

## OREGON REAL ESTATE AND LAND USE DIGEST

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

Vol. 35, No. 2  
May 2013

**Also available online**

### Contents

- 1 **Board Must Now Deny Request for Voluntary Remand after Local Government Files the Record in LUBA Appeal**
- 2 **Winery Upheld as Commercial Use in Conjunction with Farm Use**
- 2 **Court of Appeals Refuses to Supplant LUBA's Jurisdiction**
- 4 **Wind Energy Gets Another Lease on Life in Umatilla County**
- 4 **Ninth Circuit Affirms Installation of Road Median Against Constitutional Challenges**
- 5 **Time Restrictions on an RV Park's Permit Allowed**
- 5 **Zoning In: Review of Comprehensive Plan Amendments under Washington's Growth Management Act**
- 7 **Washington Appeals Court Decides Vesting Case**
- 7 **LUBA Summaries**

## Appellate Cases – Land Use

### ■ BOARD MUST NOW DENY REQUEST FOR VOLUNTARY REMAND AFTER LOCAL GOVERNMENT FILES THE RECORD IN LUBA APPEAL

*Dexter Lost Valley Community Association v. Lane County*, 255 Or. App. 701, \_\_\_ P.3d \_\_\_, 2013 WL 1150145 (2013), examines two issues of LUBA procedure: the statutory right of a state or local government to withdraw a decision after a notice of intent to appeal is filed; and LUBA's authority, as a matter of administrative practice, to grant a voluntary request for a remand. The Court of Appeals concluded that a state or local government may withdraw a decision after the filing of a notice of intent to appeal at LUBA and prior to, but not after, the date set for filing the record. The decision clarifies that granting a "voluntary remand" after the record is filed is not within the scope of LUBA's authority.

Three developers applied to Lane County for a bridge permit. Petitioner community association opposed the application and appealed the adverse decision to LUBA. LUBA received the record on July 23, 2012. On August 13, 2013, the community association filed its petition for review. On August 27, 2013, the county filed a motion for voluntary remand, which the community association opposed. In granting the motion, LUBA explained:

Petitioner apparently views the unilateral right to withdraw a decision for reconsideration under ORS 197.830(13)(b) and the right to move for voluntary remand as the same thing. They are not. The right to withdraw a decision for reconsideration under ORS 197.830(13)(b) is unilateral, and must be granted by LUBA if timely filed. The right to move for voluntary remand is conditional.

255 Or. App. 701, 2013 WL 1150145, \*2 (quoting *Dexter Lost Valley Cmty Ass'n v. Lane County*, \_\_\_ Or. LUBA \_\_\_, LUBA No. 2012-044 at 2-3 (Oct. 16, 2012)).

LUBA explained that its practice of granting motions for voluntary remand was consistent with "sound principles governing judicial review" under ORS 197.805 and was grounded in the legislative preference that land use matters should be resolved at the local level if possible, rather than at LUBA or in the courts. *Dexter*, 255 Or. App. 701, 2013 WL 1150145, \*2 (citing *Mulholland v. City of Roseburg*, 24 Or. LUBA 240, 241 (1992)). The developers also argued that LUBA's existing practice of granting remands before hearing only if the local government agreed to address all the issues should be viewed in context with the current version of ORS 197.830(13)(b), which eliminated the requirement that a local government agree to address all issues in that circumstance. The court noted that both sides had "plausible textual and contextual arguments"; however, "[r]espondents' argument . . . cannot be reconciled with [an] unusually persuasive legislative history." *Id.*, 2013 WL 1150145, \*3.

ORS 197.830(13)(b) provides:

At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, . . . the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision.

The court recited the legislative history, particularly the testimony of 1000 Friends of Oregon, who advocated for a change in the language of an amendment when what is now ORS 197.830(13) (b) was enacted in 1991. 1000 Friends requested changing the time for withdrawal from "oral argument" to "filing the record," and the bill that passed incorporated the suggested language. *Id.*, 2013 WL 1150145, \*4. The court did not accept the developers' argument that, because the community association requested a reversal or remand of the county's decision, it forfeited the right to seek judicial review when LUBA remanded. The court found the community association was seeking at least a partial adjudication on the

merits. The court also rejected the developers' second assertion that the community association had not demonstrated that its substantial rights were prejudiced. That would have triggered a reversal or remand in response to procedural error under ORS 197.805(9)(a). The court stated that the remand effectively "delayed providing petitioner with a judicially reviewable decision on the merits of the county's order." *Id.*, 2013 WL 1150145, \*2. The court reversed and remanded LUBA's decision.

While voluntary remands will still be available if requested before the record is filed, this decision makes clear LUBA is not authorized to grant a "voluntary remand" if the local government's motion is untimely. It is also likely LUBA will not be able to grant a stipulated but untimely motion for voluntary remand, unless the legislature sees fit to pass a bill that establishes that authority.

**Joan S. Kelsey**

[\*Dexter Lost Valley Cmty Ass'n v. Lane County\*](#), 255 Or. App. 701, \_\_\_ P.3d \_\_\_, 2013 WL 1150145 (2013)

## ■ WINERY UPHeld AS COMMERCIAL USE IN CONJUNCTION WITH FARM USE

*Friends of Yamhill County v. Yamhill County*, 255 Or. App. 636, 298 P.3d 586 (2013), involved a winery approved as a conditional use under ORS 215.283(2)(a) as a "commercial use in conjunction with farm use." LUBA affirmed Yamhill County's approval of the conditional use. Petitioners sought review at the Court of Appeals, arguing that: (1) The commercial winery, including the events venue and commercial food service facility, was a new use that could not be considered to be "in conjunction with farm use" under ORS 215.283(2)(a); and (2) the level of activity exceeded the "incidental" limitation imposed on such activity under applicable law. The Court of Appeals affirmed LUBA and Yamhill County.

Before turning to the merits of the case, the Court of Appeals embarked on a rather lengthy recitation of the history of ORS 215.283(2)(a) and a review of the prior decisions in *Craven v. Jackson County*, 94 Or. App. 49, 764 P.2d 931 (1988) (*Craven I*), *aff'd*, 308 Or. 281, 779 P.2d 1011 (1989) (*Craven II*). The court also noted that while *Craven II* was pending, the legislature amended ORS 215.283(1) to allow certain wineries that met particular criteria as an allowed use that did not need to go through the conditional use process.

Next, the court relied on its prior decision in *Craven I* to reject petitioner's argument that the events and food service were not activities in conjunction with farm use, but rather were activities in conjunction with the winery, which was a non-farm use. The Supreme Court in *Craven II* concluded that LUBA (and the Court of Appeals) was entitled to find that the incidental retail activity (in *Craven*, involving a tasting room and associated retail sale activities) was "in conjunction with farm use." Relying on this, the Court of Appeals reached the same conclusion in *Friends of Yamhill County*.

Turning to petitioner's final contention that the events and restaurant activities exceeded the "incidental" standard, the Court of Appeals recited from *Craven II* that to be in conjunction with farm use, the commercial activity must enhance the farming enterprise of the local agricultural community. The Court of Appeals found this standard to have been met because of a condition that the events be "directly related to" the sale and promotion of wine produced at the winery. The Court of Appeals also found that the county had imposed several conditions to ensure that the events and food service did not overtake the primary activity of processing and selling wine. Those conditions included a limit on the number of events (44 per year), a limit on the number of guests (72 guests per event), and a limit on the amount of income that could be derived from events and food service activity (may not exceed 25% of the gross income from on-site retail sales of wine). The court agreed with LUBA that the number of events and commercial kitchen came "dangerously close" to allowing these secondary activities to overtake the primary activity (processing and selling wine). 255 Or. App. at 651. However, the court concluded that, as conditioned, the event and food service were intended to promote the winery's products and enhance the marketing of its wines, consistent with ORS 215.283(2)(a).

**Steve Morasch**

[\*Friends of Yamhill County v. Yamhill County\*](#), 255 Or. App. 636, 298 P.3d 586 (2013)

## ■ COURT OF APPEALS REFUSES TO SUPPLANT LUBA'S JURISDICTION

In *Grabhorn, Inc. v. Washington County*, 255 Or. App. 369, 297 P.3d 524 (2013), an appeal from the circuit court's denial of claims for declaratory and injunctive relief, the Oregon Court of Appeals affirmed the circuit court's conclusion that the Land Use Board of Appeals ("LUBA") had jurisdiction over the petitioner's claims.

Petitioner Grabhorn operates a landfill in Washington County. It has done so continuously since the 1950s. Washington County previously declared Grabhorn's operation to be a lawful nonconforming use in 1972 and again in 1974. Grabhorn possessed an Oregon Department of Environmental Quality ("DEQ") permit to operate the facility, and in 1991 it applied to DEQ to renew its operating permit. As part of that process, DEQ required the county to determine whether the facility was compatible with the county's comprehensive plan and land use regulations.

In 1991, the county determined that Grabhorn's "demolition landfill and recycling facility" was compatible and it issued a

land use compatibility statement (“LUCS”) to that effect. The 1991 LUCS made no mention of composting taking place at the facility, although findings attached to the LUCS did note that a small component of the operation included “turning demolition debris into useable mulch and wood chips.”

Sometime after 1991, Grabhorn’s landfill became exclusively a composting operation. In 2009, as part of another renewal of Grabhorn’s operating permit, DEQ required Grabhorn to secure another LUCS from the county. Grabhorn asked the county to confirm that its 1991 LUCS covered its now-exclusive composting operation. The county declined. In a 2010 letter to DEQ, the county noted that Grabhorn had never asked for permission to operate a composting facility and stated its belief that before the county could determine whether the composting facility was compatible with its plan and land use regulations, Grabhorn would need to receive a determination that the composting operation was a nonconforming use.

Grabhorn filed for declaratory and injunctive relief approximately a week after the county sent its letter to DEQ. Grabhorn sought a declaration that the 1991 LUCS established the composting operation as a lawful nonconforming use and that DEQ was entitled to rely on it and not an additional LUCS from the county. The trial court dismissed Grabhorn’s claims for want of jurisdiction, finding that state law vested LUBA with exclusive jurisdiction over them.

On appeal, the court agreed with the circuit court’s reasoning. The court clarified that the petitioner was ultimately challenging the lawfulness of the county’s 2010 letter to DEQ, in which the county declined to determine the legal effect of the 1991 LUCS on the now-exclusive composting operation. The court disagreed that the county’s 2010 letter fell into one of two statutory exceptions to the definition of a land use decision: (1) a decision that is made under land use criteria that do not require interpretation or the exercise of judgment (ORS 197.015(10)(b)(A)); or (2) a decision that DEQ’s permit would be compatible with the county’s plan and land use regulations (ORS 197.015(10)(b)(H)).

Because the county clearly refused to rely on the 1991 LUCS and expressed its belief that the petitioner would need to apply for a nonconforming use determination, the court had little trouble concluding that neither exception applied. The court found that the county exercised legal judgment when it refused to conclude that the 1991 LUCS applied to Grabhorn’s exclusive use of its facility for composting. Furthermore, because the county did not issue a LUCS in 2010 and therefore compatibility was not conclusively established, the exception in ORS 197.015(10)(b)(H) did not remove LUBA’s jurisdiction.

### **David Doughman**

[Grabhorn, Inc. v. Washington County](#), 255 Or. App. 369, 297 P.3d 524 (2013)

## **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.

### **Editor**

Kathryn S. Beaumont

### **Assistant Editor**

Eric Shaffner

### **Associate Editors**

Alan K. Brickley

Edward J. Sullivan

### **Contributors**

Nathan Baker	Joan S. Kelsey
Richard S. Bailey	Jeff Litwak
Tyler J. Bellis	Peter Livingston
Jennifer M. Bragar	Marisol R. McAllister
Alan K. Brickley	Nicholas P. Merrill
Tommy A. Brooks	J. Christopher Minor
Robert A. Browning	Steve Morasch
Thomas G. Chandler	Tod Northman
Sarah Stauffer Curtiss	John Pinkstaff
Lisa Knight Davies	Carrie A. Richter
David Doughman	Shelby Rihala
Mark J. Fucile	Jacquilyn Saito-Moore
Glenn Fullilove	Bill Scheiderich
Christopher A. Gilmore	Robert S. Simon
Susan C. Glen	Alan M. Sorem
Peggy Hennessy	William A. Van Vactor
Keith Hirokawa	A. Richard Vial
Jack D. Hoffman	Noah W. Winchester
Mary W. Johnson	Ty K. Wyman
Gary K. Kahn	

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.

## ■ WIND ENERGY GETS ANOTHER LEASE ON LIFE IN UMATILLA COUNTY

In *Cosner v. Umatilla County*, LUBA Nos. 2011-070, 2011-071, and 2011-072 (2012), the Land Use Board of Appeals (“LUBA”) overturned a series of Umatilla County ordinances adopted in 2011 to prevent several wind energy developments. The main issues in the case involved the county’s compliance with Goal 5 and the constitutionality of two-mile setbacks for wind turbines from certain uses and locations. LUBA found against the county on both assignments of error.

After the *Cosner* decision, the county adopted a new series of ordinances in 2012 that it believed would resolve the problems identified in *Cosner*. Jim Hatley (also a party in *Cosner*) then appealed the 2012 ordinances. LUBA upheld the county’s new ordinances, *Hatley v. Umatilla County*, LUBA Nos. 2012-017, 2012-018 and 2012-030 (2012), and Hatley appealed to the Oregon Court of Appeals, *Hatley v. Umatilla County*, 256 Or. App. 91, \_\_\_ P.3d \_\_\_ (2013).

In April the court reversed and remanded LUBA’s decision. *Id.*, slip op. at \*13. Significantly, the court held that Hatley did not waive his right to appeal the 2012 ordinances when he failed to raise those issues in the original LUBA proceedings. *Id.*, slip op. at \*12. The court distinguished between quasi-judicial decision-making, where a strong “raise-it-or-waive-it” standard applies, and legislative decision-making, where waiver does not apply. In a quasi-judicial process the governing body is required to give notice of and apply a set of criteria within a fixed time frame and to adopt a final decision. In contrast, once LUBA overturned the 2011 ordinances, the county was not bound to take any action, but opted on its own to adopt two new ordinances. Therefore, the public involvement process started anew.

On remand, LUBA will consider whether the county’s 2012 ordinances are preempted by state laws that encourage and govern renewable energy.

This decision is also likely to inform the legislative debate over House Bill 3362 that attempts to limit public participation in local legislative actions. This bill comes from Eastern Oregon and the ongoing battles between the City of Bend, Deschutes County, and Central Oregon Landwatch.

Stay tuned to both the legislative debate and LUBA’s treatment of *Hatley v. Umatilla County* on remand.

**Jennifer Bragar**

[Hatley v. Umatilla County](#), 256 Or. App. 91, \_\_\_ P.3d \_\_\_ (2013)

## *Appellate Cases – Ninth Circuit*

### ■ NINTH CIRCUIT AFFIRMS INSTALLATION OF ROAD MEDIAN AGAINST CONSTITUTIONAL CHALLENGES

*Wardany v. City of San Jacinto*, No. 11-55879, 2013 WL 602310 (9th Cir. Feb. 14, 2013), involved the installation of a median strip in front of plaintiff’s business to prevent motorists from making a left turn onto the property. Plaintiff alleged a taking and violations of procedural due process, equal protection and First Amendment rights as well as the Establishment Clause. The district court granted summary judgment for the City and the plaintiff appealed.

The Ninth Circuit said there must be a protected property or liberty interest under state law before a violation of these constitutional provisions may become actionable. The court found plaintiff had no such interest in any particular level of access to its property. The property remained accessible except for a prohibited direct left-hand turn into the property. Even if there were such an interest, plaintiff was affected in the same way as other property owners along the same stretch of road. Moreover, the city alleged it mailed notices of the change (although plaintiff denied ever receiving them).

Having found no procedural due process violation, the Ninth Circuit also rejected plaintiff’s equal protection and First Amendment challenges as there was no discriminatory treatment on the basis of race or national origin. There was also no differential treatment of plaintiff’s business, aside from plaintiff’s own speculation, which did not create a triable issue of fact. Evidence in the record demonstrated that a previous denial of plaintiff’s cell tower request was a proper application of the City’s zoning ordinance. The court noted that plaintiff could have sought a variance or asked for a rezoning of the property but declined to do so. The court saw no connection between that denial (and a previous sign code violation dispute) and the median installation sufficient to support an inference of a retaliatory motive. Similarly, the record contained no evidence of an establishment clause violation other than plaintiff’s suggestion that an adjacent church was attempting to buy his property. Finally, there was no factual basis for a taking or inverse condemnation claim under either federal or California constitutional or statutory laws to support a civil rights claim. The district court judgment was thus affirmed.

This case illustrates the folly of spending time and money to make constitutional claims without a supportive evidentiary basis.

**Edward J. Sullivan**

*Wardany v. City of San Jacinto*, No. 11-55879, 2013 WL 602310 (9th Cir. Feb. 14, 2013)

## Appellate Cases – Washington

---

### ■ TIME RESTRICTIONS ON AN RV PARK'S PERMIT ALLOWED

In *Schlotfeldt v. Benton County*, 172 Wash. App. 888, 292 P.3d 807 (2013), the Schlotfeldts intended to construct and operate a recreational vehicle (“RV”) park in Benton County, Washington. They applied to the Benton County Board of Adjustment (“the Board”) for a special use permit for a park with 182 pad sites that would accommodate motor homes, travel trailers, and fifth wheels. The proposed site was zoned as a “light industrial area” and surrounded by properties zoned as “agricultural” and a school.

The RV park proposal drew public concerns that the park could become a permanent residential subdivision. The Board specifically cited concerns about the potential for “unfavorable conditions” at the RV park, stating that, when RVs remain parked in any one area for too long, items such as freezers tend to be left outside. To address the community’s concerns, the Board approved the Schlotfeldts’ permit with the condition that the RVs not remain in place in the park for more than 180 days. (Based on the Board’s expressed concerns, it might be suggested that the Board was trying to regulate people rather than land use.)

The Schlotfeldts challenged the Board’s decision under the Land Use Petition Act (“LUPA”), arguing that the board erroneously applied the law to the facts of the case because there was no basis for the time restriction condition on their permit. Both the superior court and the Court of Appeals Division III affirmed.

The Benton County Code (“BCC”) 11.52.090(d) allows for conditions to be attached to permits issued by the Board. Conditions can be imposed to guarantee that any newly permitted use “is compatible with other uses in the surrounding area” and “would not hinder or discourage the development of permitted uses on the neighboring properties in the applicable zoning district.” BCC 11.52.090(d)(1, 5). However, according to the court, BCC 11.52.090(d) requires the permit conditions to be reasonable. The court held that the time restriction placed on the proposed RV park was reasonable because it relates to “protecting the compatibility of the uses in the area” and would prevent the possibility of hindering the development of the surrounding properties. 292 P.3d at 810 (citing BCC 11.52.090(d)(1)). The court further stated that the time restriction would help eliminate the risk that the proposed RV park would become a residential development that was inconsistent with the uses of the surrounding properties. The court also held that there was no “definite” or “firm” belief that a mistake had been made by the Board and that the Board’s decision was thus not clearly erroneous. *Id.* at 810-11.

The Schlotfeldts also argued that the Board’s decision was not substantially supported by evidence, which is one of the standards for relief under RCW 36.70C.130(1)(c). When a court determines the sufficiency of the evidence the court will “view facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority . . . .” *Id.* at 811 (quoting *Phoenix Dev., Inc. v. City of Woodinville*, 256 P.3d 1150, 1154 (2011)). For the evidence to be sufficient, it must be enough to convince a reasonable person of its truth. *Id.* The court again rejected the Schlotfeldts’ argument and recognized that, by definition, RVs are not meant to provide permanent housing. The BCC explicitly defines RVs as vehicles intended for recreational use. BCC 11.04.020 (131). RCW 43.22.335 (7) also defines RVs as vehicles intended to be used for recreational activities and states that RVs are intended for temporary use. The court held that, because of the risk that the RV park could become a permanent subdivision, and because of the possibility of “unfavorable conditions,” there was substantial evidence to support the Board’s conditional permit. 292 P.3d at 811.

### Caitlin Davie

---

*Schlotfeld v. Benton County*, 172 Wash. App. 888, 292 P.3d 807 (2013)

### ■ ZONING IN: REVIEW OF COMPREHENSIVE PLAN AMENDMENTS UNDER WASHINGTON’S GROWTH MANAGEMENT ACT

In *Spokane County v. East Washington Growth Management Hearings Board*, 173 Wash. App. 310, 293 P.3d 1248 (2013), Division Three of the Washington Court of Appeals reviewed a decision challenging the Eastern Washington Growth Management Hearings Board’s (“the Board”) invalidation of a zoning amendment from Spokane County. The court overturned the superior court’s holding that the Board lacked jurisdiction over the amendment petition but upheld that court’s reversal of the Board’s invalidity determination.

*Spokane County* arose from a challenge to a 2009 map amendment to Spokane County’s comprehensive plan. The amendment was proposed for a rezone of a five-acre parcel owned by Headwaters Development Group, LLC and Red Maple Investment Group, LLC (“Headwaters”) to change the county’s comprehensive plan from low-density residential (“LDR”) to high density residential (“HDR”). The planning commission recommended denial of the amendment on the basis of traffic-related impacts. The county commissioners rejected the recommendation, finding that the rezone would promote the overall goal of the comprehensive plan by providing an HDR zone to act as a transitional area between commercially-zoned property containing a shopping center to the west and LDR to the north, south, and east of Headwaters’ property.

Opponents to the map amendment filed a petition for review with the Board and served copies of the petition with the county's prosecuting attorney and Headwaters' lawyers. They did not, however, serve a copy on the county auditor. The Growth Management Act ("GMA") requires service on the county auditor when a non-chartered county is a party to a zoning challenge. Former Washington Administrative Code 242-02-230(1) (*repealed* in 2011) provided that the Board "may" dismiss a case that does not meet the requirements stated in the GMA. Where a statute or regulation states that an issue "may" be dismissed for failure to comply with service requirements, the court reviews the decision to dismiss only for abuse of discretion. The court overruled the lower court's finding that the Board should have dismissed this petition. The court held that, since the county's prosecuting attorney and Headwaters' lawyers were served, and therefore the interested parties were on notice of the review, the decision not to dismiss this petition for insufficient service was not an abuse of discretion.

The more important point concerned the substantive issues regarding the Board's reasoning in invalidating the map amendment. The Board determined that the amendment was not in compliance with the GMA based on four apparent inconsistencies between the map amendment and the comprehensive plan policies and goals. First, Policy UL.2.16 of the Spokane County comprehensive plan provides that "multifamily residential" areas should "encourage the location of medium- and high-density residential categories . . . on sites with good access to major arterials." The Board recognized that only one road, Dakota Street, served the area in question. Second, Goal UL.7 of the plan provides that residential land use should locate "residential development in areas where facilities and services can be provided in a cost-effective and timely fashion." Third, Goal T.2 provides the requirement of "transportation system improvements concurrent with new development and consistent with adopted land use and transportation plans." Fourth, in connection with Goal T.2, Policy T.2.2 requires an assessment to determine either that the transportation systems and public facilities must be adequate to grant new development plans, or that a plan to update inadequate transportation systems and public facilities must be in place at the time new development impact occurs. The amendment contained no such assessment of the affected area and, therefore, the Board found it inconsistent with Policy T.2.2.

The legislature enacted the GMA with a presumption that local comprehensive plan amendments and development regulations are valid upon adoption, setting the standard of review to invalidate a proposal only if it is "clearly erroneous" in its connection with the comprehensive plan. The court held that each of the four reasons that the Board cited for the invalidation of the map amendment did not meet this "clearly erroneous" threshold.

First, the opposition presented no expert testimony that Dakota Street could not support the increased traffic that could result from development of the area, and a traffic planner had opined that it could. Because the comprehensive plan supported the notion that residential development should be located in proximity to commercial and open space areas, the proposal furthered the plan policies.

Second, the proposed area is located in a designated urban growth area where municipal services are readily available and where high-density residential development can provide cost-effective housing and infrastructure options.

Third, although the map amendment did not specifically address transportation system improvements identified in Goal T.2, the court recognized that the county would require detailed traffic analysis on a case-by-case basis and that the map amendment was subject to a provision that no project would be approved that runs contrary to those goals.

Finally, the court found that the concurrency policy did not apply to the proposed map amendment. Policy T.2.2 states that the transportation assessment must be in place at the time new development impacts occur. However, the court held that the challenged amendment was not itself a development plan and that, therefore, a contemporaneous transportation analysis was not necessary. The Board had decided that, in order to prevent unnecessary future delays in development projects, at least a rudimentary analysis of the transportation impacts should be required at this planning stage. The court rejected the Board's reasoning, finding that without specific development plans it would be impossible to assess accurately the resiliency of the transportation system against future development.

The court focused on the balance of the project impacts from the map amendment on the comprehensive plan. Although the impacts of the amendment on the transportation system may have been unknown, the court stressed that the proposal promoted other aspects of the planning goals. The court reiterated that an amendment can be "in accordance with the comprehensive plan" without equally promoting all of the planning goals. So long as proposed amendments are not "clearly erroneous" in their connection to the overall goals of the comprehensive plan, the amendments will be considered valid.

**Max Lindsey**

*Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 293 P.3d 1248, 173 Wash. App. 310 (2013)

## LUBA'S ADDRESS HAS CHANGED

Effective May 6, 2013, LUBA's new address is:

Land Use Board of Appeals

DSL Building

775 Summer Street NE, Suite 330

Salem, OR 97301-1283

Telephone: (503) 373-1265 remains the same

## ■ WASHINGTON APPEALS COURT DECIDES VESTING CASE

*Town of Woodway v. Snohomish County*, 172 Wash. App. 643, 291 P.3d 278 (2013), addressed the status of an application filed under comprehensive plan provisions and regulations that were later found to violate procedural provisions of the State Environmental Policy Act (“SEPA”).

The subject 66-acre site had a history of industrial use. The applicant wanted to change the plan and zoning designations for the site to accommodate commercial and residential uses. The county ultimately approved the applications and the town and others sought review of the plan and zoning amendments through the Washington Growth Management Act (“GMA”) before the Washington Growth Management Board (“GMB”). After the matter was heard, but before the decision, the applicant filed a development permit application. The GMB subsequently found the plan amendment violated procedural provisions of SEPA. The town then brought an action for a declaratory judgment to determine the validity of the permit and an injunction to halt the development. Both sides moved for summary judgment. The trial court granted summary judgment for the town and the county appealed.

The court of appeals found the dispositive issue to be whether the development permits vested at the time complete applications were filed despite the appeals that subsequently resulted in the GMB rulings that the underlying comprehensive plan amendments violated SEPA. Under Washington law, a complete development permit application vests in those regulations in place at the time of filing. In 1995, the Washington legislature amended the GMA and authorized the GMB to declare a plan or regulation to be either non-compliant with the GMA or invalid. Following further study, the 1997 Washington legislature adopted statutory changes stating expressly that a declaration of invalidity did not necessarily affect vested rights. The court found this statutory provision controlled and the permits had vested, notwithstanding the GMB’s subsequent declaration that the underlying plan provisions were invalid. Unlike this case, however, where the GMB finds the challenged plan provision “interferes with the fulfillment of the GMA’s goals,” permit applications filed after the date of the GMB’s order are not vested in the noncompliant regulations. 291 P.3d at 286. This case involved a SEPA procedural violation which, the court determined is insufficient to defeat the vesting of the permit. As a result, the appellate court reversed the trial court judgment. 291 P.3d at 289.

The outcome that a permit may vest notwithstanding noncompliance with the underlying plan and land use regulations is a peculiar result of Washington statutory law. It reflects that state’s liberal views on vested rights and a minority position on the issue.

**Edward J. Sullivan**

---

*Town of Woodway v. Snohomish County*, 172 Wash. App. 643, 291 P.3d 278 (2013)

## LUBA Summaries

---

### ■ LUBA JURISDICTION

The boundaries of LUBA’s jurisdiction continue to evolve as two recent decisions illustrate. In *Kaiser Permanente v. City of Portland*, LUBA No. 2012-087 (Feb. 13, 2013), LUBA concluded that a planner’s written summary of an early assistance appointment with a potential applicant was not a reviewable land use decision. Portland offers an Early Assistance process in which a potential applicant can meet with city planners to review the zoning code requirements, procedures, and land use reviews necessary for proposed development. Following a meeting with representatives of Kaiser to discuss the status of its approved 1989 master plan for its medical campus, city staff sent Kaiser a letter stating that the master plan had expired. Kaiser appealed the letter to LUBA and, in response to the city’s motion to dismiss, argued the letter represented the City’s final decision concerning the master plan’s expiration. The city asserted the letter was merely an advisory opinion by a city planner and no final decision concerning the master plan’s status would be issued until Kaiser applied for a development project under the plan. LUBA agreed with the City and dismissed the appeal, ruling the letter was a nonbinding staff advisory opinion and not a final land use decision.

In *Wetherell v. Douglas County*, LUBA No. 2012-051 (Mar. 27, 2013), LUBA considered whether the county’s approval of a temporary use permit for a one-day music festival fell within an exception to the definition of “land use decision” the legislature clarified in 2011. State statutes regulate “outdoor mass gatherings” and agri-tourism in exclusive farm use zones. In 2011, the legislature amended ORS 197.015(10) to clarify that “except as provided in ORS 215.283(6)(c) . . .” the definition of “land use decision” excludes outdoor mass gatherings and “other gatherings” of fewer than 300 people that will not continue for more than 120 hours in a three-month period. ORS 197.015(10)(d). LUBA noted that the 2011 legislature added the reference to ORS 215.283(6)(c) at the same time as it adopted the agri-tourism statutes. The effect of the additional reference was to create an exception to the exception from LUBA’s jurisdiction and, as a result, to clarify that decisions approving agri-tourism events are land use decisions.

The county approved the music festival as an “outdoor event” authorized by its land use ordinance. Under the ordinance,

an “outdoor event” may have between 1,000 and 3,000 people in attendance or continue for more than three days in any three-month period, but is expressly defined not to be an “outdoor mass gathering” as defined by state law. LUBA concluded the county’s decision approving the music festival authorized neither an outdoor mass gathering nor an agri-tourism event. Instead, it fell within the statutory exclusion for “other gatherings” because attendance was limited to fewer than 3,000 people and it lasted only one day. Absent a final land use decision to review, LUBA transferred the appeal to the circuit court as the petitioner requested.

## ■ LUBA PROCEDURE – LOCAL RECORD AND POWERPOINT PRESENTATIONS

With the frequent use of PowerPoint presentations in local land use hearings, local governments commonly include paper copies of these presentations in the records filed with LUBA. In *Save Downtown Canby v. City of Canby*, \_\_\_ Or. LUBA \_\_\_, LUBA No. 2012-097 (May 5, 2013), the petitioner objected to the city’s inclusion of a paper copy of the staff PowerPoint shown to the city council because the council members viewed only the electronic presentation during the local proceedings. They did not receive a paper copy. LUBA acknowledged that its rule governing record preparation does not address the possibility that a decision maker may watch a visual presentation during the proceedings leading to the appealed land use decision, but never receive a tangible copy of the presentation. Nevertheless, LUBA concluded:

Despite the lack of explicit guidance in our rules, local governments routinely include either paper or electronic media copies of such visual presentations, when preparing a record that is transmitted to LUBA. Either is appropriate, regardless of whether the electronic media or paper copy is placed before the decision maker at the hearing where the visual presentation is made.

Order at 3. The city included an electronic media copy of the PowerPoint in a supplemental record and, as a result, LUBA denied the petitioner’s record objection.

## ■ WIND ENERGY FACILITIES

LUBA concluded that the county’s efforts to remedy a constitutional defect in its ordinances regulating wind energy facilities were still insufficient to pass constitutional muster in *Iberdrola Renewables, LLC v. Umatilla County/Hatley v. Umatilla County*, LUBA Nos. 2012-082/2012-083 (Feb. 28, 2013). In 2011, the county adopted ordinances establishing conditional use standards and approval criteria for siting wind energy facilities. The ordinances required a facility to be set back two miles from a rural residence unless the residential landowner recorded a waiver for a lesser setback to be determined at the landowner’s sole discretion. The county would then apply the agreed-upon setback in its conditional use review of a proposed wind energy facility. On appeal, LUBA held the county’s ordinances constituted an unlawful delegation of the county’s legislative authority and violated the Delegation Clause of Article I, Section 21 of the Oregon Constitution because it allowed a rural residential owner, rather than the county board, to establish a reduced setback. *Cosner v. Umatilla County*, LUBA Nos. 2011-070/071/072 (Jan. 12, 2012).

On remand, the county adopted ordinances deleting the constitutionally impermissible waiver provision and amending its development ordinance to allow a wind facility applicant to apply for an adjustment (variance) to the two-mile setback. The amended ordinance included a requirement that the rural residential owner involved in the adjusted setback must sign an adjustment application. On appeal to LUBA, the petitioner in *Iberdrola* argued the county once again violated Article I, Section 21 by effectively giving the affected residential owner the ability to veto an adjustment application by refusing to sign it. Although the county argued the ordinance did not allow the residential owner the ability to approve or deny adjustment, it conceded the county would not process an adjustment application without the affected residential owner’s signature. LUBA agreed with the petitioner that this amounted to giving the affected owner a constitutionally impermissible veto power over the adjustment application and violated Article I, Section 21 of the Oregon Constitution.

Petitioner also argued that a section of the county’s ordinance was preempted by statutes governing the Energy Facility Siting Council’s (EFSC) approval of a site certificate for wind energy facilities as prescribed by ORS 469.300 *et seq.* The challenged section purported to bind EFSC as to the substantive local criteria that must be used in EFSC’s review and issuance of a site certificate and included the setback adjustment criteria among the binding local criteria. LUBA sided with the petitioner, ruling that ORS 469.504 gives EFSC the authority to determine which local criteria are the “applicable substantive criteria” and whether the proposed facility complies with these criteria.

Given the ordinance’s inconsistency with both the Oregon Constitution and state law, LUBA remanded the county’s decision.

**Kathryn S. Beaumont**

---