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Patrick A. Randolph

Pat Randolph, the first editor of the *RELU Digest*, died on October 12, 2012 at the age of 68 in Kansas City. He received his BA from Yale and his JD from Boalt Hall, Berkeley, where he was a special projects editor for the *California Law Review*. In Oregon, he served as a law clerk for Chief Justice Kenneth J. O'Connell. Pat served only a few months as editor of the *Digest* in 1979 before moving on to join the law faculty at the University of Missouri at Kansas City.

Most real estate lawyers knew Pat as the managing editor and website manager for his nearly-daily postings in the DIRT discussion group, which was an offshoot of the American Bar Association's Quarterly Development Report. He also was editor of the Randolph Edition of Friedman on Leases.

The *Digest* honors his memory.

Edward J. Sullivan

Associate Editor

Déjà Vu: La Tush Lives!

Long-time readers will remember tales of the mythical town of La Tush, Oregon and the antics of its inhabitants, Glen and Nadine Twidley, which occasionally appeared in the *RELU Digest*. La Tush and the Twidleys were created by Laurence (Larry) Kressel, editor of the *Digest* from 1980 to 1997, who used these characters and stories to gently poke fun at the complexities of Oregon land use law and to prevent us from taking ourselves too seriously. Planning Commissioner Glen Twidley was known as the father of "Fasanology," described as "a tax exempt belief system based on *Fasano v. Board of Commissioners of Washington County*." Nadine Twidley fulfilled various positions and functions, including mayor of La Tush, order filler at the La Tush Press, and director and custodian of Fasanomentia, Inc. In celebration of the season and in remembrance of Larry's sly wit, excerpts of the occasional series "News from La Tush" are reprinted below.

■ PUBLICATIONS: LA TUSH PRESS PUBLISHES TREATISE EXPLAINING COMMISSIONER TWIDLEY'S MOTIONS

The scenario is now familiar. It is after midnight at the La Tush City Hall. A tense, five-hour hearing has just ended. Petitioner's request to install yet another diesel-powered chicken plucker and a variable speed tweezer at its processing plant is finally before the Planning Commission. The chairman calls for a motion. As Commissioner Twidley takes the microphone, anxious attorneys and their clients lean forward to catch each word.

TWIDLEY: I would like to make a motion that we approve this, including the findings and conditions of the Staff, but that we also add a review of the site connected with the structure and landscaping, but put forth in front of the staff for approval, and that in every consideration of scenic acceptability in the area, that if it is financially feasible without due hardships that they can't do it, that it be considered and put in, and that includes the landscaping and the structure, otherwise to be denied as a fasano per the nonconforming use.

McVAPID: O.K., I'll second that.

A victory for petitioner? Or a cleverly disguised zoning defeat? La Tush Planning Commissioner Glen Twidley cogently answers these and other

billable questions about his art in an authoritative volume (with annual pocket parts) soon to be published. For further information write Twidley's Motion Sickness, c/o La Tush Press, La Tush, Oregon (attention Nadine Twidley).

■ *GIFT IDEAS FROM LA TUSH: TWIDLEY PUBLISHES HOLIDAY GIFT IDEAS FOR FASANOMANIACS*

Glen Twidley Enterprises, Inc., the La Tush, Oregon Mail Order Firm, has published its catalog of gift ideas for land use fanatics. The publication is available at no charge by writing to Fasanomania, P.O. Box 300 La Tush, Oregon 97800 (Attention: Nadine).

Trivial Disputes: The popular question and answer game about obscure land use issues. Spend hours of holiday fun answering brainteasers like: When should the Statewide Goals be capitalized? and What county planning department adjoins a cemetery? Hundreds more where these zingers come from! The perfect gift for hypercompetitive land use nuts who no longer enjoy normal conversation. (\$30.00, comes in junior, senior and complete-nerd levels).

The Illustrated Joy of LUBA: 100 successful positions taken before Oregon's Land Use Board in recent unpublished cases. An extremely helpful manual. (\$17.50, hard-bound edition mailed in plain brown wrapper).

■ *LA TUSH FIRM PUBLISHES MORE GIFT IDEAS FOR LAND USE NUTS*

Bernstein and Springstein: Whole Lotta Zonin' Going On! The maestro and the boss finally team up on an album. Side 1 features Lenny at the ivories and includes his hit rap single "Whither Fasano?" On Side 2, the boss belts out "Born in the UGB" and "Pay for It!," the new rallying call for anti-zoning landowners. And here's an inside secret: the backup group on "Pay for It!" is The Supremes! (\$6.50)

Laptop Reasonable Mind: This new digital item is for attorneys who have difficulty recognizing substantial evidence in land use cases. An alarm sounds and the attractive laptop unit lights up and vibrates to warn of the entry of evidence a reasonable mind would rely on. Frees the attorney to concentrate on other matters during own and opponent's presentations. Standard model does not take conflicting evidence into account in warning of reasonableness; super-duper deluxe unit does. Only a few left! (\$1,500 for standard model, \$2,500 for deluxe).

■ *FILMED IN LA TUSH, RAISING FAZONA WILL DELIGHT LAND USE WHACKOS*

Movie buffs who yelled for more after seeing *Fazona the Zoning Enforcer Part I* last year are lining up for the sequel, *Raising Fazona* (see advertisement this issue). The film opens April 1 at the La Tush Downtown Capri.

Raising recalls the formative years of Fazona, the flying protectress of The Code. By day she was a waxer and mint flavorist at the Drive-In Jiffy Floss. By night, Fazona soared above the city, using her infrared fazondetector to check setbacks and expose unsupported findings. What made this wonderwoman tick? Why did she pick zoning for her schtick?

Director Glen Twidley's *Raising Fazona* will tell it all, in color, from the beginning. The film brings back Nadine Twidley (*The Unbearable Vagueness of Headnotes*; *Honey I Shrunk the UGB!*; *The Enforcer, Part I*) as the adult Fazona, but the real star is little Baguette Twidley. She portrays the infant Fazona, who mysteriously appears on a La Tush doorstep one night while the town sleeps. Her uncanny knowledge of The Code, even the procedural parts not even grownups understand, immediately makes her the mortal enemy of Thordo the Developer (Merkin Twidley). Thordo hires the evilhearted Condo (Warren Twidley) to make sure little Fazona doesn't foul up Thordo's plan to build a theme park on Spotted Owl Creek. But Condo is smitten by the adorable baby Zona. He decides to raise her as his own and help her thwart Thordo's terrible theme. Or does He? Don't miss *Raising Fazona*, A Glen Twidley Production. Subtitled in English for the zoning-impaired. (No discounts or passes.) Coming soon to your neighborhood screen!

■ *TWIDLEY'S LA TUSH INDEX*

The following index of land use planning facts was compiled by Twidley Research, Inc., La Tush, Oregon. Any similarity to the Harper's Magazine Index is pure coincidence. For sources of data used to compile the index, contact Glen Twidley, Box 1400, La Tush, Oregon 90001.

- Zykovv Believability Rating for La Tush EcoProtecto Gortex Policy Plan, 1989-2000: -50 (score of +50 means “believable”).
- Number per thousand of Oregon lawyers who talked about zoning during foreplay in 1970: 2 Same figure for 1989: 253
- Total dry weight of land use findings of fact approved by La Tush City Council, 1970-75: 6 oz. Same figure for first two weeks in 1990: 1,500 lbs.
- Number of lawyers in 1989 who won a land use case in which they questioned a Commissioner about pre-hearing ex parte contacts: .05
- Average length of City Attorney answer to Planning Commission question when bottom line was “I really don't know”: 14.5 minutes (data covers 1980-89)
- Times anyone kept track of what was in or out of the record for La Tush Planning Commission hearings in 1989: none.
- Percent of appeals heard by La Tush City Council that supposedly were limited to “evidence in the planning commission record” during same period: 95
- Appearances by Nadine Twidley at side yard variance hearings that were none of her business during first quarter of 1990: 23
- Total numbers of coffee and cookie breaks taken by Oregon planners assigned to do something about adult bookstores in 1989: 16,345 (does not include decaf)
- Percent of teenagers who would rather mow all afternoon than attend a 15-minute land use hearing: 98.8

Appellate Cases -- Real Estate

■ COURT OF APPEALS REVERSES LARGE INVERSE CONDEMNATION AWARD

In October, the Court of Appeals reversed a large inverse condemnation award in a hard-fought case that may have broader legal application beyond its own facts. As this is written, Supreme Court review had not yet been sought, but seems likely.

Hall v. State ex rel. Oregon Department of Transportation, 252 Or. App. 649, 288 P.3d 574 (2012), involved a 25-acre parcel abutting I-5 in Linn County. The property's only access was over an easement that led to the “Viewcrest” interchange. The property owners

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The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

had attempted to develop the property for a number of years without success except for two billboards. At the same time, the Oregon Department of Transportation (“ODOT”) began evaluating the possibility of removing the interchange due to safety concerns. The effect would be to landlock the property. As a part of its evaluation, ODOT held public meetings and informed both the federal and local governments. While the public planning process was underway, the property owners sued ODOT on an inverse condemnation claim. The gist of their claim was that ODOT’s public planning process that publicized the possibility of closing the interchange and landlocking the property had effectively devalued it by over \$5 million.

Following a jury trial that the Court of Appeals described as “contentious,” the jury awarded the property owners nearly \$3.4 million and the trial court followed with a fee and cost award of almost \$500,000. On appeal, ODOT argued that the trial court erred in allowing the claim to go to the jury because there was no dispute that some economically viable use of the property remained (such as the billboards) even assuming the impact of the publicity (which ODOT disputed). The Court of Appeals agreed and reversed the entire judgment, finding that the trial court should have granted ODOT’s motion for a directed verdict.

In doing so, the Court of Appeals used the strict test employed for regulatory takings rather than the more relaxed standard used for physical takings and similar kinds of physical interference with property rights. The former requires that a plaintiff show that the governmental action involved deprived the owner of essentially all beneficial use of the property while the latter simply requires the plaintiff to show that the governmental action amounted to substantial interference with the use of the property. If Supreme Court review follows, it may turn on which of these two competing tests is the correct standard for what is often referred to as “condemnation blight,” where the planning process for a major public project can affect the market value of properties in its path.

Mark J. Fucile

[*Hall v. State ex rel. Oregon Dep’t of Transp.*](#), 252 Or. App. 649, 288 P.3d 574 (2012)

Appellate Cases – Land Use

■ *MEASURE 49 REQUIRES PROOF OF ACTUAL ENTITLEMENT TO HOMESITE, NOT POSSIBLE ENTITLEMENT*

In two cases consolidated as *Bertsch v. Department of Land Conservation and Development*, 252 Or. App. 319, 287 P.3d 1162 (2012), the Court of Appeals was asked to determine whether Measure 49 claimants were lawfully permitted to build a farm dwelling under Washington County’s code in place at the time they acquired their properties. Based on the rules that applied to these Measure 49 claims, the county typically reviewed and approved applications for farm dwellings with a condition of approval to implement a farm plan. The county required applicants to prove that they had enough land available to plant a crop that would equate to meeting a particular income standard. For example, a farm plan that showed an applicant’s intent to plant 1.7 acres of blueberries was deemed to equate with a \$10,000 farm income requirement. Both sets of claimants had enough acreage to meet the planting requirement, but neither had yet provided a farm plan to the county in order to obtain a farm dwelling, nor had they planted their properties with blueberries or any other listed crop. They sought, and the circuit court approved, Measure 49 relief in the form of an approval subject to applying for a farm dwelling under the rules in place in the county on the date they acquired their property.

The Court of Appeals reversed because it determined that, at the time the claimants acquired the property, they did not establish they were actually permitted to establish the use, based on then-existing standards applied to the condition of the property as it existed when the prior law was in effect. The court concluded that when, as here, the law in effect at the time of acquisition required local government approval of owner-implemented requirements as a condition to county approval of a dwelling, in order to be entitled to just compensation under section 6(6) of Measure 49, the owner must establish that, more likely than not, those conditions were satisfied at the time when the county had authority to authorize the dwelling. Because the claimants could not establish they had satisfied the conditions that were necessary for authorization of the construction of the dwelling, Measure 49 relief was denied. The Department of Land Conservation and Development (“DLCD”) does not have authority under Measure 49 to grant the type of contingent approval of a home site that the circuit court granted in this case, under which the actual home site approval is dependent on the owner’s future satisfaction of historic contingencies and local

government approval that applied to claimants' properties at the time of acquisition or before the change in the law.

Several other cases were placed in abeyance pending the outcome of this decision. This author does not know of any of those claimants that are willing to take the question to the Oregon Supreme Court. In light of this decision, one would expect the Court of Appeals to continue to take a hard line view of the circumstances surrounding the law on the acquisition date, and the status of land uses at the time those regulations changed.

Two years ago, I co-authored an article critical of Measure 37 and pondered the outcome of Measure 49 case law in *The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon*, 46 Willamette L. Rev. 577 (2010). After the article was published, DLCD began to issue decisions on Measure 49 claims and the not-surprising cascade of lawsuits followed. I represented the Measure 49 claimants in these consolidated appeals because they were the kind of claimants that one would have thought the measures meant to provide a remedy for. These were two couples who purchased rural lands with the hopes of retiring on the property with a modest farm to care for. However, at the time they filed Measure 49 claims neither couple had developed their properties into working farms and had not made applications for farm dwellings. As this decision indicates, those facts ultimately meant these claimants found no relief under Measure 49.

Jennifer Bragar

[*Bertsch v. Dep't of Land Conservation and Dev.*, 252 Or. App. 319, 287 P.3d 1162 \(2012\)](#)

■ CREAM OR SUGAR? STATUTORY INTERPRETATION OF THE WORD "OR"

In *Burke v. DLCD*, ___ Or. ___, ___ P.3d ___, 2012 WL 5285702 (2012), the Oregon Supreme Court examined whether the word "or," when separating items on a list, was meant to be inclusive or exclusive of the rest of the list. The question arose out of a dispute as to what constituted an "owner" who could file a claim under Ballot Measure 49—specifically, whether this term included the seller of property under a land sale contract who retained legal title to the property.

Plaintiff Thomas Burke acquired 18 acres of property in Clackamas County in 1967. In 2005, he executed a land sale contract to Griffin. In the contract, Burke retained legal title to the property and promised to assist Griffin in pursuing either compensation or a waiver under Measure 37. Griffin then transferred his interest in the land sale contract to plaintiff Educative, LLC. In June 2005, Burke and Educative filed a joint Measure 37 claim.

When Measure 49 superseded Measure 37, Burke and Educative sought approval through the new state framework. Section 6 of Measure 49 permitted an owner or owners of property to obtain approval for the development of up to three additional homes on the property if they acquired the property before any regulations then precluding development came into effect. Measure 49 defined the term "owner" to mean (a) "[t]he owner of fee title to the property," (b) "[t]he purchaser under a land sale contract, if there is a recorded land sale contract in force for the property," or (c) "[i]f the property is owned by the trustee of a revocable trust, the settlor of a revocable trust" ORS 195.300(18).

The Department of Land Conservation and Development ("DLCD") denied the Measure 49 claim, finding that only Educative, not Burke, was an owner. It reasoned that only the purchaser under a land sale contract could be considered the owner and, because Educative acquired the property after the applicable regulations on the property went into effect, Educative was not entitled to relief. The trial court affirmed DLCD's final order, as did the Court of Appeals.

The Supreme Court reversed, finding that the categories of ownership should be viewed cumulatively and not as mutually exclusive. In other words, the use of the disjunctive connector "or" in the statute did not mean that only one category of owner could apply in a given case. The court first began its analysis by looking at the plain meaning of the word "or," acknowledging that it was somewhat ambiguous as to whether "A or B" means "A or B, but not both" or "A or B or both." The court noted that, in ordinary conversation, the latter was most often true. Citing an example from Bryan A. Garner, the court stated, "if a person is asked whether she wishes 'cream or sugar' with her coffee, the request does not necessarily exclude the possibility of having both." 2012 WL 5285702, slip op. at *5, citing *Modern American Usage* 45 (2003).

Because the plain meaning was unclear, the court then moved to a contextual analysis. The court concluded that some statutes make it clear that only one alternative on a list may apply, such as by using the phrase "only

one of the following” to precede the list. However, that was not the case here. Additionally, the court noted that elsewhere in the context of Measure 49, it was clear that only one alternative could apply. Such was the case with whether a property owner could pursue a claim via an “express pathway” (for three homes on the property), a “conditional pathway” (for up to 10 homes on the property), or a “vested right” option (to complete development on the property). The nature of these alternatives made it such that an owner could not pursue a claim both under the express pathway and the conditional pathway. Rather, “or” in that instance separated 3 mutually exclusive alternatives, which was not true as to the definition of owner.

Relying on the text and context, the court concluded that the alternatives listed in the definition of “owner” were not mutually exclusive. The court therefore held that Burke was an owner because he held legal title to the property *and* Educative was an owner because it was the purchaser of the property under a recorded land sale contract.

Justice Kistler dissented, joined by Justice Linder. The dissent argued that the parts of the definition dealing with land sale contracts and revocable trusts were stand-alone paragraphs, exclusive of each other. The dissent also noted the rights that Measure 49 granted to sellers under land sales contracts--either to build on the property or subdivide it--were rights they no longer could exercise. The dissent pointed to this incongruous result as contextual evidence that this was not the intent behind the measure. DLCD had made this argument as well, relying on the legislative history behind the measure and its intent to relieve owners from unfair burdens on their use of private property. The majority, however, rejected this view, calling the legislative findings a “slim reed on which to rest an argument” *Id.* at *8.

According to the dissent, the better way to resolve the definition’s ambiguity would have been to recognize that paragraph (a), defining owner as the fee title owner, provided the general definition and that the other paragraphs, addressing land sale contracts and revocable trusts, were complete definitions in those two limited situations. Such an approach would give effect to the common law understanding that the purchaser is the owner in a land sale contract as well as avoiding the anomaly created by the majority’s interpretation where a seller under a land sale contract could obtain relief in a form of rights which that seller could no longer exercise.

Shelby Rihala

[Burke v. DLCD](#), ___ Or. ___, ___ P.3d ___, 2012 WL 5285702 (2012)

■ WILLAMETTE RIVER GREENWAY PLANS MAY REGULATE PANOPLY OF DEVELOPMENT ACTIVITIES, SAYS SUPREME COURT

In *Gunderson, LLC v. City of Portland*, 352 Or. 648, ___ P.3d ___, 2012 WL 5463691 (2012), the Oregon Supreme Court upheld the lawfulness of certain provisions of the City of Portland’s North Reach River Plan, which was an update to the city’s Willamette River Greenway Plan. The court affirmed rulings by LUBA and the Oregon Court of Appeals that local governments’ greenway plans may regulate development activities along the Willamette, even when such activities do not constitute new development, “intensifications” of existing uses, or “changes” to existing uses.

State law, adopted in 1973, requires the development and maintenance of an area known as the Willamette River Greenway in order to, in pertinent part, “protect and preserve the natural, scenic and recreational qualities of lands along the Willamette River.” ORS 390.314(1). Accordingly, Statewide Planning Goal 15, the Willamette River Greenway Goal, was adopted in 1975. OAR 660-015-0005. Among other requirements, Goal 15 requires local governments along the greenway to designate in their comprehensive plans “the uses to be permitted for the rural and urban areas of each jurisdiction . . . ,” consistent with the state’s greenway laws and goals. *Id.*, para. E.2.

In 1979, the City of Portland adopted its Willamette River Greenway Plan, and in April 2010 the city adopted an update to its Greenway Plan known as the North Reach River Plan (“the NRRP”). The NRRP applies to a twelve-mile portion of the Willamette River stretching from approximately the Broadway Bridge to the Willamette’s confluence with the Columbia. The area covered by the NRRP includes a sizable portion of the city’s industrial land base, including the area known as the Portland Harbor.

Petitioners, several industrial interests, challenged the NRRP. In deciding the challenges, LUBA and the Oregon Court of Appeals found deficiencies in some of the underlying inventories and studies on which the NRRP is based, and remanded to the city. However, LUBA and the court of appeals rejected other arguments raised by the petitioners, including their Goal 15 arguments. The supreme court granted review in order to address petitioners’ Goal 15 arguments.

Two of the NRRP's requirements were relevant to the Goal 15 arguments. First, the NRRP created a new "River Environmental" overlay zone and requires mitigation for development activities within this zone. Second, the NRRP imposes "vegetation enhancement standards" on all new development and exterior alterations within the River Industrial, River General, and River Recreational overlay zones.

On review by the supreme court, the petitioners raised three arguments. First, they argued that the city's authority under Goal 15 to regulate industrial uses was limited to the regulation of "intensifications" of existing uses and developments, changes in use, and new development. The resolution of this claim primarily involved interpretation of the following provision of Goal 15:

The qualities of the Willamette River Greenway shall be protected, conserved, enhanced and maintained consistent with the lawful uses present on December 6, 1975. Intensification of uses, changes in use or developments may be permitted after this date only when they are consistent with the Willamette Greenway Statute, this goal, the interim goals in ORS 215.515(1) and the statewide planning goals, as the case may be, and when such changes have been approved as provided in the Preliminary Greenway Plan or similar provisions in the completed plan as appropriate.

Id., para. A.1 (emphasis added); *see also id.* at para. E3 ("Greenway Compatibility Review"). The question presented was whether local governments may regulate activities that do not squarely fit within the three listed categories: intensifications, changes in use, and development. The petitioners argued that the italicized language quoted above is a ceiling that permits local governments to regulate only the listed types of development activities, and that the "development" category means *new* development. The city responded that the categories are a floor, allowing the city to decide which types of activities to regulate, so long as existing uses are allowed to continue.

The supreme court, like the court of appeals and LUBA, rejected the petitioners' Goal 15 arguments. First, the court accepted the city's argument that the categories of uses listed in Goal 15 are floors, rather than ceilings. The court noted that as home rule governments, cities have authority under the Oregon Constitution to adopt substantive land use standards, so long as such standards are not incompatible with state law. The court also noted that the word "developments" in Goal 15 could be broader than just *new* developments. In addition, the court focused on the phrase "may be permitted" in the Goal: the listed types of uses *may* be permitted, which is different from saying that they *must* be permitted. Finally, the court noted an express legislative intention to allow existing residential, commercial, and agricultural uses to continue, but to "*limit* the intensification and change in the use of such lands." ORS 390.314(2)(b) (emphasis added). The court concluded that because either interpretation of the listed categories (floor or ceiling) was plausible, the language does not rise to the level of an "unambiguous expression of preemptive intention" by the state to forbid local governments from regulating uses not specifically listed in Goal 15. *Gunderson*, 2012 WL 5463691, slip op. at *9.

The petitioners also argued that legislative history for Goal 15 demonstrated that the listed uses are a ceiling. Apparently, however, the only purported legislative history offered by the petitioners consisted of general statements from some members of the public asking that the state allow existing uses to continue. The court determined that nothing cited by the petitioners mentions—let alone decides—the particular issue of whether the state intended to preempt local governments' authority to regulate types of uses not listed in Goal 15.

In their second argument, the petitioners maintained that the court of appeals had erred in requiring the petitioners to prove that the NRRP would preclude the continuation of urban uses in order for the NRRP to be deemed invalid under state law. The supreme court first noted that it had already determined that the city has authority to regulate uses not expressly listed in Goal 15. Under Goal 15, such regulation is permissible so long as it does not preclude existing uses from continuing. Finding that the court of appeals had done little more than "paraphrase the Goal itself," the supreme court upheld the court of appeals decision with little discussion. *Id.* at *10.

The petitioners' third argument was that the NRRP's vegetation enhancement standards will prohibit the continuation of existing urban uses on more than 300 acres of land. The supreme court determined that this was a new argument that had not been preserved before LUBA or the court of appeals, and therefore declined to address it.

Nathan Baker

[Gunderson, LLC v. City of Portland](#), 352 Or. 648, ___ P.3d ___, 2012 WL 5463691 (2012)

■ COURT OF APPEALS LIMITS MEASURE 49 “EXPRESS PATHWAY” TO A MAXIMUM OF THREE DWELLINGS

Hoekstre v. State ex rel. Department of Land Conservation and Development, 249 Or. App. 626, 278 P.3d 123 (2012), explores the connection between Measure 49 sections 6(2) and 6(3) for Measure 37 claims filed on or before June 28, 2007. In essence, Measure 49 provides three different “pathways” for landowners to continue development under prior Measure 37 approvals. Section 6(2), known as the “express pathway,” is the subject of this case.

Petitioner owned a parcel of property with one existing dwelling. Petitioner obtained Measure 37 waivers from Polk County and the Department of Land Conservation and Development (“DLCD”), which allowed him to partition his property into three parcels and place a new dwelling upon each parcel. After Measure 49 invalidated the waiver, petitioner requested DLCD approval of his plan to continue with his development as originally approved. DLCD determined that application of section 6(2) would allow a total of three parcels, but only one dwelling per parcel for a total of two, not three, new dwellings. Petitioner responded that, in addition to one dwelling per parcel, he was also entitled to “one additional” dwelling according to the provision in section 6(3).

DLCD disagreed with petitioner’s reasoning and authorized only one dwelling per parcel. Petitioner sought judicial review under ORS 195.318(1). The reviewing court agreed with DLCD and dismissed the petition for review. On appeal, the issue under consideration was whether the circuit court correctly determined that the “one additional” language in section 6(3) does not authorize an additional dwelling in conjunction with the three previously approved by DLCD.

To paraphrase section 6(2), claimants are allowed up to three lots, parcels, or dwellings. The next section, section 6(3), then states that notwithstanding section 6(2), a claimant is entitled to at least one additional lot, parcel, or dwelling. Petitioner contended that a combined reading of sections 6(2) and 6(3) allowed a total of four dwellings on his property. DLCD argued that 6(3) is an alternative means of relief for claimants who are not otherwise entitled to relief under 6(2).

The appellate court turned to the text of section 6(2), Measure 49’s enactment history, and the Official Voters’ Pamphlet, Special Election, November 6, 2007 to resolve the question of interpretation. The court emphasized that DLCD’s interpretation was, as a whole, consistent with voters’ objectives to expressly limit the number of lots, parcels, or dwellings to three; to confer limited development rights to landowners who could not take advantage of the Measure 49 “conditional pathway”; and to protect high-value forestlands, farmlands, and groundwater-restricted lands. Petitioner’s interpretation contradicted these objectives.

Accordingly, the court of appeals determined that the circuit court did not err in finding that the DLCD properly construed section 6(3). Finally, the appellate court noted that the circuit court did not have authority to dismiss the petition for review. Under ORS 183.484(5)(a), the circuit court could affirm, vacate, or remand the order—but not dismiss the appeal. The court of appeals therefore vacated the judgment and remanded with instructions to affirm the DLCD order.

Jacquilyn Saito-Moore

[*Hoekstra v. State ex rel. Dep’t of Land Conservation and Dev.*](#), 249 Or. App. 626, 278 P.3d 123 (2012)

■ LOCAL INTERPRETATION OF LOCAL LEGISLATIVE HISTORY AND LATENT AMBIGUITY ENTITLED TO DEFERENCE

In *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or. App. 543, 281 P.3d 644 (2012), the Court of Appeals reversed LUBA and deferred to Deschutes County’s interpretation of an ambiguous Goal 5 “Program to Meet the Goal” (PTMG). The county had enacted the PTMG in 1990 after adopting an inventory of mineral resources (including the site at issue in this case), together with an economic, social, environmental, and energy (“ESEE”) decision regarding the consequences of allowing conflicting uses for those sites. (See OAR Chapter 660 Division 16 for the Goal 5 compliance process.)

The local legislative history of that process included the then-owner’s representation that less than 25 acres of the site would be mined for pumice, sand, and gravel without mention of other minerals. The ESEE analysis described mining as “opening of a pit in the ground” and did not mention “headwall” mining (shearing rock off a cliff or hillside). It also described mining as a “transient use” that would allow other future uses, whereas headwall mining

is in that sense arguably not “transient.” The site is near the Deschutes River and within sight of the River Scenic Area and Tumalo State Park. In light of that, the county concluded the process by zoning the site for surface mining subject to “ESEE conditions” that restricted hours of operation, required setbacks and visual screening, and limited excavation to 5 acres—but did not explicitly mention headwall mining or extraction of other minerals.

In 2009 the county by conditional use permit (“CUP”) allowed new owners to mine both pumice and tuff, a different kind of aggregate, by expanding the mine into a hillside. The result would be a much more visible headwall. LUBA in 2010 remanded that CUP decision with instructions that the county show how mining five times more tuff than pumice would support a required finding that mining the tuff would be “incidental” to mining the already-identified Goal 5 resources there. LUBA stated the test as “whether the [county] would have enacted the same PTMG [if it] had . . . known about the new mineral resource at the time the ESEE analysis and PTMG were adopted.” 250 Or. App. at 548.

On remand, the county first determined that mining tuff was not “incidental” to mining pumice and that a new ESEE would be required. (That portion of the county’s decision also was appealed to and upheld by LUBA but not pursued further.) The county’s other action on the 2010 remand was to find, as LUBA seemingly invited it to do, that its 1990 decision on the PTMG would have been different if headwall mining had been proposed. Thus the county now required, as a condition of approval of the CUP to expand the mine, that “[f]urther* mining of the headwall is prohibited unless and until a Post Acknowledgment Plan Amendment is submitted and approved for that use.” *Id.* at 549. (*The PTMG did not restrict where the owner could mine and did not mention the hillside).

LUBA on the present appeal rejected the county’s determination that its PTMG would have been different, and rejected that condition of approval, finding that there was nothing ambiguous in the PTMG, the ESEE, nor the surface mining zoning text as to headwall mining as there simply was no mention of it. At the Court of Appeals the county argued that it was entitled to interpret its former enactments in that 1990 Goal 5 process. The county said the lack of any mention of hillside or headwall mining or of their potential impact in the earlier ESEE and PTMG, the discussion of other visual impacts, and the proposal for only open pit mining meant that headwall mining was not contemplated—not that such mining was, by lack of mention, implicitly allowed.

The Court of Appeals reversed, holding that LUBA was required to defer to the county’s interpretation of its own land use regulations if that interpretation was plausible based on the interpretative principles of *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or. 606, 859 P.2d 1143 (1993), as modified by *State v. Gaines*, 346 Or. 160, 214 P.3d 1042 (2009). The county was entitled to review the ESEE and the PTMG and determine that it never intended to allow the now-proposed extensive mining of the headwall.

The court found that the owner’s interpretation of the ESEE, PTMG, and surface mining zoning text—namely, that nothing there showed an explicit intent to expressly include headwall mining—though “certainly plausible” in its own right, must give way to the deference that the statutes and decisional law give only to the county’s interpretation. *Id.* at 555. The standard of review does not allow, much less require, deciding which interpretation is the “better” or more plausible one. The court also explicitly rejected the principle, relied on by LUBA below, that the county first was required to find ambiguity in specific wording in the PTMG susceptible to different meanings. It cited *Gaines* for the proposition that “[l]egislative history may be used to confirm seemingly plain meaning . . . [or] to attempt to convince a court that superficially clear language actually is not so plain at all—that is, that there is a kind of latent ambiguity in the statute.” *Id.* at 556 (citing *Gaines*, 346 Or. at 172).

The court, in closing, rejected the owner’s final arguments: that the county’s condition of approval categorically prohibited mining, contrary to the PTMG’s purpose of balancing resources and conflicting uses; and that the ESEE analysis is not to be site-specific. As to the latter, the court held instead that the findings supporting a Goal 5 decision (including a PTMG) must rely on conditions existing at the time of adoption. In this case the prospect of headwall mining simply was not discussed at the time of that decision.

Bill Scheiderich

[Mark Latham Excavation, Inc. v. Deschutes County](#), 250 Or. App. 543, 281 P.3d 644 (2012)

■ COURT CLARIFIES EXPENDITURE RATIO FOR VESTED RIGHTS

For purposes of a “vested rights” analysis, the decision-maker must first look at the expenditure ratio to determine whether the landowner’s expenses have been “substantial.” *Friends of Yamhill County v. Bd. of Comm’rs of Yamhill County*, 351 Or. 219, 264 P.3d 1265 (2011) (*Friends*). However, the expenditure ratio is not the sole consideration. Other relevant “vested rights” factors include whether the landowner acted in good faith, whether there was notice of the change in zoning before the development commenced, and the relationship of the expenditures to the completed project. *Clackamas Co. v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973). However, the expenditure ration provides the “necessary starting point in analyzing whether a landowner has incurred substantial costs toward completion of the job.” *Friends*, 351 Or. at 242-243, 264 P.3d 1265.

In *DLCD vs. Linn County*, 249 Or. App. 537, 278 P.3d 83 (2012), the Glenders received a Measure 37 waiver to develop a 16-lot subdivision. Then they recorded the plat, including a dedicated street (on land valued at \$53,000), the day before Measure 49 became effective. The Linn County Board of Commissioners found that the Glenders had a vested right to complete the subdivision based on substantial expenditures. However, the board did not include the cost of constructing residences when calculating the total project cost for purposes of the denominator of the expenditure ratio. According to the board, the Measure 37 waiver was to compensate for buildable home sites—not for the homes themselves; therefore, the denominator need not include the cost of home construction. Thus, the board found that the Glenders were entitled to continue their development based upon the \$53,000 value of the dedicated land for a street as the numerator and the understated total cost of the project (excluding home construction costs) as the denominator.

The Department of Land Conservation and Development (“DLCD”) challenged the decision through a writ of review, alleging that the Glenders did not have a vested right because they had not incurred *any* expenses yet and there should be zero in the numerator for the expenditure ratio. According to DLCD, the Board erred in considering the \$53,000 value of the property dedicated for a street as “an expenditure” for the numerator in the expenditure ratio. The circuit court found that recording the plat (with the \$53,000 dedication) the day before Measure 49 became effective was not an action made in good faith, as required for establishing a vested right. With respect to the denominator, the Linn County Circuit Court agreed that the cost of home construction should be included, and speculated that, even with a cost as low as \$100,000 per dwelling, the resulting expenditure ratio could not support the Board’s vesting determination.

The Court of Appeals agreed with the circuit court’s finding that the board erred in failing to consider the home construction costs. However, the Court of Appeals further found that the circuit court erred in assigning a “hypothetical cost” of \$100,000 per dwelling for purposes of calculating the denominator for the expenditure ratio. Relying on *Friends*, the Court of Appeals held that “the cost of construction must be based on an actual determination, not a hypothetical assumption.” 249 Or. App. at 544.

In summary, when considering whether a landowner has incurred substantial costs toward completion of a project (for purposes of a “vested rights” analysis), the necessary starting point is to establish an expenditure ratio. The denominator must include the estimated cost of construction that is supported by evidence in the record. The costs cannot be hypothetical or assumed. The court also found that the numerator can include the value of dedicated land, even if the dedication can likely be vacated if the project does not go forward. Accordingly, the case has been remanded for further consideration after establishing an appropriate expenditure ratio.

Peggy Hennessy

[DLCD vs. Linn County](#), 249 Or. App. 537, 278 P.3d 83 (2012)

■ WHAT IS A FOREDUNE IS NOT ALWAYS A FOREGONE CONCLUSION!

In *Rudell v. City of Bandon*, 249 Or. App. 309, 275 P.3d 1010 (2012), property owners Robert and William Rudell appealed the City of Bandon’s decision denying their application for a conditional use permit to construct a house on their property near the beach. The property was on a “foredune,” a specific and important term of art for coastal communities and for Statewide Planning Goal 18. In this decision the Oregon Court of Appeals addressed how a city defined a key component of that goal, which protects beaches and dunes.

The property owners sought review of a decision of the Land Use Board of Appeals (“LUBA”), which, the second time around, had affirmed the city’s decision. In the earlier case, *Rudell v. City of Bandon*, 62 Or. LUBA 279 (2010),

LUBA had sustained the petitioners' challenge of the city's initial decision. When the petitioners had initially submitted their application for construction of their house, the city had denied the application, determining that the entire property was located on a foredune.

A foredune, as described by and defined in the Bandon municipal code, means the dune closest to the high tide line that extends parallel to the beach. A foredune can be divided into three sections; the frontal area, which is closest to the water; the top surface; and the lee, or reverse slope of the backside. The city had concluded that development was prohibited by the Bandon municipal code, which stated "no structure shall be located on identified foredunes." In the initial proceeding, the city's determination was based upon a definition contained in a Federal Emergency Management Administration guidance document. However, LUBA sustained the petitioners' challenge to that finding as inadequate and unsupported by the record because the city's findings did not explain the basis for its conclusion or cite any supportive evidence.

On remand, the City of Bandon for the first time consulted and interpreted the definition of "foredune" contained in its development code. In doing so, the city referred to Webster's Third New International Dictionary to define certain terms related to a foredune. Based upon those definitions, the city adopted the proposed findings that had been drafted by intervenor Department of Land Conservation and Development. Again, the City of Bandon denied the petitioners' application. LUBA affirmed the city's decision in *Rudell v. City of Bandon*, LUBA No. 11-032 (Oct. 25, 2011), and petitioners sought judicial review.

The essential question before the Court of Appeals was whether the city's interpretation of its own code was entitled to deference under ORS 197.829. In answering affirmatively, the Court of Appeals made three decisions.

The Court of Appeals applied the reasoning of *Siegert v. Crook County*, 246 Or. App. 500, 266 P.3d 170 (2011), in which the Court of Appeals allowed a local government to review the dictionary for guidance to interpret the scope of a term in its code even though the meaning of the term was not ambiguous. In *Siegert*, the Court of Appeals determined that the term was non ambiguous but uncertain. In this case involving the definition of a foredune, the Court of Appeals found that although the Bandon City code defined the term foredune and although the term was not ambiguous, it was "undeterminative." Thus, the city's use of the dictionary definitions was appropriate under ORS 197.829.

Secondly, the Court of Appeals found that the city's interpretation of the term "foredune" was consistent with its comprehensive plan. The comprehensive plan defined foredune consistent with Statewide Planning Goal 18.

Finally, the Court of Appeals confirmed that the city's interpretation of its code was clear and objective even though the city used the term "relatively level" to describe a portion of a foredune. The city contended that its standards were clear and objective because the term "relatively" did not alter the fact that the petitioners knew when they submitted their application that they could not build on a foredune; the foredune ended when the land appeared to an observer to be flat. The court stated that the approval or denial of a discretionary permit application must be based on standards or criteria that are "clear enough for an applicant to know what he must show during the application process." *State ex rel. West Main Townhomes v. City of Medford*, 233 Or. App. 41, 48, 225 P.3d 56 (2009), *modified and adhered to on recons.*, 234 Or. App. 343, 228 P.3d 607 (2010) (quoting *Lee v. City of Portland*, 57 Or. App. 798, 802, 646 P.2d 662 (1982)).

Although the Court of Appeals did not decide whether the city's interpretation was an approval standard, it concluded, as had LUBA, that the city's definition of foredune was sufficiently clear and objective to satisfy ORS 197.307(6).

Jack D. Hoffman

[Rudell v. City of Bandon](#), 249 Or. App. 309, 275 P.3d 1010 (2012)

■ COURT REJECTS RELIANCE ON A RANGE OF DEVELOPMENT COSTS AS PART OF A VESTED RIGHTS DETERMINATION

In *Oregon Shores Conservation Coalition v. Board of Commissioners of Clatsop County*, 249 Or. App. 531, 277 P.3d 639 (2012), the Court of Appeals reconsidered its previous decision, which was vacated by the Oregon Supreme Court in 351 Or. 541, 273 P.3d 135 (2012), as a result of the Supreme Court's decision in *Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County*, 351 Or. 219, 264 P.3d 1265 (2011).

The Oregon Shores Conservation Coalition (“OSCC”) appealed the county’s decision finding that Gary and Beverly Aspmo obtained vested rights in their Measure 37 waivers to construct a 30–lot residential subdivision. Significantly, unlike in other cases that the court has considered, the county planning director determined that, in calculating the vested right expenditure ratio, the cost of the residences must be included in the denominator. On appeal, the county commission agreed with the director’s conclusion and found that, in determining the total project cost in this case, the commission could properly consider “a range of the potential total cost” of development. 249 Or. App. at 535. The commission then concluded that the Aspmos did not establish that their expenditures resulted in a vested right. However, in considering the separate factor from *Clackamas County v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973), regarding “whether the expenditures . . . could apply to various other uses of the land . . . ,” 265 Or. at 198-99, the commission found no other adaptability because all the activities were connected to development of the subdivision pursuant to the waivers. Based on the adaptability analysis, the county concluded the Aspmos had a vested right.

The circuit court affirmed the county’s findings and conclusions. OSCC challenged both the county’s consideration of the expenditure ratio and the adaptability finding. The court ruled that, in calculating the expenditure ratio, the cost of building homes must be included in the denominator. Also, the likely total cost of completing the particular development sought to be vested must be based on construction costs as of December 6, 2007 (the date Measure 49 went into effect). Based on that ruling, the court reversed the circuit court’s decision and remanded on the adaptability question because it was unable to determine whether the circuit court reviewed the county’s finding concerning the adaptability factor for substantial evidence and, if it did, whether it applied the correct standard.

The Aspmos appealed to the Oregon Supreme Court. In light of its ruling in *Friends of Yamhill County*, the court remanded to the Court of Appeals for reconsideration of the expenditure ratio, the starting point for determining whether substantial costs have been incurred. The expenditure ratio must be established comparing the costs that the landowner incurred and the project cost of constructing the residential subdivision. Here, the county considered a range for the potential total cost and gave the ratio factor less importance, finding that the volatile housing market renders the figures unreliable. The Court of Appeals remanded so that the county could reconsider the project cost as established in the record instead of a range of the potential costs as of 2007, the date the Aspmos’ claim their project vested.

Carrie A. Richter

[*Oregon Shores Conservation Coalition v. Bd. of Comm’rs of Clatsop County*](#), 249 Or. App. 531, 277 P.3d 639 (2012)

Cases From Other Jurisdictions

■ *GETTING MORE THAN THEY SETTLED FOR: AMICABLE SETTLEMENT BETWEEN PARTIES CAUSES LOSS OF STANDING FOR PETITIONERS IN UNIQUE WASHINGTON SHORELINES CHALLENGE*

In *Patterson v. Segale*, ___ P.3d ___, 2012 WL 4857218 (Wash. App. 2012), Division I of the Washington Appellate Court was asked to resolve a unique challenge to a Shorelines Hearings Board decision confirming the City of Burien’s choice of shoreline master program (“SMP”) and to assess the state of that challenge following the petitioners’ intervening settlement of claims. Not surprisingly, the court ruled that the petitioners’ standing evaporated with the controversy, which was settled amicably between the parties. The decision is nonetheless interesting for the issues that were resolved, as well as those left on the table for future consideration.

Patterson involved a petition to the Washington Shorelines Hearings Board for review of the city’s permit for the replacement of a bulkhead. *Engdahl v. City of Burien*, SHB No. 10-007, at *2-3 (July 16, 2010), *available at* <http://www.eho.wa.gov/Decisions.aspx>. A portion of petitioners’ challenge questioned the city’s determination that King County’s SMP was applicable to development of the city’s shorelines. In its decision, the Shorelines Hearings Board first determined that, prior to incorporation, the area that became the city was subject to the King County SMP. However, the city did not initiate a formal process to adopt its own SMP following incorporation. *Id.* at *12. The Shorelines Hearings Board concluded that although the city had not formally adopted the King County SMP, it remained the applicable SMP in this case. *Id.* at *15.

Petitioners' challenge to the determination of the governing SMP might have succeeded because the Board's determination rested on Washington Administrative Code ("WAC") 173-26-160, which did not directly apply to the issue at hand. That administrative rule identifies the appropriate SMP for an area "upon annexation" or for an area undergoing "municipal incorporation." *Id.* at *15. Where, as here, the area has already incorporated without formally adopting an SMP, WAC 173-26-160 is silent. *Id.* Although the Shorelines Hearings Board acknowledged that WAC 173-26-160 speaks to a different issue than the case at hand, the Board still concluded that the city appropriately used King County's SMP because such an extension of WAC 173-26-160 made "equal sense in the situation of incorporation." *Id.* at *15.

Petitioners sought judicial review, arguing that the city could not apply the county's SMP as its own governing shorelines plan without notice or other process.

Petitioners' standing was governed by the state's Administrative Procedures Act, Chapter 34.05 RCW, which required a showing that petitioners were "aggrieved or adversely affected" by the agency decision. *Patterson v. Segale*, ___ P.3d ___, 2012 WL 4857218, *3 (Wash. App. 2012). The Washington Court of Appeals found that petitioners lacked standing because they were not "aggrieved or adversely affected" by either (1) the Shorelines Hearings Board's determination that King County's SMP continues to apply within the City of Burien, and (2) the Shorelines Hearings Board's affirmance of the city's permit decision. *Id.* at *3-4.

The court found that petitioners lacked standing on appeal to challenge approval of the bulkhead permit. Petitioners asserted standing based on alleged injuries from the bulkhead that diminished their aesthetic enjoyment of the shoreline. However, the court could not redress the prejudice with a favorable decision because Segale's bulkhead had been built and petitioners settled their claims against Segale. *Id.* at *4. Since the settlement effectively resolved any question concerning the immediate harm caused by the city's approval of the permit, all that remained was the potential for future harm. The court found that petitioners were not prejudiced by the city's continued use of King County's SMP because the future harm did not place them in a different situation than any member of the public. An assertion of future harm is insufficient to provide standing under the APA. *Id.*

Ultimately, petitioners inadvertently settled away their standing and the opportunity to assert a promising challenge to the Shorelines Hearings Board's "sensible" adoption of WAC 173-26-160. In the event of a new controversy regarding the City's adoption of King County's SMP, a successful challenge will likely address the application of WAC 173-26-160 to resolve the applicable SMP. After all, the adaptation of WAC 173-26-160 to this controversy was not an easy fit, but was instead compelled as a "practical approach" to the question whether the SMP in use before a city's incorporation remains the SMP that applies after incorporation. The challenger will want to press what the Shorelines Hearings Board conceded in its determination: WAC 173-26-160 establishes the appropriate SMP after a "municipal annexation," but not the appropriate SMP when a city incorporates and fails to formally adopt an SMP thereafter.

Daniel Van Winkle

Patterson v. Segale, ___ P.3d ___, 2012 WL 4857218 (Wash. App. 2012)

■ **NINTH CIRCUIT UPHOLDS, STRIKES HAWAI'I BEACH WEDDING RULES**

Kaahumanu v. Hawai'i, 682 F.3d 789 (9th Cir. 2012), involved a native Hawai'ian pastor, who performed commercial wedding ceremonies on state beaches, and his wedding production company. Defendant state and state officials adopted and sought to enforce regulations on such weddings on beach land, which was under the jurisdiction of the State Department of Land and Natural Resources ("DLNR"). The regulations required a license for all commercial wedding activities on DLNR beaches. The permits used a sliding scale of fees, depending on the area used, limited the time for wedding events, and required insurance and indemnification of the state. The regulations also limited the type of accessories and structures that could be used in weddings and allowed the DLNR director to grant or deny permits and to impose additional conditions on permits. Plaintiffs brought suit to declare these regulations unconstitutional under the First Amendment and the Equal Protection and Due Process Clauses. The trial court granted summary judgment to the state, finding state beaches were not a traditional public forum and, even if they were, the rules were a reasonable time, place, and manner regulation. Plaintiffs appealed.

On appeal, defendants challenged plaintiffs' standing but the court disagreed. There was testimony by certain wedding professionals that costs had gone up and business had dropped off as a result of the new rules. The

court found these allegations sufficient for standing because the case arguably involved constitutional rights and economic injury. Only one plaintiff need have standing for the case to proceed.

The court next turned to DLNR's contention that weddings were not protected First Amendment speech. The court found that weddings conveyed a "particularized message" of the wedding couple's mutual commitment and they were appropriately categorized as speech.

The court next turned to whether the beaches under the DLNR's jurisdiction were considered a "traditional public forum" (such as public streets and parks), a designated public forum (such as a speaker's corner) designated by a local authority, or a limited public forum (such as public hearings). Traditional public forums have a long tradition of public use and, as such, speech can only be excluded if necessary to serve a compelling state interest and the exclusion is narrowly drawn to serve that interest. Designated public forums are created by affirmative governmental actions and, upon designation, have the same protections as traditional public forums. Limited government forums are government lands used for discussion of certain topics. Reasonable and viewpoint-neutral regulations may be imposed on this kind of forum. Other government properties are either nonpublic or not a forum at all and may be regulated so long as the regulations are reasonable in light of the public space's purpose and the regulations are viewpoint-neutral.

DLNR contended that beaches are nonpublic forums while plaintiffs claimed they were traditional public forums. The court said it was unnecessary to categorize all DLNR beaches in a single group, but assumed, without deciding, that they were traditional public forums; however, for the regulations that it would declare invalid, the court assumed that those beaches were nonpublic forums.

Then the court concluded that with one category of exception (related to the authority to grant or deny permits or to impose conditions on them) all challenges to the regulatory regime must be "as applied" challenges. Only those rules that sought to regulate words or patently expressive or communicative conduct are liable to a facial challenge. In this case, most of the challenged rules do not seek to regulate the words or the wedding ceremony or patently expressive or communicative conduct. The regulations deal with all commercial activities on the beach—thus those challenges must be to particular permits (the regulations as applied), rather than facial challenges to the regulations. Facial challenges to the DLNR chair's authority to approve, deny, or condition permits focus on both the dangers of unfettered discretion and prior restraint as well the possible effects of actual or self-censorship, even if that power is not used in a specific case. A plaintiff in such a case need only show that the licensing requirement applies to its conduct and has a sufficient nexus to the regulation of expression or conduct to pose a real and substantial threat of censorship risk. On that basis, the court considered plaintiff's facial challenges to the permit process.

Plaintiffs brought three challenges to these portions of the regulations:

1. The permit requirements themselves;
2. Limitations on accessory equipment and structure; and
3. The insurance and indemnification requirements of the regulations.

The court added the fourth consideration:

4. Delegation of overly-broad discretion to a licensing official.

Defendants contended that the regulations were reasonable time, place, and manner restrictions of the kind upheld by the United States Supreme Court in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002), and concluded that the regulations served the same purposes as in *Thomas*. Those purposes included coordinating multiple uses of public space; assuring the preservation of park facilities; preventing dangerous, unlawful, impermissible use of parks; and assuring financial accountability for damages caused by an event. Moreover, the court found the rules narrowly tailored to further those interests. Permits may be requested and paid for online, and it was reasonably easy to add the state as an additional insured. The process is ministerial and no permit has ever been denied. Similarly, the permit conditions for those already issued were narrowly tailored by limiting the event in time, assuring that other beach users were not inconvenienced, and safeguarding clean-up after the event, unlike the regulations found invalid in *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009). *Berger* had significant differences in the process of filling out and submitting a written permit application, waiting for that permit to be processed, and the elimination of spontaneous and anonymous speech. The court did not find these problems in the instant case. Moreover, the court found the process was content-neutral and did not foreclose the entire medium of commercial beach weddings.

Nevertheless, while the power to grant a permit is sufficiently constrained, the power to revoke it is not, as the permit is terminable for any reason in the sole and absolute discretion of the DLNR chair, who also retains the discretion to impose additional terms and conditions on any permit without limitation. Even assuming the beaches were nonpublic forums, restrictions on access must be reasonable in view of the purpose served and be viewpoint neutral. Viewpoint neutrality has not been directly required by the United States Supreme Court, but two circuit courts of appeal have required governments to provide affirmative prohibitions on permit-granting to assure such neutrality, and there are additional inferences from some United States Supreme Court opinions to that same effect.

Here, the Ninth Circuit concluded the dangers of arbitrary standardless application and real or self-censorship would allow for content-based discrimination and thus would not constitute a reasonable time, place, and manner regulation. However, the court upheld the limitation on structures and accessories used in weddings (which did not include hand-carried accessories) in view of allowing public access to beaches and therefore not violating the First Amendment. Similarly, the court upheld the regulations relating to insurance and indemnification which required, *inter alia*, a policy naming the state as an additional insured with a \$300,000-per-incident and \$500,000 aggregate policy limits in place, as well as holding DLNR harmless from third party claims regarding events occurring at the wedding. The court found these regulations protected the state's property interests, were not overly broad (as they dealt with harm caused by the applicant, and not torts of the state), and were content-neutral. The court concluded that only those portions of the permit requirements that dealt with revocation or the imposition of conditions offended the First Amendment and held only those portions as unconstitutional.

Additionally, the court rejected plaintiffs' due process and equal protection contention. While the right to marry is fundamental, regulation of commercial weddings on state property does not impinge on that right or the right of free expression. Moreover, the power of the state to choose to regulate commercial (but not non-commercial) regulations on state property does not offend equal protection. The regulations, except for the permit revocation and conditioning authorities, were thus upheld.

Edward J. Sullivan

Kaahumanu v. Hawai'i, 682 F.3d 789 (9th Cir. 2012)

■ ***UNITED STATES SUPREME COURT FINDS NO TAKING IMMUNITY FROM GOVERNMENT-INDUCED FLOODING***

Arkansas Game and Fish Comm. v. United States, (No. 11-597, December 4, 2012) involved continual but temporary flooding of plaintiff's Dave Donaldson Black River Wildlife Management Area, which allegedly reduced the timber harvest by 16 million board feet and disrupted the recreational use of that land. The trial court found a taking but the Federal Circuit reversed, finding the temporary flooding was not a permanent or inevitably recurring situation and thus not a taking.

Since 1948, Defendant, through its Corps of Engineers, has owned and operated the Clearwater Dam about 115 miles upstream from the Management Area. The Corps uses a Water Control Manual ("Manual") to determine water release rates on a seasonal basis with planned deviations for agricultural, recreational and other purposes. In 1993, the Corps released the water more slowly to allow farmers a longer harvest season, but then released more water later, during the tree-growing season from April through October, resulting in more flooding over those months. From 1994 to 2000 similar deviations were authorized over Plaintiff's objections. The Corps also considered, but abandoned, a permanent revision to the manual.

This lawsuit was filed in 2005, claiming a temporary taking. The U.S. Court of Claims found for plaintiff, determining that the greater number of peak flood days had an adverse effect on the root system of certain tree species which justified an award of \$5.7 million in damages. The Federal Circuit distinguished permanent flooding (which it found generally compensable) from temporary flooding or flowage easements (which was not compensable), relying on two cases from 1917 and 1924 respectively.

The Supreme Court reiterated its stock takings formula from *Armstrong v. United States*, 364 US 40, 49 (1960) that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." While there was no "set formula" for determining a taking, permanent physical occupation of property has generally been recognized as a *per se* taking. In addition, over time courts have recognized temporary physical occupation might also amount to a taking. In

Sanguinetti v. United States, 264 U.S. 146 (1924), the Supreme Court rejected a takings claim based on a one-time flood surge through a canal built by the United States, using principles of causation and foreseeability, finding that liability required that the overflow be a direct result of the structure and constitute a permanent invasion of land. The Supreme Court said that it did not find the use of the word “permanent” in *Sanguinetti* dispositive and that the requirement of permanent occupation to amount to a taking had been eliminated by subsequent Supreme Court case law, particularly *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982) in which the court distinguished permanent physical occupation from temporary invasions, including flooding, for which the court said a “more complex balancing process” was required.

The United States used a “slippery slope” argument to defend a full exemption from the takings clause, arguing that to apply that clause would make the public liable for any flooding for any brief period of time. The court responded:

“* * * To reject a categorical bar to temporary flooding takings claims, however, is scarcely to credit all, or even many such claims. It is of course incumbent on the courts to weigh carefully the relevant factors and circumstances in each case, as instructed by decisions.* * *”

Thus the court said takings are better determined and damages calculated by review of the circumstances of each case rather than imposing a blanket rule or exemption. Moreover, the court limited itself to the arguments presented in the briefs and declined to consider other arguments that may, or may not, have been raised below. Instead, the unanimous court (with the exception of Justice Kagan who did not participate) ruled only that there was no automatic exemption from takings clause liability for government-induced temporary flooding.

This is a rare consensus decision on takings from the United States Supreme Court. Given the recent case law on takings since the *Penn Central* decision in 1978, the outcome is not unexpected. Moreover, there is no guarantee that plaintiff will be successful – Arkansas merely lives to fight another day.

Arkansas Game and Fish Comm. V. United States, (11-597, December 4, 2012).