Oregon State Bar

# OREGON REAL ESTATE AND LAND USE DIGEST

*Published by the Section on Real Estate and Land Use, Oregon State Bar*

Vol. 34, No. 4
September 2012

***Also available online***

## Contents



# *Appellate Cases -- Real Estate*

## ■ *ADVERSE POSSESSION IS CLEARLY AND CONVINCINGLY DIFFICULT TO PROVE*

In *Case v. Burton*, 250 Or. App. 14, 279 P.3d 259 (2012), the Cases appealed a trial court's decision to grant the Burtons' motion for a directed verdict and to dismiss the Cases' claims for common-law and statutory adverse possession. Central to the trial court's judgment was its finding that the evidence presented by the Cases was insufficient to establish the location of the boundary of the property that the Cases claimed by adverse possession. On appeal, having declined to review the case *de novo*, the Oregon Court of Appeals determined that it was bound by the trial court's factual findings if any evidence in the record supported them. Accordingly, the Court of Appeals held that there was evidence in the record to support the trial court's finding that the Cases had failed to prove by clear and convincing evidence the location of the boundary line of the disputed property, and the court found that failure to be fatal to the Cases' claims for adverse possession under the common law and ORS 105.620.

The Cases and the Burtons own adjoining—but not naturally delineated—parcels of farmland in Linn County. Specifically, the Cases own tax lot 700 to the east, and the Burtons own tax lot 500 to the west. At issue was a strip of land that separates the two parcels and runs along the eastern deed line of tax lot 500. The parties dispute the location of the western border of that strip, and the Cases contend that they possess a portion of the strip that lies west of the eastern deed line of tax lot 500.

At a bench trial, the Cases argued their claim for common-law adverse possession by explaining that the western border of the strip was not the deed line of tax lot 500, but actually a fence and parallel farm road built on tax lot 500 by the Burtons' predecessor in 1940. According to them, the fence and farm road remained continuously in place until the mid-1980s, when one of the Cases dismantled the fence. To establish the precise location of the fence line and farm road, the Cases offered aerial photographs of them taken between 1948 and 2008 along with witness testimony regarding their location. The Cases believed that the evidence they presented at trial clearly and convincingly demonstrated that the location of the fence and farm road was fixed throughout the time periods necessary to prove their case.

However, the trial court disagreed and found that the testimony of the Cases' witnesses was equivocal with regard to the location and placement of the fence line and the farm road in relation to other landmarks that appeared in the photographs. The trial court found that, on cross-examination, the witnesses were unable to identify the location of the fence and farm road at various points in time, and that the Cases themselves even admitted that the farm road was tilled and erased at pertinent times over the years. After considering the Cases' evidence, the trial court held that the Cases could not establish by clear and convincing evidence the location of the fence and farm road with sufficient certainty to support a finding that the Cases adversely possessed any specific portion of tax lot 500 for the requisite 10-year period.

For their statutory theory, the Cases argued that they adversely possessed the disputed property under ORS 105.620, based on the location and reach of an irrigation pivot. The Cases testified that a large irrigation pivot was installed on their property in the mid-1980s in order to water the Cases' crops and that when the pivot rotates, its arm extends past the eastern deed line of tax lot 500. The Cases suggested that because the pivot was positioned to water only the Cases' crops, it was clear that the Cases possessed the disputed property beyond the deed line and that the pivot's location and the extent of its reach proved the boundary of the disputed strip.

However, on cross-examination, the Cases also admitted that the reach of the pivot's rotating arm would vary, depending on the direction and force of the wind. Thus, the trial court found that even if the strip's western boundary line was

determined by the reach of the pivot, rather than the fence line and farm road, the exact location was still not established by clear and convincing evidence because the boundary line would have varied depending on the wind.

Ultimately, the trial court concluded that the strip's western boundary line had certainly moved over the years, and because the court could not determine when the line moved, the Cases failed to prove by clear and convincing evidence that there was continuous possession for ten years of the entire portion of land between the deed line and the line being claimed by the Cases. As a result, the trial court granted the Burtons' motion for a directed verdict, treating the Burtons' motion as a request for a judgment of dismissal under ORCP 54 B(2).

On appeal, the Oregon Court of Appeals acknowledged that it had discretion to review the case ***de novo*** under ORS 19.415(3)(b) but declined to do so and instead reviewed the trial court's legal conclusions for error of law. The court decided that it was bound by the trial court's findings of fact if any evidence supported them.

As the Court of Appeals explained, in Oregon, a common-law adverse possession claim can only succeed if a claimant proves by clear and convincing evidence that he or she or a predecessor in interest made use of the property in a way that was actual, open, notorious, exclusive, continuous, and hostile for a period of 10 years. 250 Or. App. 14, 22-23 (citing ***Lieberfreund v. Gregory***, 206 Or. App. 484, 490, 136 P.3d 1207 (2006)). This common-law rule is codified in ORS 105.620, which adds the requirement that a claimant must have had an "honest belief" of actual ownership that had an objective basis and was reasonable under the circumstances when the claimant first entered into possession of the property. This statute applies to adverse possession claims that vested after January 1, 1990. ***Id***. at 23 (citing ***Lieberfreund***, 206 Or. App. at 490, 136 P.3d 1207). Importantly, the Court of Appeals emphasized that all elements necessary to establish common-law or statutory adverse possession must be proved by clear and convincing evidence, and that standard applies to identification of the property adversely used.

In its review, the Court of Appeals determined that there was evidence in the record to support the trial court's factual finding that the Cases failed to establish the location of the strip's western boundary line, and that the evidence instead showed that the line almost certainly moved. Because the Court of Appeals declined to review the trial court ***de novo***, it was bound by the trial court's factual findings that were supported by any evidence. Accordingly, the Court of Appeals affirmed the trial court and found that the Cases failed to sufficiently identify the area of asserted adverse use, which failure was fatal to their common-law and statutory adverse possession claims.

It is possible that if the Court of Appeals had exercised its discretion to review this case ***de novo***, which ORS 19.415(3)(B) allows, it might have reversed the trial court's decision and remanded the case. However, given that an adverse possession claimant must present evidence to prove its case clearly and convincingly, it is equally likely that this high standard would have doomed the Cases' claims after trial on remand in any event. This case serves as a reminder of the challenging burden an adverse possession claimant must overcome to prevail under Oregon law.

**Tyler Bellis**

*Case v. Burton*, 250 Or. App. 14, 279 P.3d 259 (2012)

## ■ *READ EXPRESS EASEMENTS CAREFULLY*

In this action, ***Eagles Five, LLC v. Lawton***, 250 Or. App. 413, 280 P.3d 1017 (2012), an RV park owner sued his neighbor, alleging that the neighbor had breached an express freshwater easement agreement by capping the water pipeline that ran through the RV park. The neighbor filed a counterclaim, alleging that the RV park owner's claims were frivolous, and seeking declaratory relief.

In 1968 both parcels, still under single ownership, obtained water rights to springs located on the neighbor's parcel. Water from the springs runs into a collection box and feeds spring water into a pipeline running east over a section of the RV park owner's property and finally to a pump house located on the neighbor's parcel. The pipeline had been in place since 1973, while the parcels were under single ownership, and had been used to transport water to the pump house since that time.

In 1988, the RV park property was separated from the larger parcel and a freshwater easement was executed in favor of the RV park with the following language:

> an easement and use for a fresh water pipe running from the pump station in Lot 6 generally westerly to the RV building in lot 4; said line will run along the meander of the Old Immigrant Road, also known as the Meander Line of Tule Lake; as built.

250 Or. App. at 416 (emphasis added). In 1995, an agreement reaffirming the 1988 easement was executed. The 1995 agreement provided that "[s]hould any legal proceeding, including arbitration, be necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorneys' fees incurred including any costs and attorneys' fees incurred on appeal." ***Id.*** at 417.

In 2004, the RV park owner's predecessor installed a valve into the pipeline at a point where the pipeline crosses the RV park. The valve diverted spring water to the RV park property before the water reached the neighbor's pump house. In 2006, the neighbor capped the pipeline at the collection box, preventing all flow of water into the pipeline. The RV park owner sued for breach of the 1988 easement, interference with water rights, and an injunction preventing the neighbors from interfering with the flow of water through the pipeline.

The neighbor countersued for, among other things, declaratory relief that the RV park owner had no right to use a valve on the pipeline and could obtain irrigation by a water line pursuant to the recorded easement, and that the neighbor had an implied easement for delivery of water through the 1973 pipeline over the RV park. The neighbor also sought damages, an injunction to prevent the RV park owner from interfering with delivery of water through the 1973 pipelines, and attorney fees pursuant to the terms of the 1995 agreement.

The trial court concluded that the 1988 easement and the 1995 agreement were not ambiguous and did not grant any express or implied easement relating to the springs, and that the language was "straightforward" in that the "easement only runs from the pump house westerly to the RV Park." *Id.* at 419. Because of this, the RV park owner would have to make arrangements for the physical transport of water from the pump house to the RV park. Because the neighbor had not interfered with these arrangements, the trial court concluded that the neighbor had not interfered with the RV park's easement by capping the pipeline. However, the court concluded that although the RV park owner did not own an easement to reach the springs on the neighbor's property, the RV park owner was entitled to injunctive relief. The court granted the relief as follows:

> At such time as plaintiffs install the necessary piping to allow water to flow from the pump house on defendants' property to plaintiffs' property or are otherwise legally able to transport such water to the plaintiffs' property, defendants shall not interfere with the flow of said water to plaintiffs' property and are specifically enjoined from such interference.

*Id.*

All other claims by the RV park owner were dismissed. Regarding the neighbor's request for declaratory relief, the court declared that the RV park owner had no right to place a valve on the 1973 pipe or to cap it and had to remove the cap. The court further enjoined the RV park owner from interfering with the flow of water to the neighbor's property and concluded that the neighbor had an implied easement across the RV park for use and delivery of water through the 1973 pipe from the springs. Last, the court declared that the RV park owner had a right to use water from the springs only to exercise the easement at or near the pump house. The judgment declared the neighbor as the prevailing party but the court did not award any attorney's fees.


## Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.
Subscription Price: free to Real Estate and Land Use Section Members, $25.00 per year for others.
To subscribe, send your name, firm name, address, telephone number, and OSB member number (if applicable) along with your check to OSB account #84-0335 at the above address.

On appeal, the appellate court reviewed the neighbor's assertion that the trial court had erred in granting an injunction that the RV park owner had not requested regarding future rights not in dispute. Specifically, the trial court had enjoined the neighbor from interfering with the flow of water to the RV park when and if the RV park owner installed the necessary piping to transport the water from the pump house.

The court held that the trial court erred in granting such injunctive relief. *Id.* at 422-23. "An injunction is an extraordinary remedy, to be granted only on clear and convincing proof of irreparable harm when there is no adequate legal remedy." *Id.* at 422 (citing ***Knight v. Nyara***, 240 Or. App. 586, 597, 248 P.3d 36 (2011)). "Moreover, there must be an appreciable threat of continuing harm." *Id.* (citing ***Levasseur v. Armon***, 240 Or. App. 250, 259, 246 P.3d 1171 (2010)). For injunctive relief, the court said that the conduct to be enjoined has to be "probable or threatened." *Id.* (citing ***McCombs et al. v. McClelland***, 223 Or. 475, 485, 354 P.2d 311 (1960)).

At the time the injunction was granted in this case, the neighbor had not interfered with the RV park owner's right to obtain fresh water. The court stated that "the facts do not support a conclusion that the conduct enjoined was 'probable or threatened.'" *Id.* at 423. In addition, there was no "appreciable threat of irreparable harm to plaintiffs if the injunction were not granted." *Id.*

The court next reviewed the RV park owner's position that an implied easement for the 1973 pipeline should not have been granted because there was not clear and convincing evidence. The appellate court disagreed and concluded

> that the trial court could properly find by clear and convincing evidence that, at the time the RV park property and the 1988 easement were conveyed, the parties intended that [the neighbor's] predecessors-in-interest would continue to transport water through the 1973 pipeline across [the RV park] to [the] pump house.

*Id.* at 424. With respect to the central issue of intent, the trial court had found that the parties had been using the 1973 pipeline well before the 1988 easement, and any purchaser of the RV park would have been clearly on notice of the 1973 pipeline. In addition, the 1973 pipeline would result in reciprocal benefit to both parties.

Last, the court agreed with the neighbor's contention that the trial court erred in failing to award them reasonable attorneys fee. The 1995 agreement provides for mandatory attorneys fees to the prevailing party. Therefore, the trial court was required to identify the prevailing party for purposes of attorney fees, and to award reasonable fees for claims relating to the 1988 easement as preserved by the 1995 agreement. *Id.* at 427. "To the extent that the trial court believed it had discretion not to award any fees, in light of the mandatory nature of the attorney fee provision, the court erred." *Id.*

**Marisol R. McAllister**

---

*Eagles Five, LLC v. Lawton*, 250 Or. App. 413, 280 P.3d 1017 (2012)

## ■ *ACCEPTANCE OF A TRUST DEED TO SECURE A CONSTRUCTION-RELATED DEBT WAIVES THE RIGHT TO FILE A CONSTRUCTION LIEN*

In *Evergreen Pacific, Inc. v. Cedar Brook Way, LLC*, 251 Or. App. 194, ___ P.3d ___ (2012), the issue was whether a contractor forfeits the right to a construction lien if it accepts a trust deed to secure a debt owed by a property owner that would otherwise be secured by a construction lien. In relying on the holding from an 1879 case, ***Trullinger v. Kofoed***, 7 Or. 228, 33 Am. Rep. 708 (1879), the Court of Appeals reversed the trial court and held that a contractor does forfeit the right to a lien by accepting a trust deed.

In *Evergreen Pacific*, the property owner, Cedar Brook Way, LLC, wanted to develop several parcels of land and obtained a $4.49 million line of credit from defendant Pacific Continental Bank. To secure repayment of the debt, Cedar Brook gave Pacific Continental a trust deed on two parcels. Cedar Brook hired Evergreen Pacific to pave parking lots and perform other work. Because of a dispute over the quality of some of the work, Cedar Brook did not pay Evergreen and Evergreen filed a construction lien contending it was owed $192,252.00.

Cedar Brook then sued Evergreen alleging slander of title as a result of the "wrongful" lien, arguing that Evergreen's work was defective and that Evergreen therefore had overstated the amount that Cedar Brook owed it, invalidating the lien. The parties then reached a settlement agreement in which Evergreen agreed to repair some of its work, perform new work, and release its lien claim. In turn, Cedar Brook agreed to pay the entire amount owed for the previous work plus an additional $10,000.00 for the new work. Cedar Brook secured this obligation to make the payments by granting Evergreen a trust deed on the property, encumbering the same two parcels that Cedar Brook had previously encumbered with a trust deed to Pacific Continental. The settlement required Evergreen to release, waive, and discharge the lien claim. After Evergreen performed the work contemplated in the settlement agreement, Cedar Brook failed to make payments pursuant to the terms of the settlement and ultimately refused to allow Evergreen the right to finish the work. Thereafter, Evergreen filed a new construction lien against the property. Evergreen then filed suit claiming breach of contract and seeking foreclosure of the lien. In the suit, Evergreen alleged that its lien against Cedar Brooks' property was superior in priority to the security interest of Pacific Continental Bank in the two parcels.

At trial, the bank took the position that Evergreen's lien was invalid because Evergreen had waived its right to a lien when it released the first lien claim and that, in the alternative, Evergreen had forfeited its right to a lien when it accepted a trust deed to secure the debt. The trial court ruled that the lien was valid and superior in priority because Pacific Continental had notice that Evergreen had not waived its right to claim a lien against the property. This notice arose as a result of language in the settlement agreement between Cedar Brook and Evergreen. The court therefore entered a general judgment in Evergreen's favor in the amount of $192, 260.00 plus interest. Pacific Continental appealed.

On appeal, Pacific Continental relied on ***Trullinger***, the 1879 case, for the proposition that a contractor waives its construction lien if it takes a mortgage to secure the debt underlying the lien. In ***Trullinger***, Runey, a contractor, performed construction work on a building owned by the Kofoeds. While the work was underway the Kofoeds signed promissory notes to two people and executed mortgages on the property to secure the notes. After those mortgages were recorded, Runey filed a construction lien on the same property. On the same day, the Kofoeds gave Runey a promissory note for the full amount owed and executed a mortgage on the property in his favor. The question was whether Runey's lien was valid, which would give him priority over the other two mortgages, or whether Runey waived his lien by taking a note and mortgage on the property. The court concluded that, by taking the mortgage, Runey waived the lien. The reason behind the court's holding was that subsequent lien holders and purchasers have a right to rely on the record and should be protected against secret liens. The court was concerned that, if the taking of a mortgage on property is not a waiver of a construction lien, a contractor may hold a mortgage on the property and then, at a time period within the construction lien statute, file the lien.

In ***Evergreen***, plaintiff Evergreen did not dispute the holding in ***Trullinger*** that taking a mortgage forfeits a construction lien. Instead, Evergreen argued that, because the bank had received a copy of the settlement agreement, it therefore had notice that Evergreen was not waiving its right to file a lien in the future and, therefore, there was no secret lien from which the bank needed protection.

In rejecting this argument, the ***Evergreen*** court interpreted ***Trullinger*** as creating a bright-line rule regarding the effect that a mortgage or trust deed has on a construction lien. In reaching this bright-line holding, the court noted that the parties did not identify any statutory or other changes in the law that would undermine the general principles announced in ***Trullinger***. Thus, ***Trullinger*** remained good law and Evergreen's lien was invalidated.

**Gary K. Kahn**

*Evergreen Pacific, Inc. v. Cedar Brook Way, LLC*, 251 Or. App. 194, ___ P.3d ___ (2012)

## ■ *UNRECORDED DEED HAS PRIORITY OVER BFP WITHOUT CONSIDERATION*

In *Muzzy v. Uttamchandani*, 250 Or. App. 278, 280 P.3d 989 (2012), a quiet title action over competing deeds, the Court of Appeals took the opportunity to apply the ***bona fide*** purchaser rule, codified at ORS 93.640:

> Every . . . deed . . . affecting the title of real property within this state which is not recorded as provided by law is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose . . . deed . . . is first filed for record, and as against the heirs and assigns of such subsequent purchaser.

In 1999, the owner of a family beach house quitclaimed the property to his daughter, reserving a life estate. In 2003, the daughter quitclaimed her interest in the property back to her father for "love and affection." That deed was not recorded. In July 2004, the daughter gave a bargain and sale deed to Rowlands for the property. The deed was recorded on July 30, 2004. Weeks later, Rowlands executed a note to the daughter for $10,000, payable on sale with clear title. Then on September 8, 2004, the 2003 deed was recorded. Thus, the 2004 bargain-and-sale deed was recorded prior to the 2003 quitclaim deed. The issue was which deed had priority.

The court ruled that, under the statute, an unrecorded conveyance is valid as between the grantor and the grantee, but is void as against a subsequent ***bona fide*** purchaser for value ("BFP"). The subsequent purchaser has the burden to prove that he or she (1) bought in good faith; (2) paid valuable consideration; and (3) filed first for record.

The case turned on whether Rowlands was a BFP—specifically, whether he paid valuable consideration for the 2004 deed. The court held that the note given subsequently was not consideration for the deed. Nothing of value changed hands at the time the deed was executed, and the note actually was consideration for something else—the clearing of title; specifically, termination of the life estate.

The court left open the issue whether the 2003 quitclaim deed reciting "love and affection" as consideration was valid because ORS 93.030 at the time required consideration to be stated in dollars. However, the statute subsequently was revised to allow consideration to be stated as "other property or value was either part or the whole of the consideration."

The take-away best practices from this case are to (1) recite the consideration properly on the face of the deed; (2) assure that consideration changes hands when the deed is executed; and (3) record deeds promptly.

**Mary W. Johnson**

*Muzzy v. Uttamchandani*, 250 Or. App. 278, 280 P.3d 989 (2012)

## ■ NO DISCOVERY RULE FOR CERTAIN STATUTES OF LIMITATIONS

*Rice v. Rabb*, 251 Or. App. 603, ___ P.3d ___ (2012), involved actions for conversion and replevin with respect to ***personal*** property—specifically, the outfit worn by the 1930 "Queen of the Pendleton Round-Up." The outfit was loaned to the Pendleton Round-Up and Happy Canyon Hall of Fame for display, allegedly by plaintiff and her husband. Decades later, the Hall of Fame released the outfit to defendant. Plaintiff, who had been legally blind for many years, did not learn defendant had removed the outfit from the Hall of Fame until 2007, seven years later. Plaintiff commenced her lawsuit in 2009.

The Court of Appeals affirmed the trial court's holding that plaintiff's claims were properly dismissed as time-barred under the 6-year statute of limitations governing actions for the taking of personal property, ORS 12.080(4), and that the statute is not subject to a discovery rule. The court explained that when the legislature intends to subject a statute of limitations to the discovery rule, it knows how to do so clearly. The text here contains no indication the legislature intended a discovery rule to apply. The court rejected plaintiff's argument that ORS 12.010 impliedly incorporates a discovery rule into ORS 12.080(4). In *Berry v. Branner*, 245 Or. 307, 421 P.2d 996 (1966), a medical malpractice case, the Oregon Supreme Court did hold that ORS 12.010 impliedly incorporated a discovery rule into ORS 12.100(1). Here, however, the Court of Appeals rejected the plaintiff's argument that the *Berry* analysis should apply. Just as tort victims will sometimes not know they have been damaged (or the source of their damage) for some years after the tort has been committed, so will those who convert property sometimes remain undiscovered for long periods of time.

Does *Rice* say anything about real property claims? Not directly. However, another subsection of ORS 12.080 is the statute of limitations for "waste or trespass upon or for interference with or injury to any interest of another in real property, excepting those mentioned in ORS 12.050, 12.060, 12.135, 12.137 and 273.241." ORS 12.080(3). In *Waxman v.Waxman & Associates, Inc.*, 224 Or.App. 499, 198 P.3d 445 (2008), the Court of Appeals held that ORS 12.080(1) (relating to certain contract claims) did not contain a discovery rule. Now, in *Rice*, citing *Waxman*, the Court of Appeals has held that ORS 12.080(3) does not contain a discovery rule. The Court of Appeals stated in *Waxman* that it is well settled that a contract claim accrues on breach and, in *Rice*, that it is well settled that a conversion claim accrues at the time the defendant exercises wrongful control over property. Any attempt to argue that ORS 12.080(3) contains a discovery rule will need to distinguish these cases.

**Suan C. Glen**

*Rice v. Rabb*, 251 Or. App. 603, ___ P.3d ___ (2012)

# Appellate Cases – Land Use

## ■ SPECIFIC FINDINGS TO SUPPORT EXPENDITURE RATIO IS PARAMOUNT FOR MEASURE 49 VESTED RIGHTS

In light of the Oregon Supreme Court's decision in *Friends of Yamhill County v. Board of Commissioners*, 237 Or. App. 149, 238 P.3d 1016 (2010), *rev. allowed*, 349 Or. 602, 249 P.3d 123 (2011), the Oregon Court of Appeals on remand reconsidered its earlier decision in *State v. Crook County*, 242 Or. App. 580, 256 P.3d 178 (2011) (*Crook County I*), *adhered to as modified on reconsideration*, 244 Or. App. 572, 261 P.3d 1264 (2011) (*Crook County II*). The issue on remand was whether the trial court properly analyzed the expenditure ratio for vested rights purposes in a Measure 37 waiver claim. The court adhered to its prior decision, again determining that the expenditure ratio was improperly calculated by the circuit court where it failed to make specific findings for both the costs incurred by the landowner and the total anticipated cost of development. In *State v. Crook County,* 248 Or. App. 602, 274 P.3d 260 (2012) (*Crook County III*), the court of appeals found this determination was consistent with the law articulated by the Oregon Supreme Court in *Friends*.

A landowner was granted state and county Measure 37 waivers to develop a 59-lot residential subdivision. The development was not completed at the time Measure 49 took effect and the landowner subsequently applied to the county to affirm her right to continue development. DLCD submitted materials during the comment period, including "guidelines" for analyzing Measure 49 common-law vested rights. The landowner's application indicated a total expenditure of over five million dollars but did not include the cost of homes that would be built as part of the project.

The county planning director did not include the cost of individual residences when considering the expenditure ratio. The planning director ultimately determined that the landowner had a common-law vested right to complete the development as contemplated and DLCD filed a local appeal pursuant to county procedure. The local county court affirmed the planning director's decision, specifically finding in its order that the cost of the homes should not be included in the total cost of the development project.

DLCD next appealed the order to the circuit court via writ of review. In affirming the county court's decision, the circuit court stated in its opinion, "a specific determination of the denominator in the ratio of investment to total cost of development is not required in every case. . . ," and that, even if it were required, the landowner had met her burden of proving sufficient

investments to warrant vesting of development rights. *Crook County I*, 242 Or. App. at 585. These facts set the stage for *Crook County I, II, and III*.

The appellate court in *Crook County III* noted that the circumstances of this case were materially indistinguishable from *Friends*. In *Friends*, the landowner similarly obtained a vesting determination from the county. The county did not assign significant weight to the expenditure ratio, nor did it determine the total cost of completing the project.

*Crook County III* reiterated the factors for vested rights analysis set out in *Clackamas County v. Holmes*, 265 Or. 193, 198-99, 508 P.2d 190 (1973):

> The test of whether a landowner has developed his land to the extent he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors considered. Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.

*Crook County III*, 248 Or. App. at 605.

Notwithstanding the supreme court's admonition that "there is no bright line for determining when an expenditure will be substantial enough to establish a vested right," the "ultimate cost" supported by specific findings is a requirement in the analysis. *Id.* at 606. Even in the presence of other *Holmes* factors, the failure to provide specific supporting evidence to substantiate incurred costs and project costs will likely prove fatal in a vested rights case.

**Jacquilyn Saito-Moore**

---

*State v. Crook County*, 248 Or. App. 602, 274 P.3d 260 (2012)

## ■ *WHEN "UNDER" MEANS "AS AUTHORIZED BY," NOT "IN ACCORDANCE WITH"*

In December of last year, the Oregon Court of Appeals rendered its opinion in *Jones v. Douglas County*, 247 Or. App. 81, 270 P.3d 278 (2011), a case involving an exception to the definition of a land use decision, LUBA jurisdiction, and canons of statutory interpretation. In 1995, Douglas County authorized Philip and Cynthia Bowes ("Bowes") to construct a "lot of record" dwelling on property Bowes owned. Bowes could not comply with various conditions of approval within the approval's two-year deadline. At the county's invitation, Bowes applied for a 12-month extension of the approval in June 1997, three days after the approval's expiration. Each year thereafter, from 1998 through 2010, Bowes applied for and received additional 12-month extensions. Bowes submitted several of these applications after the relevant 12-month deadline had passed, though Bowes did submit a timely request in 2010.

ORS 197.825 grants LUBA the exclusive jurisdiction to review local "land use decisions," subject to a number of exclusions to the definition of that term. For instance, a "land use decision" does not include a local government decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A). Based on that particular exclusion, LCDC promulgated a rule governing the extension of dwelling approvals in farm and forest zones. The rule, OAR 660-033-0140(2), states that counties may approve one-year extensions if, among other things, the extension request "is submitted to the county prior to the expiration of the approval period." Subsection (3) of the rule states that "[a]pproval of an extension granted ***under*** this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision." OAR 660-033-0140(3) (emphasis added).

Eventually it seems Bowes' neighbors became sufficiently frustrated with Bowes' delays and serial requests for extensions that they appealed the underlying 1995 decision as well as five of the extension approvals to LUBA. Bowes and the county argued that LUBA did not have jurisdiction over the appeals because the county granted approval of the extensions "under" OAR 660-033-0140(2) and because subsection (3) clearly exempts such actions from the definition of a land use decision. The neighbors claimed that the county could not have granted approval of the extensions "under" the rule because several of Bowes' requests were not timely filed. The neighbors argued that "under" is analogous to "in accordance with" and, because many of Bowes' requests were untimely, (1) the county's approvals did not accord with the rule; (2) the approvals were therefore not excluded from the definition of a land use decision; and (3) LUBA thus had jurisdiction of the neighbors' appeals.

LUBA agreed with Bowes and the county that it did not have jurisdiction over the neighbors' appeals and that "under" in the context of the rule means "as authorized by" and not "in accordance with." On appeal, the Court of Appeals agreed with LUBA and affirmed its order dismissing the appeals. The court noted that to interpret "under" to mean "in accordance with" (i.e., only if the local government complies with the rule) "would render subsection (3) [of the rule] a functional nullity." 247 Or. App. at 94, 270 P.3d at 284. Under the neighbors' proffered interpretation, "in every appeal, LUBA, to determine its jurisdiction, would be required to review and decide the merits of the appeal. The jurisdictional limitation would be rendered

meaningless." *Id*. The court concluded the "under" in the context of the rule means "as authorized by" and "so long as the local government has purported to allow an extension under the authority of OAR 660-033-0140, subsection (3) operates to preempt LUBA review." *Id.*

It is important to remember that the rule does not foreclose judicial review entirely. The neighbors may have been able to establish jurisdiction with the circuit court through a writ of review or an alternative action.

**David Doughman**

*Jones v. Douglas County*, 247 Or. App. 81, 270 P.3d 278 (2011)

## ■ MAGUIRE V. CLACKAMAS COUNTY UNDERSCORES THE NEED TO STRICTLY FOLLOW LUBA'S PROCEDURAL RULES

*Maguire v. Clackamas County*, 250 Or. App. 146, 279 P.3d 314 (2012) involved a two-lot partition undertaken pursuant to a Measure 49 claim. The Court of Appeals ruled on two distinct issues: (1) a decision made under Measure 49 is not appealable to LUBA; and (2) a motion to transfer a LUBA appeal to circuit court must be filed within 14 days of a jurisdictional issue being raised by anyone, including LUBA itself.

Petitioners challenged the decision at the local level, arguing that Section 11(4)(b) of Measure 49 requires that newly-created lots on EFU land must be clustered. The hearings officer reasoned that because only one new parcel was being created, it did not need to be clustered with the original parcel.

The petitioners appealed to LUBA, which dismissed the case for lack of jurisdiction because Measure 49 decisions are not land use decisions. LUBA reasoned that the county's partition approval was a final determination "under" Section 11 of Measure 49 because the county's decision was made pursuant to the substantive standards set forth in that section, in particular the clustering standard of Section 11(4)(b). After a somewhat esoteric analysis of the definition of the word "under," the Court of Appeals determined that in this context the word "under" means "as authorized by" and further determined that the partition decision was made under the authority of Measure 49 and that ORS 195.318(1) preempts LUBA review.

The more interesting part of the opinion, at least for land use practitioners seeking to avoid traps for the unwary, involved LUBA's refusal to transfer the case to Circuit Court under ORS 34.102(4) and the Court of Appeals decision to sustain LUBA on this issue as well.

At oral argument, LUBA verbally raised the issue of whether it had jurisdiction over what appeared to LUBA to be a Measure 49 decision, and LUBA asked for briefing on the issue. At that point, petitioners should have filed a motion to transfer to circuit court, conditioned on LUBA's ultimate decision. Under OAR 661-010-0075(11)(b) a party has 14 days to file a motion to transfer, measured from the date that any party or LUBA itself raises a jurisdictional issue. Although LUBA may have discretion to accept a late-filed motion (provided the substantive rights of the other parties are not prejudiced), once LUBA issues its final decision, it is then too late to ask for a transfer because LUBA lacks authority to reconsider a final order.

At the Court of Appeals, the petitioners challenged LUBA's refusal to consider the late-filed transfer motion. According to petitioners, the requirement of ORS 34.102(4) that a matter ***shall*** be transferred to circuit court means that LUBA ***must*** transfer an appeal, notwithstanding petitioners' failure to comply with LUBA's procedural rule requiring the motion to be filed within 14 days. The Court of Appeals disagreed and found that LUBA's administrative rule setting forth procedures for transfer to circuit court was well within LUBA's authority to adopt under ORS 197.820(4), which bestows on LUBA the authority to adopt procedural rules.

This case is a good reminder for land use practitioners to pay close attention to LUBA's procedural rules.

**Steve Morasch**

*Maguire v. Clackamas County*, 250 Or. App. 146, 279 P.3d 314 (2012)

## ■ SURPLUS FINDINGS HAVE "NO LEGAL EFFECT WHATSOEVER"

In this latest *Weber Coastal Bells v. Metro* decision, 352 Or. 122, 282 P.3d 822 (2012) ("*Weber II*"), the Oregon Supreme Court concluded that Metro's findings in its land use final order on remand about the new I-5 bridges already receiving land use approval were of no consequence. This case is a follow-up to the Supreme Court's decision earlier this year, *Weber Coastal Bells v. Metro*, 351 Or. 548, 273 P.3d 95 (2012), which this digest summarized in its June 2012 edition.

On remand, Metro issued its final land use order, removing at LUBA's direction those portions of the Columbia River Crossing project that would extend beyond the urban growth boundary. *Weber Coastal Bells v. Metro*, ___ Or. LUBA ____ (LUBA Nos. 2011–080, 2011–081, 2011–082, and 2011–083, Oct. 26, 2011). But Metro also included a finding stating that the portions of the project removed from the final order "must gain authorization through the usual land use decision-making

process," and "are authorized in Metro's acknowledged 2035 Regional Transportation Plan . . . and the City of Portland's acknowledged Transportation System Plan . . . ." *Weber I*, 352 Or. at 126 (quoting LUBA).

Initially, the court rejected Metro's claim that Plaid Pantries did not have standing because it did not file anything with the court in the earlier proceeding, concluding that Plaid Pantries' brief before LUBA was sufficient to give standing. The court cited specific text in the 1996 act that provided for expedited review to facilitate completion of the South North MAX Light Rail Project, Or. Laws 1996, ch. 12, § 2.

Plaid Pantries claimed Metro's findings were not supported by substantial evidence and were erroneous as a matter of law, arguing that the findings are "intended [by Metro] to support a later claim that the City is estopped from requiring additional land use reviews and approvals[.]" The court succinctly rejected Plaid Pantries' arguments, concluding that Metro's final order recognized that the portions of the Columbia River Crossing project that would have extended beyond the urban growth boundary "must gain authorization through the usual land use decision-making process." The statements in the order that those portions of the project, "are authorized in Metro's acknowledged 2035 Regional Transportation Plan and the City of Portland's acknowledged Transportation System Plan" may reflect Metro's and Tri-Met's position regarding the need for land use approval, but they are just mere assertions without additional legal effect.

Thus, the court left the parties to argue about approvals of the portions of the Columbia River Crossing project that extended beyond the urban growth boundary at some point in the future.

**Jeffrey B. Litwak**

*Weber Coastal Bells v. Metro*, 352 Or. 122, 282 P.3d 822 (2012)

## ■ CONSTRUCTION COSTS AS OF THE EFFECTIVE DATE OF MEASURE 49 MUST BE INCLUDED IN DENOMINATOR OF VESTED RIGHT EXPENDITURE RATIO

*DLCD v. Clatsop County*, 249 Or. App. 566, 281 P. 3d 613 (2012), is one of several cases on remand to the Court of Appeals following the Oregon Supreme Court's decision in *Friends of Yamhill County v. Board of Commissioners*, 237 Or. App. 149, 283 P.3d 1016 (2010), which vacated the Court of Appeals' decision. The issue on remand was whether the circuit court in a writ-of-review proceeding properly affirmed Clatsop County's determination that respondent James and Virginia Carlson had a common law vested right to complete a residential subdivision in compliance with county and state waivers issued pursuant to Ballot Measure 37 (2004).

The county planning director had determined that, in calculating the vested right expenditure ratio, the costs of home construction, based on generalized numbers from historic building permits, must be included in the denominator. On appeal, the county commission disagreed, finding that if the costs of home construction must be included, those costs should be based on current market conditions, as determined by a specific market analysis of the project performed by a qualified expert.

The Court of Appeals reversed and remanded, concluding that, in calculating the expenditure ratio, the costs of home construction must be included in the denominator, and those costs must be the likely costs of completing the particular development sought to be vested based on construction costs as of the effective date of Measure 49, or December 6, 2007.

**Lisa Knight Davies**

*DLCD v. Clatsop County*, 249 Or. App. 566, 281 P. 3d 613 (2012)

# Cases From Other Jurisdictions

## ■ NINTH CIRCUIT FINDS NO DAMAGES FROM INVALID MORATORIUM

*Samson v. City of Bainbridge Island,* 683 F.3d 1051 (9th Cir. 2012), involved defendant city's moratorium on development of shoreland property (including that of plaintiff), which was successfully challenged under the Washington Constitution in state court. Plaintiffs then sought civil rights damages for alleged violations of their procedural and substantive due process rights. The local regulations were developed under the Washington Shoreline Management Act and the moratorium was placed on new docks and piers until the City adopted new regulations for that development under the act. The city extended the moratorium and, in a subsequent legal challenge, the state trial court declared it invalid under the Washington constitution. While the city's appeal of the trial court's decision was pending, the city adopted new shoreline requirements prohibiting all new overwater structures, including plaintiffs' desired dock development. Those regulations were found to be valid and constitutional. The instant case was filed in state court, but the city removed it to federal court and successfully moved for summary judgment. Plaintiffs appealed.

The court turned first to plaintiffs' substantive due process claims, which involved allegations of property deprivation under color of state law (which law defines property interests), and found no violation of fundamental rights in the enactment

of the moratorium. The Ninth Circuit used the traditional formulation that, to be in violation of the constitution, an ordinance must be clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare—a burden which the court found not to be met in this case. The court said the possibility of alternative regulatory mechanisms, the expansion and continuation of the moratorium after its initial declaration of invalidity in the state trial court by use of a stay, and its ultimate determination of unconstitutionality do not give rise to the sort of egregious official conduct lacking any justification. In fact, in the light of the city's stated intention of revising its shoreline regulations, the court found the moratorium was "positively sensible." 683 F.3d at 1059.

The court also rejected the plaintiffs' claim that the city's revision of its shoreline management plan was a pretext for imposing the moratorium. Similarly, the court found the city's extension of the moratorium and success in seeking a stay of the trial court's decision was done in good faith. The city sought the stay both to preserve the public's rights during an appeal and to refuse the issuance of permits that would frustrate the City's ultimate regulatory aims in the meantime. The court noted that the stay was secured in the courts through a lawful process. Moreover, the moratorium's unconstitutionality in this case was based on the Washington, rather than the federal, constitution and the court concluded that not every act that violated the state constitutional provision would automatically result in a federal constitutional deprivation. The Court concluded there was no showing of substantive due process violations sufficient to proceed to trial in this case and the moratorium was at least "fairly debatable." *Id.* at 1060 (quoting ***Halverson v. Skagit Cnty***., 42 F.3d 1257, 1262 (9th Cir.1994)). Thus the Ninth Circuit affirmed the trial court on this point.

The court then turned briefly to plaintiffs' procedural due process objections and noted that these requirements were satisfied within a legislative context when the legislative body performed its functions in the manner prescribed by law in the adoption of a broadly applicable ordinance. The court cited ***Bi-Metallic Investment Company v. State Board of Equalization***, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915), to conclude that plaintiffs' rights were "protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the law," ***id.*** at 1060, and concluded:

> It is surely vexing to the Samsons that they and their co-plaintiffs successfully challenged the moratorium in state court, but received no damages for their efforts. And it must be more vexing still that they won the battle, but lost the war: the state courts struck down the temporary moratorium, but upheld the permanent ban on shoreline development. But the federal courts do not exist to satisfy litigants who are unhappy with what they received in state court. Nor do they exist to second-guess the manner in which city officials promote the public welfare. Because the Samsons have suffered no violation of their constitutional rights to substantive and procedural due process, the district court's order granting Bainbridge's motion for summary judgment is affirmed.

*Id.*

The above conclusion speaks for itself. Due process is not a roving constitutional grant to courts to fix any unfairness that does not give rise to a constitutional violation. It is up to law-makers and citizens to design mechanisms, if any, to deal with those perceived situations, and, when those mechanisms are too blunt, such as Measure 37, to redesign them.

**Edward J. Sullivan**

*Samson v. City of Bainbridge Island,* 683 F.3d 1051 (9th Cir. 2012)

# *Land Use Board of Appeals*

## ■ *UTILITY FACILITIES*

Under the county planning and zoning statutes, "utility facilities necessary for public service" are allowed as permitted uses in exclusive farm use (EFU) zones "as provided in ORS 215.275." (ORS 215.283(1)(c)) A utility facility is necessary for public service if it must be sited in an EFU zone to provide the service. (ORS 215.275(1)) To make this showing, an applicant must demonstrate that "reasonable alternatives" have been considered and the utility facility must locate in an EFU zone as a result of one or more specifically listed factors. In approving a facility, the county governing body may impose clear and objective conditions to minimize the impacts of the facility on surrounding farm lands. (ORS 215.275(2), (5))

In *WKN Chopin, LLC v. Umatilla County,* ____ Or. LUBA ___ (LUBA No. 2012-016, July 11, 2012), LUBA considered what this statutory scheme requires when both a proposed utility facility and all reasonable alternatives are located in an EFU zone. Petitioner in *Chopin* applied for land use approvals to build a wind turbine facility and a 12-mile long transmission line to connect the wind turbine to a PGE transmission line. The county approved the wind turbine, but denied approval for the transmission line because it did not comply with a comprehensive plan policy calling for transmission lines to be located within existing corridors and because there were three alternatives that would be shorter in length than the proposed transmission line. Before the county, the applicant argued that it was not legally required to consider the three alternatives because all of them, like the proposed 12-mile transmission line, cross EFU-zoned land and ORS 215.275(2) requires consideration of only alternatives that do not require use of EFU-zoned land. In its appeal of the county's denial to LUBA, petitioner argued the county erred by imposing an alternatives analysis that state law does not require.

In LUBA's view, "the statutory question is whether ORS 215.275 and its local law analogue . . . require that petitioner must demonstrate it is not feasible to use EFU-zoned alternative alignments to the 12-mile long EFU-zoned proposed alignment, where the alternatives are much shorter and therefore will likely utilize less EFU zoned land." Slip Op. at 6. Citing decisions by the Oregon Supreme Court and Court of Appeals as well as its own decisions, LUBA had no difficulty answering this question in the negative. Where, as here, the only potential alternative locations for a utility facility are also in an EFU zone, these alternatives need not be analyzed. Similarly, general legislative policies favoring the protection of farm land cannot be read to impose this type of alternatives analysis. An applicant is required to consider only non-EFU-zoned alternatives; since there were none here, the county erred in faulting the applicant for failing to analyze the three shorter alternative transmission lines that would also cross EFU-zoned land.

LUBA also concluded the county erred in disapproving the transmission line as inconsistent with a comprehensive plan policy requiring transmission lines to be co-located within existing corridors as much as possible. Since the proposed transmission line is permitted as a utility facility necessary for public service under ORS 215.283(1), the county may not apply its local standards to preclude this use. Similarly, LUBA held the county acted improperly in basing its denial in part on the applicant's failure to show it is technically feasible to build the transmission line within the proposed alignment. ORS 215.275(5) allows the county to deny a proposal if substantial evidence in the record shows it will negatively affect farm practices or the cost of farm practices and these effects cannot be mitigated by imposing conditions. However, the county did not address this issue; instead it held the applicant failed to make a showing of technical feasibility without identifying any legal basis for this requirement. Because the county misconstrued the applicable statutes pertaining to utility facilities in EFU zones, LUBA reversed the county's decision.

## ■ LOCAL PROCEDURE

### *Bias*

In ***Newell v. Clackamas County***, ____ Or. LUBA ____ (LUBA No. 2012-011, June 20, 2012), examined whether the impartial tribunal requirement articulated in ***Fasano v. Washington County Commission***, 264 Or. 574, 588, 507 P.2d 23 (1973), is violated when a hearings officer who contracts with multiple jurisdictions to provide land use hearings officer services decides a land use application filed by one of the jurisdictions with whom he contracts. In this case, the City of Portland applied to the county for a conditional use permit to build water supply facilities. The county hearings officer who heard the application disclosed at the hearing that he also serves as a contract hearings officer for the City. Petitioner, an opponent, argued the hearings officer had a conflict of interest and should recuse himself. The hearings officer declined to do so, approved the application and petitioner appealed.

Before LUBA petitioner argued the county committed procedural error because the hearings officer's work for multiple jurisdictions, including the City, created an appearance of personal interest or bias and rendered him incapable of making an impartial decision on the City's application. LUBA disagreed, citing previous decisions in which no bias was found simply because the decision maker decided an application filed by the jurisdiction for which he worked or represented private clients who might seek land use approvals in the future. Similarly, LUBA concluded the petitioner failed to make any showing that the county hearings officer had any actual bias and affirmed the county's decision.

### *Local Action on Remand*

State law gives a local government 90 days to take final action in response to a LUBA final order remanding or reversing an appealed land use decision. ORS 227.181(1); ORS 215.435(1). In ***Poe v. City of Warrenton***, ____ Or. LUBA ____ (LUBA No. 2012-029, Aug. 16, 2012), the city conducted a hearing on a conditional use and site design permit approval that LUBA remanded. The county held a remand hearing on the 90$^{th}$ day after the date the applicant asked the city to take action on his application consistent with ORS 227.181(2)(a). At the hearing, the applicant submitted evidence addressing one of the outstanding issues, adequacy of fire services. Petitioners asked for an opportunity to respond to this evidence. Apparently believing it was statutorily required to take action on the 90$^{th}$ day, the council denied the petitioners' request and approved the application.

On appeal, LUBA agreed with the petitioner that the city erred in failing to give them an opportunity to respond to the applicant's evidentiary submittal. In LUBA's view, "the fact that the city believed it was making a decision on the last day allowed by ORS 227.181 for such a decision does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing." Slip op. at 5. LUBA identified potential alternative courses of action available to the city under the circumstances presented here; these included rejecting the applicant's new evidence or leaving the record open so petitioners could respond to the evidence. LUBA observed there is no mandamus remedy available under ORS 227.181 when a local government fails to comply with the 90-day time limit for taking action on remand. As a result, exceeding this time limit creates minimal risk for the city. Given the city's procedural error, LUBA again remanded the decision to the city.

## ■ LUBA JURISDICTION

One of the rarely claimed exceptions from LUBA's review jurisdiction is the exception for local ordinances establishing tax or fiscal policies first articulated in ***State Housing Council v. City of Lake Oswego***, 48 Or. App. 525, 616 P.2d 655 (1980), ***rev dismissed***, 291 Or. 878, 635 P.2d 647 (1981). In ***Conte v. City of Eugene***, ___ Or LUBA ___ (LUBA No. 2012-041, Aug. 14, 2012), LUBA applied this "fiscal exception" to conclude it lacked jurisdiction to review a city resolution approving a property tax exemption for a multi-family housing project under ORS 307.618(1) and the city code.

As a preliminary matter, LUBA noted that both state law and the city code require the city to find that the proposed multi-family project will be "in conformance with all local plans and planning regulations" in order to approve the tax exemption. The city made that finding here and did not dispute the appealed resolution is a statutory land use decision because it concerns the application of comprehensive plan provisions or land use regulations. The city argued, however, that the ***State Housing Council*** fiscal exception to LUBA's jurisdiction applied and LUBA lacked authority to review the city's tax exemption approval.

LUBA observed that both ORS 307.631(1) and the city code counterpart state that judicial review of a ***denial*** of an application is by way of writ of review. Neither says anything about how a city decision ***approving*** a tax exemption is reviewed. LUBA concluded the statutory language did not provide a basis for finding LUBA had review jurisdiction here, reasoning "we do not believe that that language represents a deliberate legislative choice to provide for review of denial of tax exemptions in circuit court and of approval of tax exemptions before LUBA. We can imagine no basis for such a distinction." Slip op. at 4-5.

Even if the statutory language could be read to make this distinction, LUBA held that the city's approval of the tax exemption is exempt from LUBA's review jurisdiction under the fiscal exception doctrine. LUBA characterized the statutorily required determination that the proposed project "is or will be" in conformance with city land use plans and regulations as a "broad-brush, tentative evaluation" rather than a focused determination of compliance with applicable land use approval criteria. Additionally, the city's decision merely approves a tax exemption. It does not approve or purport to approve actual development and, as a result, has only "incidental impacts" on land use. Lacking jurisdiction to review the city's resolution, LUBA dismissed the appeal.

**Kathryn S. Beaumont**