, the Thayers conveyed Tax Lot 500 to plaintiff's predecessor by warranty deed. The deed made no mention of the easement and stated that the property was "free from all encumbrances." At the time, the dirt access road was the only means of ingress and egress and continued to be the only means of reaching the southern portion of the property until 1994. Plaintiff and her predecessors used the dirt access road continually from 1961 until 2008, when defendants obstructed the roadway with a fence, vehicles, equipment, and a dirt pile.

The Thayers conveyed Tax Lot 900 to the defendants' predecessors in 1965. The warranty deed to convey the property stated that the property was "free from all encumbrances."

After the defendants blocked the easement road, plaintiff brought the action seeking an injunction and ancillary property damages for interference with the easement. Plaintiff alleged that the "words of reservation" in the 1961 easement from the Thayers to the Lelands created a right to use the dirt access road for the benefit of Tax Lot 500 and that that right of use had been conveyed to plaintiffs as an appurtenance to the land. In the alternative, plaintiff contended that she was entitled to an implied or prescriptive easement. The court granted summary judgment for the defendants.

On appeal, plaintiff contended that the Thayers' reservation of rights in the easement operated to create a new easement in the nature of a servitude carved out of the interest granted to the Lelands. Plaintiff then contended that the servitude was conveyed to plaintiff's predecessors by the Thayers as an appurtenance to Tax Lot 500. Alternatively, plaintiff argued that she acquired an easement by implication from prior use because the dirt access road was necessary for the use of Tax Lot 500 at the time it was severed from Tax Lot 900. Defendants contended that the Thayers' reservation of rights only meant that the grant of easement to the Lelands was non-exclusive.

The Court of Appeals analyzed the language of the easement and determined that, "in the context of the entire document, there is not a clear intent to create a servitude burdening the Lelands' easement." 246 Or. App. at 595. Instead, the court continued, "the more reasonable construction is that the Thayers simply retained their ability, as titleholders of the servient estate, to use to the land over which the easement ran." *Id.* The court focused on the language of the easement providing that the title to the easement strip "shall remain in the grantors." In rejecting plaintiff's argument, the court held that the "[u]se of the term 'reservation' in a deed does not necessarily . . . creat[e] a new right out of the thing granted, as opposed to merely excepting from the grant a right that already existed in the grantor." *Id.* at 596. In reaching this conclusion, the court relied on the holding in ***Hurd v. Byrnes***, 264 Or. 591, 506 P.2d 686 (1973), to the effect that there is no significance between the use of the terms "exception" and "reservation" and that "frequently what is designated an exception is in substance a reservation, and vice-a-versa. . . ." ***Fischer***, 246 Or. App. at 596.

The plaintiffs pointed to the holding in ***Ploplys v. Bryson***, 188 Or. App. 49, 69 P.3d 1257 (2003), in support of their argument. In ***Ploplys***, the grantor created an easement in favor of third parties who owned adjacent land. In the easement, the grantor reserved the right to use the road located upon the easement strip and that, in the event of any subdivision or sale of any portion of the property, the easement "shall remain appurtenant to all such resulting parcels." *Id.* at 597 (quoting ***Ploplys***, 188 Or. App. at 52). The Court of Appeals here found that the intent of the document creating the easement contemplated the subsequent partitioning of the property and made the easement "appurtenant to the real properties owned by each party." *Id.* at 597 (quoting ***Ploplys***, 188 Or. App. at 55).

In ***Fischer***, by contrast, the easement grantors did not intend to create a right benefiting third parties because the underlying title to the 20-foot strip remains in grantors "subject only to the uses herein granted to the grantees." Thus, the court continued, "[t]he easement is 'appurtenant' to only Tax Lot 600. . . ." and did not operate as easement to benefit the remainder of the grantors' lands. *Id.*

In the alternative, plaintiff argued that at the time of the Thayers' conveyance of Tax Lot 500 to plaintiffs' predecessors, an easement to use the dirt road arose by implication. The court noted that a number of factors are used to determine whether an easement has been created by implication, including "the claimant's need for the easement, the manner in which the land was used before its conveyance, and the extent to which the manner of prior use was or might have been known to the parties." *Id.* at 598 (quoting ***Penny v. Burch***, 149 Or. App. 15, 19, 941 P.2d 1049 (1997)). The court did not reach this issue, as it agreed with defendants that plaintiff failed to plead facts necessary for relief on such a theory. The court noted that the complaint did not allege facts showing that the easement was reasonably necessary to the Fischers' use of Tax Lot 500, that the use was apparent at the time the property was conveyed to the Fischers, or even that their purported dominant and servient estates were held in common ownership prior to the conveyance of Tax Lot 500 for the Thayers. During the summary judgment hearing, plaintiff introduced evidence "regarding the existence of an implied easement [but] . . . failed to sufficiently plead those facts in her complaint." *Id.* at 599. As a result, the court rejected the argument and affirmed the trial court on all counts. *Id.*

Gary K. Kahn

Fischer v. Walker, 246 Or. App. 589, 266 P.3d 178 (2011)

■ 4.7% RATIO OF EXPENDITURES FOR RESIDENTIAL SUBDIVISION IS INSUFFICIENT TO VEST MEASURE 37 RIGHTS

In *Campbell v. Clackamas County*, 247 Or. App. 467, 270 P.3d 299 (2011), the court considered whether plaintiffs' rights to develop a residential subdivision had vested under Measure 49. Plaintiffs acquired the 62-acre tract of land in 1969, when the property's zoning allowed residences to be built on one-acre parcels. Subsequently, zoning restrictions limited the uses of the property to agriculture and forestry. Plaintiffs obtained Measure 37 waivers and sought a vested rights determination under Measure 49 to develop a 41-lot residential subdivision. Applying the standards for a common-law vested right set forth in *Clackamas Co. v. Holmes*, 265 Or. 193, 198-99, 508 P.2d 190 (1973), the court denied the request because the expenditures to develop the property were incurred by a developer rather than the property owner acting on his own behalf, and the expenditures were insufficient to vest development rights given the costs of the entire project. Plaintiffs appealed the decision, arguing that the court erred in concluding that no vested right was proven.

Relying on the Oregon Supreme Court's analysis of vesting set out in *Friends of Yamhill County v. Board of County Commissioners,* 237 Or. App. 149, 238 P.3d 1016 (2010), *aff'd,* 351 Or. 219, 264 P.3d 1265 (2011), the court of appeals began its analysis by noting that the concept of "substantial expenditures" requires review of both the "absolute amount expended and the percentage yielded by the expenditure ratio." *Kleikamp v. Bd. of County Comm'rs.*, 240 Or. App. 57, 66, 246 P.3d 56 (2010). The denominator of the expenditure ratio includes the costs of constructing residences on the property of the type and size contemplated by the owner.

In this case, the developer incurred costs of $1,295,869 for design and preliminary road construction between 2005 and December 6, 2007 toward a total project cost of $27,185,132 to develop 41 high-end single-family homes, yielding an expenditure ratio of 4.7 percent. Although the plaintiffs presented evidence that the deterioration of the housing market during 2007 to mid-2008 would have prompted construction of smaller, lower cost homes, thereby increasing the expenditure ratio to approximately 7.5

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percent, the court was not persuaded, finding no evidence that plaintiffs' plans for the development in December 2007 anticipated the changed market conditions that existed in 2008.

The court affirmed the circuit court's conclusion that, based on the expenditure-ratio factor, the plaintiffs had not incurred enough costs in comparison to the total project development cost to obtain a vested right because the ratio amounted to only 4.7% of the cost of the total development. The court noted that some of the improvements could be used to develop the nine homesites otherwise allowed by Measure 49. Those equities suggest that a low expenditure ratio of less than five percent is insufficient to vest rights to develop the entire larger subdivision.

Carrie A. Richter

Campbell v. Clackamas County, 247 Or. App. 467, 270 P.3d 299 (2011)

■ *APPELLATE COURT HOLDS LOCAL CODE IS KEY TO PERMISSIBLE PUD MODIFICATIONS*

Willamette Oaks, LLC v. City of Eugene, 248 Or. App. 212, ___ P.3d ___ (2012), concerns a significant development project on twenty-three acres of land east of the Willamette River off of Goodpasture Island Road in the City of Eugene. Goodpasture Partners, LLC proposed to develop a planned unit development (PUD) including: (1) a four-story, age-restricted apartment building; (2) ten three-story apartment buildings; (3) two clubhouses; and (4) a one-story commercial building.

To achieve this the applicant sought a zone change from Medium Density Residential (R-2) to Limited High Density Residential (R-3), which the city approved. The Land Use Board of Appeals affirmed the city's decision in *Willamette Oaks, LLC v. City of Eugene*, 59 Or. LUBA 60 (2009), and, on appeal, the court of appeals reversed and remanded LUBA's order in *Willamette Oaks, LLC v. City of Eugene*, 232 Or. App. 29, 220 P.3d 445 (2009).

The applicant subsequently applied and received city approval for a zone change, tentative PUD, and adjustment review. Both parties appealed this decision and LUBA remanded on narrow grounds for the limited purpose of addressing an appeal fee issue. *Willamette Oaks, LLC v. City of Eugene*, LUBA No. 2010-62 (March 8, 2011). The court of appeals then reversed LUBA. *Willamette Oaks, LLC v. City of Eugene*, 245 Or. App. 47, 261 P.3d 85 (2011).

In July of 2010, and while the appeal of the zone change was pending, the owner applied for: (1) modification of the approved tentative PUD, (2) final PUD approval, and (3) tentative subdivision approval. The modification amended the tentative PUD to allow assisted-living in addition to age-restricted apartment units, move the location of the main entrance, reconfigure the number of parking spaces, add a retaining wall, and eliminate a bicycle parking structure. (Note: Because the parties did not raise the issue, LUBA did not decide whether or not the city had jurisdiction to decide the applications during the pendency of an appeal. See *Standard Insurance Co. v. Washington County*, 17 Or. LUBA 647, 660, *rev'd on other grounds*, 97 Or. App. 687, 776 P.2d 1315 (1989).)

> Under Eugene Code ("EC") 9.8335, a modification of an approved tentative PUD must:
>
> (1) [Be] consistent with the conditions of the original approval, [and]
>
> (2) [R]esult in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties.

In addition, approval of the final PUD under EC 9.8365 must "conform with the approved tentative PUD plan and all conditions attached thereto."

The modification to the tentative PUD and final PUD was initially approved by the city planning director and then appealed to the hearings officer. The hearings officer approved, finding that the proposed modification was consistent with the conditions of approval of the tentative PUD and the impacts on the surrounding property were insignificant.

On appeal, LUBA remanded the decision on two grounds: (1) the city erred in not assuring compliance with the original conditions of approval, and (2) the city erred in concluding the modifications would result in insignificant changes. Portions of the city's decision relating to the tentative and final PUD were affirmed.

In particular, LUBA found that elimination of the bicycle parking structure approved by the original conditions was inconsistent with EC 9.8335(1). That provision requires compliance with the original conditions and does not allow the city to eliminate conditions because of a modification to the project.

As to other modifications to the tentative PUD, LUBA addressed whether the changes would result in insignificant changes to the physical appearance, use of the site, and impact on surrounding properties as required by EC 9.8335. LUBA upheld the findings that the changes would result in insignificant changes to the physical appearances of the development. LUBA reasoned that, since the term "insignificant" was not defined, the city had the discretion to evaluate the evidence and conclude that the impacts were insignificant based on findings provided in the final written decision. However, LUBA found that the city failed to address issues raised regarding a change in use from age-restricted to assisted-living units that would likely result in more employees and visitors to the site.

LUBA also found that the final PUD did not "conform with the approved tentative PUD plan and all conditions attached thereto" as required by EC 9.8365. Willamette Oaks argued before LUBA that a number of conditions to the tentative PUD were not addressed or were improperly deferred. LUBA agreed in part, sustained a challenge that the city improperly deferred geotechnical analysis, and denied a challenge that the change in use was inconsistent with the original trip cap for vehicle trips from the project. Because the original trip cap was included in a note on the final PUD, any additional traffic study to evaluate impacts from the change in use did not undermine the original trip cap condition.

Not satisfied with the remand from LUBA, Willamette Oaks appealed to the court of appeals and argued: (1) LUBA erred in affirming the city's findings that the modifications were not significant, (2) LUBA erred in permitting a modification to the original trip cap, and (3) LUBA was required to reverse rather than remand the decision to the city.

The court of appeals concluded that Willamette Oaks failed to articulate how LUBA had erred with regard to whether the modifications would be insignificant but had instead argued the city's decision below was in error. Because the court of appeals' review is limited to whether LUBA's opinion is "unlawful in substance or procedure" under ORS 197.850(9)(a), any challenge to the city's decision is misplaced.

The court further upheld LUBA's decision regarding the trip cap. Although the final PUD includes a mandated traffic study, the city's decision still required compliance with the limits set in the original condition or approval. The court found the additional enforcement mechanism added to the final PUD did not undermine the original condition imposing a trip cap.

Finally, Willamette Oaks argued that LUBA should have reversed rather than remanded the decision because the modification to remove the bicycle parking was inconsistent with EC 9.8335. That provision states that failure to comply with the original conditions means "the proposed modification may not occur." Although this issue presented a closer question for the court, Judge Sercombe held that the issue was not properly raised because the appeal asked for reversal or remand of the decision and, as such, the issue of whether the decision should only be reversed was not properly before LUBA.

Christopher A. Gilmore

Willamette Oaks, LLC v. City of Eugene, 248 Or. App. 212, ___ P.3d ___ (2012)

Legislation

■ BILL STUFFING—FEDERAL GOVERNMENT EXTENDS ITS REACH INTO CELL TOWER LAND USE DECISION-MAKING

In February, President Obama signed into law H.R. 3630, also known as the "Middle Class Tax Relief and Job Creation Act of 2012," which extended unemployment benefits and payroll tax deductions. Pub. L. No. 112-96 (2012). Congress stuffed the bill with several additional provisions, including one that affects local government decisions regarding the siting of wireless facilities.

The legislation expressly states that a "local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." *Id.* § 4225(a)(1). This approval must be granted regardless of provisions in the Telecommunications Act of 1996 (Section 704) or any other provision of law. An "eligible facilities request" is any request that involves the collocation of new transmission equipment or the removal or replacement of existing transmission equipment. *Id.* § 4225(a)(2).

The new law does not prevent a locality from reviewing a proposed collocation installation. However, the federal government imposes limitations on local government consideration of wireless tower proposals in this legislation. The bill does contain several ambiguities. For example, the law only applies to "wireless towers" and the FCC has defined towers as facilities built for the "sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), *available at* 47 C.F.R. Part I, Appendix B, at § I.B. If that latter definition applies, many collocation applications may not be considered "wireless towers" subject to the new law. Moreover, the new law does not define what constitutes a "substantial change." Therefore, local governments may still retain the authority to deny a proposal if, for example, a change in tower size creates a traffic or accessibility hazard.

The bill is effective immediately and local governments may anticipate that aggressive tower companies will seek approvals under the provisions of the new law. Local governments should audit their wireless facility codes and update approval criteria to reflect this new change in the physical dimensions standard. Further, the FCC has rulemaking authority that may also affect the implementation of the new law. Local governments and tower companies alike should keep an eye on FCC activity related to this new rule.

The new legislation, combined with the federal government's significant entrance into local decision-making discussed in Ed Sullivan's analysis of the *City of Arlington v. FCC* case in this issue of the Digest, shows that Washington's hands are stretching across the wireless universe to streamline placement of wireless towers. But with every new idea, controversy about its implementation is sure to follow.

Jennifer Bragar

H.R. 3630

Appellate Cases -- Washington

■ RIPE FOR REVIEW? WASHINGTON'S FUTILITY DOCTRINE

In *Thun v. City of Bonney Lake*, 164 Wash. App. 755, 265 P.3d 207 (2011), appellants brought an action against the City of Bonney Lake alleging that the city's rezoning of their property to a residential district amounted to an unconstitutional taking. The Superior Court of Pierce County granted the city's motion for summary judgment on the ground that the appellant's claim was not yet ripe. The Court of Appeals of Washington, Division 2, affirmed the summary judgment.

Appellants own thirty-seven acres of land in the City of Bonney Lake. The land was originally zoned as a C-2 commercial district, which permitted twenty housing units per acre. On September 13, 2005, developer Abbey

Road Group, LLC filed a site plan application with the city for the construction of a 575-unit condominium building on appellants' property. That same day, the city rezoned approximately thirty of appellants' thirty-seven acres to residential (RC-5), which allowed only one housing unit per twenty acres. Furthermore, under the Bonney Lake Municipal Code, city officials had no discretion to vary this housing density restriction.

Applying the new zoning, the city denied the building permit. The developer challenged this denial, arguing that they should have been entitled to the old zoning because their rights had vested before the rezoning took effect. The hearing officer disagreed because they had not submitted a complete building plan. In 2009, the developer's appeal reached the Supreme Court of Washington in the case of ***Abbey Road Group, LLC v. City of Bonney Lake***, 167 Wash.2d 242, 218 P.3d 180 (2009). That court agreed that the developer's rights had not vested on September 13, 2005 because the site plan application they submitted was not valid. ***Abby Rd.***, 218 P.3d at 187-88.

While the ***Abbey Road*** case was pending in the Supreme Court, the same appellants filed a lawsuit against the city alleging an unconstitutional taking under Article I, Section 16 of the Washington Constitution. The city moved for summary judgment, arguing that the appellants' case was not yet ripe for review. To show ripeness, the city argued that the appellants were required to submit a building permit application to develop the land so as to clarify exactly what could be built on the land. The city pointed out that, as of the date of oral argument, the appellants had not submitted a valid building permit. The appellants countered that they were not required to submit a building permit in order to show ripeness because the effect of the challenged regulation was sufficiently known. To support their argument, the appellants submitted testimony suggesting that development of the land under the newly enacted rezoning was not economically feasible. The city, without any supporting evidence, argued that the rezoning did not render development of the property uneconomical. Nevertheless, the superior court granted the city's motion for summary judgment and the appellants appealed to the Court of Appeals.

In this case, the court recognized that the appellants first had to establish that their takings claim was ripe for review. The ripeness doctrine exists to ensure that regulatory takings claims are not litigated before they have been fully developed at the local level through available administrative procedures. The theory behind the claim is to allow a local entity first to render a final decision at the administrative level about the challenged policy before it is forced to litigate it at the state level. In ***Suitum v. Tahoe Regional Planning Agency***, the U.S. Supreme Court developed two requirements for a Fifth Amendment takings claim: (1) the "final decision requirement" and (2) the "state procedures" requirement. 520 U.S. 725, 733–34,117 S.Ct. 1659, 137 L.Ed.2d 980 (1997).

Under the "final decisions" requirement, for a takings claim to be ripe the plaintiff must give the relevant administrative agency an opportunity to arrive at "a final, definitive position regarding how it will apply the regulation at issue to the particular land in question." ***Williams County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City***, 437 U.S. 172, 191, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Under the "state procedures" requirement, "the plaintiff must first seek compensation for the alleged taking through the procedures that the government has provided for doing so." ***Thun***, 265 P.3d 207, 213 (citing ***Williams***, 473 U.S. at 194). The court in this case focused its analysis on the "final decision" doctrine because the city had not argued that the appellants had failed to avail themselves of any administrative procedures for requesting compensation; therefore, the "state procedures" requirement was not implicated.

Although the Washington Supreme Court has not directly adopted the U.S. Supreme Court's "final decision" requirement, the controlling Washington State exhaustion/futility doctrine is similar in theory and application. The Washington State exhaustion/futility doctrine dictates that "[e]xhaustion of administrative remedies is generally required before [a party may] resort to the courts . . . ," but if it is determined that exhaustion of administrative procedures would be futile, the requirement is excused. ***Presbytery of Seattle v. King County***, 114 Wn.2d 320, 338, 787 P.2d 907 (1990). Administrative procedures are deemed futile when "the available administrative remedies are inadequate, or [are] vain and useless." ***Orion Corp. v. State***, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985) (internal quotation marks and citation omitted).

In determining futility, Washington courts analyze whether or not it is sufficiently known how a challenged regulation will affect a particular property. The Washington Supreme Court in ***Orion Corp.*** decided that administrative remedies were futile because it was sufficiently clear that the challenged regulation would not permit the plaintiff to make ***any*** reasonable use of their land; as a result, no permit application was required because the effect of the regulation rendered the permit application process "vain and useless." ***Id.*** at 1379. However, in later cases the court had held that where uncertainty remains as to how the challenged regulations will impact the land, the case is not yet ripe for consideration by the court.

The court held that administrative procedures are not futile, and therefore appellants' case was not yet ripe for review. The court reasoned that the permissible uses of the land under the rezoning are not sufficiently known to support judicial interference because neither party was certain how much of appellants' property was actually rezoned and uncertain how the portions of the unaffected land could and would be used. The court held that it is insufficient to show the uses of the rezoned areas alone are reasonably known—affirmative steps in the administrative process, such as submitting a valid building permit, must be taken. In other words, it must be first shown how all portions of the property could be used to support a takings claim.

Emma Maceko

Thun v. City of Bonney Lake, 164 Wash. App. 755, 265 P.3d 207 (2011)

■ *APPLICATION COMPLETENESS IN WASHINGTON*

On December 15, 2011, the Supreme Court of the State of Washington issued a unanimous decision in *Lauer v. Pierce County*, 173 Wash.2d 242, 267 P.3d 988 (2011), 173 Wash.2d 242, 267 P.3d 988 (2011), which involved a challenge to a fish and wildlife variance granted by Pierce County to Mike and Shima Garrison. The challenge was made by two of the Garrisons' neighbors, Louise Lauer and Darrell de Tienne ("the petitioners"). The variance authorized the Garrisons to build a single-family residence within the protective buffer zone of a stream that runs through their property. The two main issues addressed by the Supreme Court in this case were: (1) whether the Garrison's rights vested in 2004 and (2) whether petitioners had standing to appeal the variance.

In December 2002, the Garrisons purchased a waterfront parcel of property on Henderson Bay in Gig Harbor, Washington. The southwest portion of the property contained, as classified by the Department of Natural Resources, a Type 4 or Type 5 watercourse. The petitioners' property bordered the Garrisons' property to the east and west respectively. A few months after purchasing the property, the Garrisons cleared vegetation from within the property's watercourse and its buffer. At that time, the Pierce County Code required a 35-foot-wide buffer on both sides of such watercourses and an eight-foot setback from the buffer for certain types of construction. On March 7, 2003, the county issued a stop work order and directed the Garrisons to revegetate the cleared area.

In March 2004, the Garrisons filed a building permit application with the county for a single-family residential building near the shoreline and the watercourse that ran through the property. The county approved the permit and the Garrisons began construction. In October of that year the county conducted a site visit and promptly issued a cease-and-desist order on the grounds that the Garrisons were building within the restricted buffer zone. The county suspended the building permit and directed the Garrisons to apply for a fish and wildlife variance. In the Garrisons' challenge to the cease-and-desist order, the hearing examiner upheld the county's decision to require a "35 foot wide, undisturbed buffer." 267 P.3d at 991. The hearing examiner also found inconsistencies between the Garrisons' 2003 site plan and their 2004 building permit site plan, namely, the absence of the watercourse in the 2004 site plan and the Garrisons' relabeling of a trail as a drive.

On March 1, 2005, Pierce County changed the required buffer width from thirty-five feet to sixty-five feet and made the requirements for obtaining a variance more stringent. Two years later the Garrisons filed for a fish and wildlife variance for their proposed construction. The petitioners challenged the application, arguing that the applicable provisions for determining whether or not to grant the variance were the 2005 regulations, while the Garrisons argued that the pre-March 1, 2005 regulations were controlling because their rights vested on March 4, 2004 when they submitted their building permit site plan.

After a hearing examiner agreed with the Garrisons' interpretation granting them the variance, the petitioners filed a Land Use Petitions Act ("LUPA") petition on March 27, 2008 with the Pierce County Superior Court pursuant to chapter 36.70C of the Revised Code of Washington ("RCW"). The court reversed the hearing examiner's decision on the grounds that the "hearing examiner erroneously applied the law to the facts when he found the Garrisons' March 2004 building permit application to be complete." *Id.* at 992. The Garrisons appealed and the Court of Appeals reversed, holding the building permit to be complete. The Supreme Court then reversed again. The two most interesting issues addressed by the Court concerned standing and the disposition of vested rights.

Standing

The Garrisons challenged the petitioners' standing to file a LUPA petition against their proposed building project on the grounds that they had failed to demonstrate that they would have been adversely affected by the project. Under LUPA, "a person other than the owner of the property that is the subject of the land use decision has standing if that person is or would be 'aggrieved or adversely affected' by the decision." ***Id.*** at 992-93 (quoting RCW 36.70C.060(2)). A person is aggrieved or adversely affected when "(1) the person is prejudiced or likely to be prejudiced by the decision, (2) the local jurisdiction was required to consider that person's asserted interests in making its decision, (3) a favorable judgment would redress or substantially eliminate prejudice, and (4) the person has exhausted [their] administrative remedies." ***Id.*** at 993.

The court ultimately concluded that the petitioners had satisfied the conditions and had successfully established standing. With regard to the first condition, court precedent has established that if an adjacent landowner can demonstrate the proposed project will injure his or her property, the owner will have standing. ***Id.*** (citing Chelan County v. Nykreim, 146 Wash.2d 904, 52 P.3d 1 (2002)). In this case, the court found that the proposed building injured the petitioners' property interests. To satisfy the second condition, Pierce County Code ("PCC") 18.80.020 requires that "adjacent property owners are to be notified about an application for a variance allowing a buffer reduction and that there be a public hearing." In other words, the county was required to consider the petitioners' interest in the project and a failure to do so could have adversely affected the petitioners. The court also held the third condition to have been satisfied because the requested relief would have eliminated or redressed the prejudice asserted since "[c]onsideration of the variance under the current variance standards would [have] assure[d] that [the petitioners'] interests [were] more protected . . . because the new standards are stricter and look to more factors." ***Id.*** Lastly, the court held that, to satisfy the fourth condition, the petitioners needed only to exhaust the administrative remedies known and available to them. The court found this to have been satisfied because the petitioners fully participated in the cease-and-desist order appeal hearing, which was the only administrative review process that preceded the initial building plan. The fact that the petitioners did not participate in the Garrisons' own LUPA petition was not fatal because that was technically not an administrative remedy, according to the court.

Furthermore, the court held that the superior court did not err when it considered evidence outside of the administrative record in addressing the issue of standing. The statutory confinement of judicial review to the evidence contained in the administrative record ***only*** applies when the parties had "an opportunity consistent with due process to make a record on the factual issues." RCW 36.70C.120(1). No such record was developed here because the Garrisons never challenged the petitioners' standing in the administrative hearing; therefore, the restriction was held not to have applied and the superior court properly considered evidence outside the record on the issue of standing.

Vesting

The court also addressed the point at which property rights in land uses vest. Under Washington law, "[d]evelopers are entitled to the benefit of 'the regulations in effect at the time a ***complete*** building permit application is filed, regardless of subsequent changes in zoning or other land use regulations.'" ***Laurer***, 267 P.3d at 995 (quoting ***Abbey Rd. Grp., LLC v. City of Bonney Lake***, 167 Wash.2d 242, 218 P.3d 180 (2009)) (emphasis added). The key here is the submission of a complete building permit. In general, the completeness of a building permit application is determined by the criteria and procedures set forth in local requirements. The PCC defines completeness for vesting purposes as "any [building permit] application including payment of all required fees and containing all the components that are applicable . . . ." PCC 17C.10.140. In this case, the Garrisons' application did not satisfy the following two requirements: (1) that a building permit application include a comprehensive site plan that includes "all set backs from buildings. . . ." and (2) that any land-use permits required for the proposed construction be applied for ***before*** the submission of the building permit application. ***Id.*** The site plan submitted by the Garrisons for their building permit did not identify the stream running through their land, made no mention of any required setbacks on the property, and falsely identified an "existing drive" at the location of a trail. In addition to these omissions, the Garrisons failed to apply for a variance prior to submitting their building permit as mandated by the PCC. Based on the county code and its definition of completeness, the court determined that the Garrisons' building permit was not complete, precluding a determination that their rights had vested.

The fact that the Garrisons had been issued a building permit in 2004 did not alter the court's disposition.

The RCW requires that a building permit application be valid under zoning or other land use ordinances at the time the application is submitted. The court concluded that the Garrisons' 2004 building permit was invalid, as it did not comply with the then-existing ordinances and contained omissions and misrepresentations. *Laurer*, 267 P.3d at 997.

Emma Maceko

Lauer v. Pierce County, 173 Wash.2d 242, 267 P.3d 988 (2011)

Cases From Other Jurisdictions

■ FIFTH CIRCUIT UPHOLDS NEW FCC DECLARATORY RULING SETTING "SHOT CLOCK" ON WIRELESS COMMUNICATIONS

City of Arlington, Texas v. Federal Communications Commission, 668 F.3d 229 (5th Cir. 2012), involved certain new commission rules to assure timely, reasoned local decisions on the grant or denial of wireless communication facilities. (For an in-depth analysis of the new rules, see Pam Beery and Courtney Lords's write-up in the June 2011 issue of the *Digest*.) The declaratory ruling was the result of a petition from a wireless trade association, the CTIA, to clarify ambiguities in the law under the federal Telecommunications Act of 1996 ("TCA"). The CTIA sought (1) time limits for local governments acting on wireless applications for land use approval; (2) a pronouncement that applications must be approved if not acted upon within a certain time; (3) a determination that new providers in an area can take advantage of the TCA to locate in the same jurisdiction; and (4) a prohibition on the use of a variance to allow for the siting of a wireless facility. The Federal Communications Commission ("FCC") granted the petition in part.

The statute before the FCC was 47 U.S.C. § 332(c)(7), which imposes certain restrictions on state and local governments with regard to decisions on the placement or construction of wireless communication facilities. Among other provisions, decisions on such facilities must be made in a "reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). The declaratory ruling established a 90-day period for the co-location of antennas on existing wireless facilities and a 150-day period for new wireless facilities, determining that the failure to act within those deadlines would presumably constitute a "failure to act" under that legislation that would allow an applicant to seek judicial relief. *Id.* § 332(c)(7)(B)(v). In addition, the new rules allow for a 30-day completeness check and for a mutual extension of the deadlines.

The FCC rejected the CTIA's request that an application be "deemed granted" in the event a local government failed to act, as well as the request to obviate the variance mechanism. Nonetheless, the commission did grant that part of the petition that would prohibit a local government from denying a land use application if another carrier was present in the area and could provide service. Several organizations sought reconsideration of the declaratory ruling, which the FCC rejected. Two Texas cities sought judicial review.

The court turned first to jurisdiction. Noting that the two review requests shared many of the same issues, the court noted that there were some issues unique to each petitioner as well. San Antonio, Texas did not file a petition for reconsideration but did file its petition for judicial review within 60 days of the action on reconsideration, though not within 60 days of the original ruling. The court found that that city's petition for review was not timely under the circumstances. A petition for reconsideration cannot itself provide the basis for a challenge to one who did not file it. San Antonio's 60-day period for seeking judicial review ran from the date of the original order. This is so even if San Antonio provided comments during the reconsideration period and even if that city intervened in the validly-filed petition for judicial review filed by the city of Arlington, Texas. The court thus declined to consider those issues raised solely by San Antonio. *City of Arlington*, 668 F.3d 229, 239.

Arlington first challenged the imposition of the 90- and 150-day time limits by the declaratory ruling, contending that there were administrative rules under the federal Administrative Procedures Act ("APA") that subjected the ruling to statutory notice and comment requirements. The court accepted the FCC's view that the new standards were the product of adjudication, finding that the agency characterized its action as such and that the ultimate product was that of an adjudication via administrative declaratory ruling, as permitted under the APA.

Such a ruling may be invalidated under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under those standards, the court said that it had "serious doubts" over FCC's choice of procedures, as the ruling looked more like rulemaking and affected a large number of entities. 668 F.3d at 242. Nevertheless, the court declined to consider those contentions as it found the failure to comply with rulemaking procedures was harmless.

In addition, the procedures the commission did follow did not prejudice the cities. The ruling was preceded by notice and multiple comments, which contained all the arguments before the court. Moreover, the ruling accommodated the issue of pending applications before local governments by providing extra time for them to be decided, as well as establishing a presumption of new timelines. The court also rejected the application of an FCC procedural rule that required notice to parties that might be affected by a preemption claim. In so doing, the court upheld the FCC's interpretation that the rule was inapplicable when a proposed ruling applied to numerous jurisdictions, especially when the petition for declaratory ruling did not identify specific parties. The court concluded that the Due Process Clause was not violated by these proceedings. *Id.* at 247.

The court then turned to the FCC's authority to adopt the challenged ruling under the APA. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), a court's review involves a two-step process to determine whether Congress had directly spoken to an issue and whether the interpretation of an agency's jurisdiction was outside the scope of the enabling legislation. The court found in this case that Congress did not directly address the issue of whether these rules could be established and determined that the construction of the TCA by the FCC in this case was reasonable, even as to its determination of its own jurisdiction. *Id.* at 254.

Petitioners claimed (1) that the TCA's provisions relating to state and local government left them with the authority to deal with placement, construction and modification of wireless facilities except as modified by Section 332(c)(7); and (2) that the deprivation of FCC authority to make rulings on wireless facilities in particular cases (which were required to go to court) was not impermissible. The court used *Chevron* deference to determine the FCC was not unambiguously precluded from adopting this ruling under its general APA authority to adopt rules and declaratory rulings. The court noted a similar result in the Sixth Circuit in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

Having determined that the FCC had the power to adopt a declaratory ruling in this matter, the court then turned to the ruling at issue in view of the challenge made to its reasonableness under the APA. The court rejected the cities' characterization of the ruling as changing a presumption against preemption to one *for* preemption, stating that the function of a presumption deals only with the burden of going forward with the evidence and does not change the burden of persuasion. *Id.* at 256 (citing Fed. R. Evid. 301). The court used what is called a "bursting-bubble" theory of presumptions, under which a wireless provider must still convince a court of the unreasonableness of the delay to obtain relief, and the local government may provide evidence that the delay in those circumstances was reasonable. *Id.*

The court said it was unconvinced by the cities' argument that the ruling would create more litigation, a possibility under the circumstances existing before the ruling. Nor was the court convinced that the completeness step was unreasonable, given the stakes at issue. Subsequent discovery of the need for additional information may enter into the calculation of reasonableness in the same way any circumstances would affect the reasonableness of the timing of decision-making. The court concluded that the timelines established under the ruling were not hard and fast but a presumption to be used in determining whether delays were "unreasonable" in evaluating the evidence. Given this background, the declaratory ruling was thus not "arbitrary and capricious" under the circumstances in the light of the FCC explanation as well as the evidence of delay in many pending cases. The declaratory ruling was thus upheld. *Id.* at 261.

The federal government has decided to undertake a significant intrusion into local government land use decision-making processes. The wisdom of that decision is open to question, but the time limit portions of the ruling appears to be within the power of the FCC to adopt. The other portion of the ruling, prohibiting a local government from limiting personal wireless facilities to an existing provider, also seems to be within those same powers.

Edward J. Sullivan

City of Arlington, Texas v. F.C.C., 668 F.3d 229 (5th Cir. 2012)

■ *THE END OF URBAN RENEWAL IN CALIFORNIA AND LESSONS FOR THE NORTHWEST*

Since the 1950s, urban renewal agencies (or "redevelopment agencies") were authorized by legislative action and created to improve blighted conditions and form a funding source used to encourage local economic revitalization. As other government services lost their sources of funding by ballot initiatives passed to freeze property tax rates (such as Oregon's Measure 5), limit increases in property taxes for city and school district budgets, and cap annual increases in property taxes (as with Oregon's Measures 47 and 50), urban renewal agencies have been a target for charges of exacerbating the problems caused by an already reduced ability to raise taxes.

To carry out redevelopment plans, these agencies may acquire real property, dispose of property by lease or sale without public bidding, clear land and construct infrastructure necessary for building on project sites, and undertake certain improvements to other public facilities in the project area. While redevelopment agencies have used their powers in a wide variety of ways, in one common type of project a redevelopment agency buys and assembles parcels of land, builds or enhances the site's infrastructure, and transfers the land to private parties on favorable terms for residential and/or commercial development.

Redevelopment agencies generally cannot levy taxes. Instead, they rely on tax increment financing. Under this method, those public entities entitled to receive property tax revenue in a redevelopment project area (the cities, counties, special districts, and school districts containing territory in the area) are allocated portions based on the assessed value of the property prior to the effective date of the redevelopment plan. Any tax revenue in excess of that amount—the tax increment created by the increased value of project area property—goes to the redevelopment agency for repayment of debt incurred to finance the project. In essence, property tax revenues for entities other than the redevelopment agency are frozen, while revenue from any increase in value is awarded to the redevelopment agency on the theory that the increase is the result of redevelopment.

Based on the active initiative process in the 1990s, urban renewal advocates in Oregon were concerned that voters would limit the reach of redevelopment efforts through further initiative efforts. However, given the California Supreme Court's December 29, 2011 decision in ***California Redevelopment Association v. Matosantos***, 53 Cal.4th 231, 267 P.3d 580 (2011), urban renewal agencies across the country may soon be in dire straits at the hands of their state's elected leaders who will be searching for all available funding to continue operation of other government services like health and safety programs. In a time when most developers cannot obtain financing, urban renewal agencies represent an easy target.

California has even more stringent caps on property-tax increases than Oregon under its Proposition 13 adopted by voters in 1978. Further, it has mandatory requirements to fund education at a certain level. In an attempt to meet its financial responsibilities to schools and provide other government services, under the leadership of Governor Brown the 2011 legislature amended the state's redevelopment law, setting forth the process for winding down and dissolving redevelopment agencies to put an to end urban renewal fundraising. Unlike Oregon, California's urban renewal laws required that 20% of redevelopment funds be used for the development of affordable housing. Nonetheless, state audits and oversight reports frequently concluded that a significant number of redevelopment agencies acted in ways that effectively reduced their housing-program productivity, including: maintaining large balances of unspent housing funds (a recent Department of Housing and Community Development report indicated that the agencies collectively had an unencumbered balance of more than $2.5 billion); using most of their housing funds for planning and administrative costs; and spending housing funds to acquire land for housing but not building the housing for a decade or longer. Given the redevelopment agencies' empire-building by caching housing funds and carrying large balances, these agencies were ripe for poaching by the state government to help solve California's financial woes.

In *Matosantos,* the California Supreme Court upheld the 2011 amendments by determining that the enabling legislation did not grant redevelopment agencies an absolute right to an allocation of property taxes revenues. Further, the court found redevelopment agencies are solely a statutory creation and not a constitutional creation. Therefore, what the legislature creates it is free to dissolve.

As with so many trends that move north from California to Oregon, those dependent on urban renewal in Oregon should closely study the predicament of redevelopment agencies in California. Those redevelopment

agencies are currently lobbying in Sacramento trying to save urban renewal before the state acts on the court's decision.

Jennifer Bragar

California Redevelopment Assoc. v. Matosantos, 53 Cal.4th 231, 267 P.3d 580 (2011)

■ KANSAS COURT UPHOLDS CONSTITUTIONALITY OF COUNTY WIND FARM ZONING REGULATIONS

In *Zimmerman v. Board of Wabaunsee County Commissioners*, 293 Kan. 332, 264 P.3d 989 (2011), plaintiff landowners appealed the county's decision to adopt zoning regulations that expressly prohibited the placement of commercial wind farms. Each of the plaintiffs had entered into written contracts for the development of commercial wind farms on their properties. Plaintiffs raised two federal constitutional challenges to that ordinance, using the Takings and Commerce Clauses.

On review, the Kansas Supreme Court found that in order to prevail on a takings claim, a party seeking compensation must first establish that the property in question is one in which a vested interest exists. A "mere expectancy of future benefit . . . does not constitute a vested right." 293 Kan. at 348 (quoting ***KPERS v. Reimer & Koger Assocs., Inc.***, 261 Kan. 17, 41, 927 P.2d 466 (1996) (internal quotation marks omitted)). Prior to the adoption of the prohibition on commercial wind farms, the county only allowed such use through a conditional use permit process. The Kansas Supreme Court concluded the challenged zoning regulations did not effect impermissible takings of private property because plaintiffs had no vested right in a conditional use permit, where issuance of the permit depends upon the discretionary approval of the board of county commissioners. *Id.* at 351. Further, plaintiffs did not have a vested right in the continuity of zoning in a particular area.

The court was much more sympathetic to plaintiffs' argument that the prohibition violated the "dormant" Commerce Clause of the United States Constitution. The dormant Commerce Clause is implicated when the county "(1) discriminat[es] against interstate commerce and (2) burden[s] . . . interstate commerce." *Id.* at 355. "In essence, the dormant Commerce Clause prohibits 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 357 (quoting ***New Energy Co. of Indiana v. Limbach***, 486 U.S. 269, 273–74, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)). "[I]f the law is not facially discriminatory, the court then engages in a balancing test set forth in ***Pike v. Bruce Church, Inc.***, 397 U.S. 137, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970)." *Id.* at 358.

The court considered whether the prohibition was facially discriminatory but was unable to discern any differential treatment of in-state and out-of-state-economic interests because the zoning regulations prohibited all commercial wind farms, regardless of whether the producer planned to sell the electricity in other states.

The court next considered the ***Pike*** balancing test, which requires that the court consider "(1) the nature of the putative local benefits advanced by the statute; (2) the burden placed on interstate commerce by the statute; and (3) whether the burden is clearly excessive when weighed against these local putative benefits." *Id.* at 359 (internal quotation marks omitted). Although the court recognized that a municipality's interests, when acting in its traditional purview (e.g. exercising its police powers), will be a factor to consider in the balancing, it would not rule as a matter of law that such exercise of power is ***per se*** valid. On the contrary, the court remanded the case to the trial court to consider whether the local interests are substantially outweighed by the burdens on interstate commerce. *Id.* at 364.

Oregon municipalities should beware of adopting wind regulations that could be construed to prohibit commercial wind farms because the dormant Commerce Clause may provide the basis for potential legal challenges.

Jennifer Bragar

Zimmerman v. Board of Wabaunsee County Comm'rs, 293 Kan. 332, 264 P.3d 989 (2011)

■ CONSTITUTIONAL LAW

Reflecting the continuing controversy over noise generated by wind facilities, petitioners in ***Cosner v. Umatilla County***, ___ Or. LUBA ___, LUBA Nos. 2011-070/2011-071/2011-072 (Jan. 12, 2012), mounted a successful constitutional challenge to the county's adoption of three wind power generation ordinances. State law allows wind facilities as conditional uses in exclusive farm use zones, and in 2003 the county adopted standards requiring a wind facility to be set back at least 3,250 feet from residentially-zoned property. Following a two-year review of these regulations, the county adopted three ordinances that require a wind facility to be set back: (1) two miles from the urban growth boundary ("UGB") of a city, unless the affected city council approves a lower setback; (2) two miles from any rural residence unless the owner records a waiver establishing a lesser setback; and (3) two miles from streams or tributaries that contain federally-listed species in the Walla Walla watershed. On appeal to LUBA, petitioners argued the two ordinances allowing the two-mile setbacks to be reduced or waived unlawfully delegates the county's legislative authority to others in violation of Article I, Section 21 of the Oregon Constitution and also violates the Due Process Clause of the federal constitution. LUBA agreed with the petitioners on both counts.

Like the petitioners, LUBA characterized the two waiver ordinances as allowing a smaller setback from a wind facility to be decided at the "uncabined discretion of the city or landowner" with no guiding standards, contrary to Article I, Section 21. LUBA Nos. 2011-070/2011-071/2011-072, slip op. at 8. Citing its ruling that airport regulations unlawfully delegated legislative authority in ***Barnes v. City of Hillsboro***, 61 Or. LUBA 375, ***aff'd***, 239 Or. App. 73, 243 P.3d 139 (2010), LUBA explained:

> In the present case, even more clearly than in ***Barnes***, the county has authorized another entity to determine whether there is a "law" at all and if so what its terms will be. The relevant "law" here is the setback from wind facilities, which under Ordinances 2011-05 and 2011-06 a city or landowner can unilaterally reduce to any distance less than two miles, theoretically to a distance of zero, or no setback. The city or landowner in that circumstance is in the uniquely situated position to determine whether there shall be a county setback at all, and if there is, the extent of that setback. . . . As we understand the challenged ordinances, once the city or landowner has recorded a waiver that embodies a lesser setback, the county has no choice but to impose that lesser setback in granting a conditional use permit.

Id., slip op. at 7. LUBA identified several "modest changes" the county could make to both ordinances that would enable them to pass constitutional muster. The ordinances could identify facts or circumstances that would allow the affected city council to establish a smaller setback and allow the city council to approve a reduced setback that is consistent with these standards. The county could also establish a variance process for approving reduced setbacks. In the absence of these provisions, however, LUBA ruled the ordinances allowing city and landowner setback waivers were constitutionally impermissible.

Similarly, LUBA agreed with the petitioners that the two ordinances granted wind facility neighbors unfettered discretion to grant or deny setback waivers in violation of the federal constitution's due process clause. LUBA noted the cases finding due process violations and cited by the petitioners involved standardless ***denials*** by project neighbors, whereas the two challenged ordinances gave neighbors the right to grant standardless ***approvals*** of reduced setbacks. This distinction is not meaningful in LUBA's view and the end result is the same: the ordinances give neighbors arbitrary and standardless decision-making power in violation of the Due Process Clause.

The remainder of LUBA's decision addresses the petitioners' arguments that the ordinances, particularly the ordinance establishing the two-mile setback from resources in the Walla Walla watershed, violate Statewide Planning Goal 5. Prior to adoption of the ordinance, the county allowed wind facilities as conditional uses in the watershed, reflecting a decision to limit this conflicting use under Goal 5. LUBA agreed with the petitioners that the two-mile setback imposed by the ordinance adjusted the balance the county established in its economic, social, environmental, and energy ("ESEE") analysis, and the resulting regulatory program adopted to comply with the goal. Since the county failed to undertake any further ESEE analysis before imposing the additional

stream and tributary resource protections reflected in this ordinance, LUBA agreed the county's ordinance was inconsistent with Goal 5. LUBA remanded all three of the challenged ordinances to enable the county to remedy the constitutional and Goal 5 defects.

■ GOAL 3

The question LUBA addressed in *Central Oregon Landwatch v. Jefferson County*, ___ Or. LUBA ___, LUBA Nos. 2011-106/2011-109 (Feb. 23, 2012), is whether resource land that is included in an urban reserve may be rezoned for higher residential density or must continue to be used for resource uses until it is included within a UGB. Both Central Oregon Landwatch ("COLW") and the Department of Land Conservation and Development ("DLCD") appealed the county's approval of a Goal 3 exception and change in comprehensive plan and zoning designations for a 189.5-acre property zoned for exclusive farm use and located outside of the City of Madras's UGB. The county's decision amended the property's comprehensive plan designation from Range Land to Rural Land and the zoning designation from Exclusive Farm Use-Rangeland to Rural Residential (RR-10). The approved mapping changes and exception were for the purpose of enabling the property owner to divide the property into 18 approximately 10-acre lots and develop an "equestrian themed rural residential development." LUBA Nos. 2011-106/2011-109, slip op. at 2.

On appeal, COLW and DLCD argued in part that the rule limiting planning and zoning for resource lands that have been designated as an urban reserve (OAR 660-021-0040(40)) precludes the county from approving a Goal 3 exception to allow agricultural land that has been designated as a reserve to be rezoned for rural residential development. The county's findings relied on Madras's designation of the property as an urban reserve to support the approved Goal 3 exception and rezoning to RR-10, reasoning that the Urban Reserve designation reflected a legislative determination that rural residential use of the property is appropriate. However, LUBA found the county's reasoning was unsupported by and conflicted with the language of OAR 660-021-0040(3) and (4) and reversed the county's decision.

Subsection (3) of the rule applies to "exception areas and nonresource land[s]" that are designated as Urban Reserves. It prohibits rezoning these lands for "more intensive uses," which is defined to include "higher residential densities" than the zoning allowed before the reserve designation was imposed. In light of this zoning prohibition for exception areas and nonresource lands (and the property at issue in this appeal is neither), LUBA questioned whether the same prohibition applies to resource land that is later designated as an Urban Reserve. LUBA concluded subsection (4) of the rule yields an answer of "yes." This subsection states: "[R]esource land that is included in urban reserves shall continue to be planned and zoned under the requirements of the applicable statewide planning goals." LUBA interpreted the requirement for planning and zoning consistent with the applicable goals to be "a somewhat imprecise way of saying that when resource lands are designated as an Urban Reserve, they must continue to be planned and zoned for the resource uses they were planned and zoned for under Goal 3," among others, until they are included in a UGB. LUBA Nos. 2011-106/2011-109, slip op. at 7. As applied to the county's decision in this appeal, LUBA held the county misinterpreted OAR 660-021-0040(4) by allowing the property to be rezoned for higher density rural residential use that is inconsistent with Goal 3's requirement to preserve the property as EFU-zoned land for farm and other uses permissible in an EFU zone. LUBA concluded the county's decision is prohibited as a matter of law, requiring reversal of the decision.

Kathryn S. Beaumont